

2016

**State of Utah, Plaintiff/Appellee, v. Ken Montey Johnson,
Defendant/Appellant**

Utah Court of Appeals

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Case No. 20141155-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

KEN MONTEY JOHNSON,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for one count of burglary, a second degree felony; in the Third Judicial District, Salt Lake County, the Honorable Katie Bernards-Goodman presiding

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STATE OF UTAH,
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KEN MONTEY JOHNSON,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for one count of burglary, a second degree felony, Utah Code Ann. §76-6-202 (West 2015). This Court has jurisdiction under Utah Code Ann. §78A-4-103(2)(e) (West Supp. 2015).

INTRODUCTION

While drunk, Defendant kicked in the back doors of his ex-wife's home, took her cell phone as she called 911, yelled at her, and feinted punches at her face. He then threatened to push her down the stairs before leaving with her phone.

Defendant admitted that he forcibly entered his ex-wife's home, took her phone, and fled. But he denied threatening her, and he argued that he did not commit burglary because he did not intend to keep the phone permanently, but

took it only to stop his ex-wife from calling police. Although he admitted that he ultimately destroyed the phone, he claimed that he decided to do so only after seeing police at her home when he returned to give it back. The jury was mostly unpersuaded and convicted Defendant of burglary, but acquitted him of making a violent threat.

STATEMENT OF THE ISSUES

1. Jury Instruction 32 stated that to commit theft, Defendant had to take another's property "with a purpose to deprive him thereof"; it then recited the statutory definition of "purpose to deprive" verbatim.

Did the instructions correctly define "purpose to deprive?"

Standard of Review. The accuracy of jury instructions are reviewed for correctness. *State v. Maama*, 2015 UT App 235, ¶29, 795 Utah Adv. Rep. 24.

2. A week after the burglary, Defendant left a voicemail on his ex-wife's phone in which he admitted to breaking into her home. He also used the f-word twice and sounded upset.

Was the probative value of the voicemail substantially outweighed by any danger for unfair prejudice?

Standard of Review. A trial court's decision to admit or exclude specific evidence is reviewed for an abuse of discretion. *State v. Jones*, 2015 UT 19, ¶12, 345 P.3d 1195.

3. When a recess took longer than expected, the trial court announced its intention to go to the jury room and explain the reasons for the delay. Defense counsel agreed to that plan.

When the jury asked during deliberations to hear again recordings that had been admitted into evidence, the trial court explained that it would have the prosecutor show the bailiff how to play the recordings for the jury. Defense counsel did not object, and asked only that he be allowed to hear the prosecutor's instructions to the bailiff about how to play the recordings.

Was trial counsel ineffective for agreeing to these jury contacts?

Standard of Review. Ineffective assistance of counsel claims raised for the first time on appeal are reviewed for correctness. *State v. Ott*, 2010 UT 1, ¶16, 247 P.3d 344.

4. After defense counsel repeatedly used the victim's written witness statement on cross-examination to show that it did not contain some of the details that she had testified to, the trial court admitted the entire one-paragraph statement as a prior consistent statement under rule 801(d)(1)(B), Utah Rules of Evidence, and under the rule of completeness in rule 106, Utah Rules of Evidence.

Did the trial court abuse its discretion in ruling that fairness required admitting the victim's entire witness statement?

Standard of Review. See Issue 2.

5. Does the cumulative error doctrine apply where Defendant demonstrates no error, or at most one harmless error?

Standard of Review. None applies.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Addendum A contains:

Utah Code Ann. §76-6-202 (West 2015) (burglary);
Utah Code Ann. §76-6-401 (West 2015) (definitions for theft);
Utah Code Ann. §76-6-404 (West 2015) (theft);
Utah R. Evid. 106;
Utah R. Evid. 403;
Utah R. Evid. 801.

STATEMENT OF THE CASE

A. Summary of facts.¹

Defendant left a voice message for his ex-wife, Barbara Johnson, warning that he was headed to her home and demanding that she “talk to him.” R347:83,86. Defendant “sounded extremely drunk” and was “slurring his words.” R347:86-87. Within a “few minutes” of listening to the message, Barbara heard a pounding on her back glass doors and saw Defendant repeatedly kicking them. R347:87-88.

¹ According to well-established appellate standards, the State recites the facts in the light most favorable to the verdict and presents conflicting evidence only when necessary to understand the appellate issues. See *State v. Heaps*, 2005 UT 5, ¶2, 999 P.2d 565.

When the door frame broke, Defendant entered Barbara's home screaming and yelling. R347:88,93. Barbara dialed 911 on her cell phone, but accidentally hung up because she was scared and "shaking like crazy." R347:88-89. When the 911 operator called back, Defendant grabbed the phone from Barbara's hand, feinted punches to her face, and continued to yell in slurred words that he had to talk to her. R347:89-90.

Defendant then headed for the front door with Barbara's phone. R347:90. Barbara followed, grabbing for her phone and begging Defendant to return it. R347:90,140. As the two stood on the landing at the front door of the split-level home, Defendant grabbed Barbara and threatened, "I should throw you down the stairs right now." R347:91. Barbara retreated and Defendant fled out the door and sped off in his truck. R347:91-92.

Defendant's version

Defendant testified that he went to Barbara's home because he wanted to talk to her about a debt that he believed she owed him under their divorce decree. R347:119-21;R348:22-23. Defendant admitted to kicking in the doors, entering Barbara's home, taking her cellphone, and leaving with the phone. R348:23-25. But he said that he never touched or threatened Barbara while in her home. R348:28-29. He also said that he took her phone only to stop her from calling police. R348:25-26. Defendant claimed that he went back an hour

later to return the phone, but that he got upset and smashed it when he saw police at Barbara's house. R348:25-26.

Defendant told the jury that he pled guilty to a charge of interrupting a communications device because he took Barbara's phone to prevent her from calling police. R348:24. He also admitted that he pled guilty to a theft charge because he destroyed Barbara's phone. R348:25-28.

B. Summary of proceedings.

The State charged Defendant with one count each of:

burglary, a second degree felony, Utah Code Ann. §76-6-202 (West 2015);

damaging or interrupting a communication device, a class B misdemeanor, Utah Code Ann. §76-6-108 (West 2015);

making a threat of violence, a class B misdemeanor, Utah Code Ann. §76-5-107 (West 2015); and

theft, a class B misdemeanor, Utah Code Ann. §76-6-404 (West 2015).

R206-08.

On the day of trial, Defendant pled guilty to the interrupting a communication device and theft charges. R230-32. A jury convicted Defendant of burglary, but acquitted him of making a violent threat. R247,297. He appeals only his burglary conviction. Br.Aplt. 1-3, 50.

The trial court sentenced Defendant to prison for one to fifteen years on the burglary count and to two jail terms of 180 days on the misdemeanor

counts. R315-16. The trial court suspended the prison and jail terms and placed Defendant on probation for 36 months, granted him credit for the 102 days he had already served, and released him. R315-16. Defendant timely appealed. R317.

SUMMARY OF ARGUMENT

I. Defendant argues that the jury instructions did not clearly explain that to be guilty of burglary based on the intent to commit theft, he had to enter or remain in Barbara's home with the intent to permanently deprive her of her cellphone. Defendant concedes that the instructions required the jury to find that he entered or remained in Barbara's home with the specific intent to commit a theft, but argues that the instructions did not clearly explain that theft requires intent to permanently deprive another of her property.

On the contrary, the instructions explained that theft required Defendant to act with the "purpose to deprive" Barbara of her cellphone, and then quoted the statutory definition of "purpose to deprive." That definition explained that "purpose to deprive" included intending to permanently deprive another of her property. And the remainder of the definition precluded the jury from finding Defendant guilty of a theft-based burglary charge if it found that he intended to keep her phone only temporarily.

At defense counsel's request, the court also instructed the jury on the elements of wrongful appropriation—which requires only an intent to temporarily deprive another of her property. Contrary to Defendant's assertion, the trial court was not required to repeat in that instruction the principle that theft required an intent to permanently deprive, because other instructions had already explained that principle.

Defendant argues that the trial court's answers to the jury's questions during deliberations mislead the jury regarding the elements of burglary. He is mistaken. When the jury asked whether Defendant had to possess the intent to commit a theft before he entered the home, the court correctly explained that Defendant could form that intent either before entry, or while remaining in the home. When the jury asked why the elements of wrongful appropriation were included in the instructions, the trial court correctly told the jury to answer that question for themselves. Contrary to Defendant's assertion, the trial court was not required to repeat that theft required intent to permanently deprive.

II. Defendant argues that the trial court erroneously admitted under rule 403, Utah Rules of Evidence, a 41-second clip of a voicemail that Defendant left for Barbara a week after the burglary. In that clip, Defendant admits to breaking into Barbara's home. He also uses the f-word twice and sounds upset. Any potential for unfair prejudice from this clip did not substantially outweigh

its probative value. Rule 403 presumes admissibility. Here, Defendant admitted to key elements of burglary in the voicemail, and the fact that he was upset with Barbara tended to prove that he broke into her home intending to threaten or to steal from her, or both. His use of the f-word twice did not create the potential for unfair prejudice.

III. Defendant argues that the trial court had improper contact with the jury when, outside of counsel's and defendant's presence, it explained why a recess was taking longer than expected. He also argues that the bailiff had improper contact with the jury when the bailiff replayed during deliberations recordings (Barbara's 911 call and the clip of Defendant's voicemail) that had been admitted into evidence. Defendant did not preserve either argument and in fact invited any error by agreeing to both jury contacts. This Court therefore may not review this issue for plain error.

Defendant cannot show that his counsel was ineffective for not objecting to the contacts because conceivable strategic reasons explain the lack of objections. By allowing the trial court to explain the delay to the jury, counsel reduced the likelihood that the jury would become frustrated with the proceedings and irritated with counsel. Counsel also could have reasonably concluded that the court's discussion of scheduling matters with the jury would be an innocuous interaction. And allowing the bailiff to supervise replaying the

recordings ensured that the jury would not hear portions of Defendant's voicemail that counsel had successfully excluded. For these same reasons, Defendant cannot show that he was prejudiced by his counsel's lack of objection.

IV. Defendant argues that the trial court abused its discretion in admitting the victim's one-paragraph witness statement (1) under the rule of completeness found in rule 106, Utah Rules of Evidence; and (2) as a prior consistent statement under rule 801(d)(1)(B), Utah Rules of Evidence, as interpreted in *State v. Bujan*. The trial court properly admitted the statement under rule 106. That rule allows for admitting the parts of a written statement that, in fairness, are required to explain previously referred to portions.

During cross-examination, defense counsel repeatedly referred to Barbara's witness statement to show that it did not contain some of the details in her testimony. This tactic called into question Barbara's ability to accurately report the event. It also suggested that Barbara was embellishing her testimony because her witness statement alone did not fully support Defendant's charges. The trial court therefore acted well within its discretion in finding that fairness required that the jury see the entire witness statement. This allowed the jury to gauge her ability to accurately report the events. It also allowed them to

determine whether the statement alone contained sufficient detail to support Defendant's charges.

But even if the statement were erroneously admitted under rule 106, any error was harmless. Barbara testified to almost all of the details in her written statement and Defendant corroborated most of Barbara's testimony. Moreover, Defendant's basis for arguing that Barbara fabricated her statement was weak because she stood to gain nothing by doing so. His conviction would not relieve her of any debt she owed him under the divorce decree.

Defendant did not preserve his argument that the statement was inadmissible under rule 801(d)(1)(B) as interpreted in *State v. Bujan*. Defendant argues that the trial court plainly erred for not sua sponte raising, and that his counsel was ineffective for not making, this argument. But even assuming that Defendant could show obvious error or deficient performance, he cannot show the required prejudice under either theory because the witness statement was independently admissible under rule 106, and even if it was not, any error in admitting it under that rule was harmless.

V. Defendant argues that the cumulative error doctrine entitles him to relief. But because no error occurred, or at most only one harmless error occurred, that doctrine is inapplicable.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY THAT TO COMMIT A BURGLARY BASED ON INTENT TO COMMIT A THEFT, DEFENDANT HAD TO INTEND TO PERMANENTLY DEPRIVE THE VICTIM OF HER PROPERTY

Defendant argues that the jury instructions on burglary were “inadequate and misleading” because they did not explain that “burglary by theft requires proof that the defendant entered/remained with the purpose to permanently deprive” another of her property. Br.Aplt. 10, 13 (bolding and capitalization omitted). According to Defendant, the instructions suggested that “the intent to temporarily deprive was sufficient to convict.” Br.Aplt. 13. Although Instruction 32 recited verbatim the statutory definition of “purpose to deprive,” R280, Defendant argues that this definition was “insufficient” because it was an “abstract definition” that did not explain that this was the “critical element” that the State had to prove beyond a reasonable doubt. Br.Aplt. 15.

The instructions correctly explained the law. Contrary to Defendant’s argument, if the jury had believed his version of events, the instructions prohibited them from convicting him of burglary.

This Court reviews jury instructions “in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case.” *State v. Maestas*, 2012 UT 46, ¶148, 299 P.3d 892

(quotation and citation omitted). “Instructions should be read in their entire context and given meaning in accordance with the ordinary and usual import of the language as it would be understood by lay jurors.” *State v. Kennedy*, 2015 UT App 152, ¶28, 354 P.3d 775 (quotation and citation omitted).

A. The jury instructions correctly explained the elements of burglary.

Before the jury could convict Defendant of burglary based on an intent to commit a theft, the instructions required it to find beyond a reasonable doubt that he intended to permanently deprive Barbara of her cellphone. They also required the jury to find that Defendant possessed that intent when he either entered or remained unlawfully in her home.

Instruction 28 listed the elements of burglary. R276 (Addendum B is a copy of the relevant instructions). It told the jury that it could not convict unless it found “beyond a reasonable doubt each of the following elements:

1. In Salt Lake County, State of Utah, the defendant KEN JOHNSON;
2. Knowingly, intentionally or recklessly;
3. Entered or remained unlawfully in the dwelling of another; and
4. With the specific intent to commit:
 - a. A theft; or
 - b. An assault on any person.

R276. Thus, to convict based on an intent to commit theft, Instruction 28 required the jury to find beyond a reasonable doubt that Defendant had the

"specific intent" to commit theft when he entered or remained unlawfully in Barbara's home.² R276.

Instruction 32 defined the elements of theft. R280. It explained that to commit theft, one must obtain or exercise "unauthorized control over the property of another with a purpose to deprive him thereof." R280. Instruction 32 then quoted the statutory definition of "Purpose to deprive," which includes having "the conscious object: (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost."³ R280.

² Instruction 31 reiterated that "a person commits Burglary if that person enters or remains unlawfully in a dwelling or any portion of a dwelling with intent to ~~commit a felony~~ or theft or to commit an assault on any person." R279. As the trial court read the instructions to the jury, it explained that the jury could "cross ... off" the words "a felony" because that "isn't the situation here ... in this case we're talking about theft or assault." R348:70-71. The striking out of the word "commit" and the failure to strike out the following "or" therefore appears to be a slip of the pen.

³ This part of Instruction 32 stated in its entirety: "'Purpose to deprive' means to have the conscious object:

- (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost.
- (b) To restore the property only upon payment of a reward or other compensation; or
- (c) to dispose of the property under circumstances that make it unlikely that the owner will recover it."

R280 (quoting Utah Code Ann. §76-6-401(3) (West 2015)).

Read together, these instructions explained that the jury could convict Defendant of a burglary based on the intent to commit theft only if it found beyond a reasonable doubt that he intended to "withhold [Barbara's] property permanently." R280 (Instruction 32). By explicitly defining "purpose to deprive" to require this mental state, Instruction 32 alerted the jury that this was a "critical element" of theft, which in turn became a "critical element" of burglary under Instruction 28. R276,280.

The instructions also explained that the jury had to find beyond a reasonable doubt that Defendant formed the intent to permanently deprive when he "[e]ntered or remained unlawfully" in Barbara's home. R276 (Instruction 28). As Defendant concedes, "Instruction 28 correctly told the jury that burglary required proof beyond a reasonable doubt that Defendant entered/remained with the 'specific intent to commit a theft.'" Br.Aplt. 15. If the jury therefore believed Defendant's testimony that he took Barbara's cellphone only because he intended to keep her from calling the police, and that he intended to return it to her shortly thereafter, the instructions prohibited the jury from finding that Defendant entered or remained in Barbara's home with the intent to commit theft. And if the jury could not find that Defendant intended to commit theft, then the instructions also prohibited the jury from convicting Defendant of burglary based on that theory. As defense counsel

argued, the “key facts” were Defendant’s “mental intent ... when he entered the place and what his mental intent was when he was in the place.” R348:87.

Defendant suggests that an instruction that quotes the statutory language is insufficient because it provides only an “abstract definition.” Br.Aplt. 15. But quoting the statutory definition of a legal term is a perfectly acceptable way to instruct the jury. See *State v. Clark*, 2014 UT App 56, ¶52, 322 P.3d 761 (accomplice liability instruction that “copied nearly verbatim” from statute “adequately instructed” jury); *State v. Augustine*, 2013 UT App 61, ¶10, 298 P.3d 693 (accomplice liability instruction that quoted statute verbatim was adequate). When the jury must understand the meaning of a statutory term like “purpose to deprive,” and the statute defines that term, the trial court cannot be faulted for concluding that the most accurate way to explain the term is to quote the statutory definition.

Defendant also argues that the instructions were unclear because they did not “distinguish between the general and specific intent requirements.” Br.Aplt. 15. In support, Defendant cites Instruction 25, which generally explained that one acts “intentionally” when it is his “conscious objective or desire to engage in the conduct or cause the result.” Br.Aplt. 15; R273. Isolating this language, Defendant argues that it “might have led the jury to believe that ‘intent to commit theft’ could be satisfied by mere proof of the intent to

unlawfully take” Barbara’s cellphone, not the intent to keep it permanently.
Br.Aplt. 15.

But jury instructions must be read as a whole and as they would be understood by lay jurors. *Kennedy*, 2015 UT App 152, ¶28. Even though Instruction 24 defined the mental state of “intentionally” in general terms, Instruction 28—the burglary elements instruction—unambiguously required the jury to find that Defendant acted with “the *specific* intent to commit ... [a] theft.” R276 (emphasis added). A lay juror would have understood this language to require that it could find Defendant guilty of burglary only if it first found that he intended to commit theft, which, as explained, required that he intend to permanently take Barbara’s phone. R276,280.

Defendant argues that Instruction 33, defining wrongful appropriation, “suggested that intent to temporarily deprive *was* sufficient to sustain a conviction.” Br.Aplt. 17. Defendant argues that Instruction 33 was confusing because it did not tell the jury that intent to temporarily deprive was insufficient to establish burglary. Br.Aplt. 18.

But it was at defense counsel’s request that the trial court instructed the jury on the elements of wrongful appropriation, which requires only a temporary taking of another’s property. R348:51-53. Instruction 33 explained that a wrongful appropriation occurs when one takes another’s property

without consent “and with intent to temporarily appropriate, possess, or use the property or to temporarily deprive the owner or legal custodian of possession of the property.” R281.

Counsel also requested that this instruction include a lengthy commentary explaining Defendant’s “theory of the case” and reiterating that if the jury found that he intended to keep Barbara’s cellphone only temporarily, then he could not be guilty of theft—or a burglary based on an intent to commit theft—because an “intention to temporarily deprive the person of the property is not sufficient to support a burglary charge.” R348:51-53;R360-61.

The trial court granted counsel’s request to instruct the jury on the elements of wrongful appropriation, but declined to include the requested commentary explaining Defendant’s “theory of the case.” R348:51-53. The court stated that counsel would “have to make [his] own arguments” to the jury about how the elements of theft and wrongful appropriation applied to the facts. R348:52-53. After the trial court refused to include counsel’s requested commentary, counsel did not ask to withdraw the instruction. R348:52-53.

Defendant argues that Instruction 33 should have told the jury that intent to temporarily deprive was insufficient to establish burglary. Br.Aplt. 17-18. But as explained, Instruction 32 already told the jury that. R280. A trial court does not err in refusing to give a proposed instruction “if the point is properly

covered in other instructions.” *State v. Maestas*, 2012 UT 46, ¶148, 299 P.3d 892; see also *State v. Sessions*, 645 P.2d 643, 647 (Utah 1982) (“It is not error to refuse a proposed instruction if the point is properly covered in the other instructions.”). Although a “defendant is entitled to have the jury instructed on the defense’s theory of the case,” he “is not entitled to further instruction” on his theory “when the other instructions already fairly instruct the jury on the law applicable to that theory.” *Maestas*, 2012 UT 46, ¶32. “Jury instructions require no particular form so long as they accurately convey the law.” *State v. Maama*, 2015 UT App 235, ¶29, 795 Utah Adv. Rep. 24. Thus, a defendant “is not entitled to have the jury instructed with any particular wording.” *State v. Marchet*, 2012 UT App 197, ¶17, 284 P.3d 668. Because Instruction 32 already explained that intent to temporarily deprive was insufficient, the court was not required to repeat that concept in other instructions.⁴

⁴ Defendant does not argue that his counsel was ineffective for proposing the wrongful appropriation instruction, or for not asking to withdraw it after the court refused to give his entire proposed instruction. But even if Defendant had made that argument, he could not prove that his counsel performed deficiently because his counsel had a legitimate strategic reason for requesting the instruction. As the trial court recognized, counsel wanted the jury to understand that an intent to temporarily deprive amounted only to wrongful appropriation, “so he can claim that was the intent he performed while he was inside rather than” the intent to commit a theft. R348:51. As counsel argued in closing, as Defendant left Barbara’s home, “he never intended to permanently keep [her] phone.” R348:90,94.

B. The trial court did not give misleading responses to the jury's questions.

Defendant argues that the trial court gave misleading responses to two questions that the jury posed during deliberations. Br.Aplt. 16-17, 18.

During deliberations, the jury asked two questions. R249,251 (Addendum C is a copy of the questions with the court's answers). The first asked:

We have a question regarding intent. p.#28-4.

Does the person need to have intent before they enter the home to commit[t] theft OR can intent happen after they are in the home?

R249. The trial court responded:

See instruction #31[.] Intent can be formed before entry or while remaining in the home.

R249.⁵

The second question asked:

Jury is confused about the reason for the addition of p.33[.]

Is there a specific reason it is included?

⁵ As explained, Instruction 31 stated, "a person commits Burglary if that person enters or remains unlawfully in a dwelling or any portion of a dwelling with intent to ~~commit a felony~~ or theft or to commit and assault on any person." R249.

R251. The trial court responded:

Use your collective memory of counsels['] argument/and testimony to determine its significance.

See Instruction #11.

R251. Instruction 11 explained that all of the jury instructions were important, that the jury should consider them as a whole, and that whether “any particular instruction applies may depend upon what you decide are the true facts of the case.” R259.

After the jury reached its verdict, but before bringing the jury into the courtroom, the court explained to counsel that the jury had asked two questions and that the court had answered them as stated above. R348:100-02. Defense counsel objected only to the court’s answer about the significance of Instruction 33 on wrongful appropriation. R348:100-02. He argued that in addition to the answer the court gave, it should have added that Defendant’s “theory of the case is that he only wanted to temporarily deprive.” R348:102. The court overruled the objection. R348:102.

1. *Defendant did not preserve his challenge to the court’s answer regarding when he had to form the required mental state, and he has not shown plain error or ineffective assistance.*

Defendant argues that the court’s answer to the jury’s first question misled them about when he was required to form the specific intent necessary

for burglary. Br.Aplt. 16-17. He acknowledges that Instruction 28 explained that “the entering/remaining had to be ‘with’ ‘the specific intent to commit theft.’” Br.Aplt. 16 (quoting R276). But he argues that the court’s response that intent “can be formed before entry or while remaining in the home” “suggested that intent could be formed after leaving the home,” because the court used the non-mandatory term “can,” instead of “must.” Br.Aplt. 16-17.

Defendant did not preserve this argument. To “preserve an issue for appeal, a defendant must raise the issue before the district court in such a way that the court is placed on notice of potential error and then has the opportunity to correct or avoid the error.” *State v. Diaz-Arevalo*, 2008 UT App 219, ¶10, 189 P.3d 85 (emphasis added). This generally requires a party to make “a timely and *specific* objection” in the trial court. *State v. Low*, 2008 UT 58, ¶17, 192 P.3d 867 (quotation and citation omitted) (emphasis in original). An appellate argument is not preserved unless the objection below was based on the same grounds as the appellate argument. *See id.*

Defendant did not object to the trial court’s answer to the jury’s first question. R348:100-02. He therefore did not preserve his appellate challenge to that answer.

Defendant argues broadly that if “any aspect” of his appellate argument is unpreserved, then his counsel was ineffective for not making the argument

and the trial court plainly erred for not sua sponte recognizing it. Br.Aplt. 24-27. "To demonstrate plain error, a defendant must establish that (1) the trial court committed error, (2) the error should have been obvious to the court, and (3) the error prejudiced the defendant." *State v. Isom*, 2015 UT App 160, ¶28, 354 P.3d 791.

To prove that his counsel was ineffective, Defendant must prove both that his counsel's performance was deficient and that the deficient performance prejudiced him. See *Kell v. State*, 2008 UT 62, ¶27, 194 P.3d 913 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Counsel performs deficiently only when his performance is objectively unreasonable. *Id.* ¶28. Deficient performance is prejudicial only when there is "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). The plain error and ineffective assistance of counsel standards "share a common standard of prejudice." *State v. McNeil*, 2013 UT App 134, ¶42, 302 P.3d 844.

Defendant cannot show any error, let alone obvious, prejudicial error because the court's answer did not mislead the jury. The jury's question shows that it was not considering whether it could find Defendant guilty if he formed the mental state only after leaving the home. Rather, its concern was whether he had to possess the mental state "before" entering. R249. Nothing in the

jury's question suggested any confusion about whether Defendant could form the required mental state after leaving the home. There was therefore no reason for the trial court to address this non-existent concern, or for counsel to insist that the trial court do so.

Moreover, as Defendant acknowledges, Instruction 28 informed the jury that the required mental state had to exist contemporaneously with either the entering or the remaining. Br.Aplt. 16; R276. Instruction 31 reinforced this fact. R279. When the lay jurors read these instructions together with the trial court's answer, they would not have understood the answer to allow them to find Defendant guilty if he did not form the specific intent to commit theft until after he left Barbara's home. Thus, there was nothing misleading about the trial court's answer. And even if there were, any error was neither obvious, nor prejudicial. Defendant therefore cannot show either that the trial court plainly erred, or that his counsel was ineffective, in addressing the jury's first question.

2. The trial court correctly responded to the jury's question about the significance of Instruction 33 on wrongful appropriation.

Defendant also argues that the trial court gave a "problematic" response to the jury's question about Instruction 33 on wrongful appropriation. Br.Aplt. 18. Rather than merely telling the jury to decide the significance of Instruction 33 for themselves, Defendant argues that the court should have also responded "that the intent to temporarily deprive was insufficient to support a

conviction.” Br.Aplt. 18. But the court had already explained that principle to the jury in Instruction 32, which defined the “purpose to deprive” element of theft. R280. The trial court was not required to reiterate that point. *See Maestas*, 2012 UT 46, ¶148. The trial court’s answer was therefore not misleading.

In sum, the instructions correctly explained the elements of burglary and the trial court’s answers to the jury’s questions did not confuse that explanation. Defendant therefore cannot show error in the jury instructions.

II.

THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION IN ADMITTING A 41-SECOND CLIP OF A VOICEMAIL IN WHICH DEFENDANT ADMITTED TO BREAKING INTO THE VICTIM’S HOME

Defendant argues that the trial court abused its discretion under rule 403, Utah Rules of Evidence, “by admitting an unfairly prejudicial recording” of a voicemail that Defendant left on Barbara’s phone in which he admitted to breaking into her home. Br.Aplt. 27. Defendant argues that the brief recording “was substantially more prejudicial than probative” because Defendant twice used the f-word and “exhibited extreme animosity” towards Barbara. Br.Aplt. 27, 28-29.

At trial, the prosecutor moved to admit an almost-four-minute voicemail that Defendant left on Barbara’s phone about a week after the burglary. R347:1,107,113-15; State’s Exhibit (SE) #5 (audio CD). Much of the recording is

unintelligible, but the intelligible portions include Defendant's admission that he broke into Barbara's home. SE#5 at 9:27-9:30. Counsel conceded that the prosecution could play the four seconds of the voicemail in which Defendant admitted to breaking into Barbara's home. R347:109. But counsel objected that the entire recording was unfairly prejudicial because it contained obscenities and "vindictive" statements. R347:109. Instead of playing the voicemail, counsel offered to stipulate that Defendant kicked in Barbara's door and forcibly entered her home. R347:108-110.

When the prosecutor insisted on playing the voicemail, the trial court ruled that it would "allow the part where he discusses coming into the house" but would not allow the jury to hear the entire voicemail. R347:110. When the prosecutor explained that it would be difficult to cue the recording at that exact point, the court allowed the prosecutor to "start at the beginning," noting that much of the initial statements were "hard to understand." R347:111.

The jury heard the first 41 seconds of the voicemail (from 9:30 to 10:11 on the CD). R347:114-15; SE#5. Although Defendant is difficult to understand, he can be heard saying, "there's nothing I owe you," "you're fucking me," and "they can arrest me for breaking and entering ... whatever the fuck they think ... for you stealing my house from me." SE#5 at 9:30-10:11.

At a later sidebar, defense counsel moved for a mistrial “because the prosecutor didn’t play just the four seconds of ‘I entered the place’” but allowed the jury to hear Defendant using the f-word. R347:137,145-46. The trial court refused to grant a mistrial merely “because the f-word might have been heard along with [Defendant’s] statements about kicking the door in.” R347:146-47.

A trial court may exclude evidence under rule 403 “if its probative value is substantially outweighed by a danger of ... unfair prejudice.” Utah R. Evid. 403. “[U]nfair prejudice results only where the evidence has an undue tendency to suggest decision upon an improper basis.” *State v. Lucero*, 2014 UT 15, ¶32, 328 P.3d 841 (quotation and citation omitted). “Given this bar,” Utah courts “indulge a presumption in favor of admissibility.” *Id.* (quotation and citation omitted).

Defendant argues that the trial court should have excluded the voicemail under rule 403 because it “was substantially more prejudicial than probative.” Br.Aplt. 27. Defendant argues that “the probative value of the voicemail was low” because he later testified and admitted breaking into the home, and because he had earlier agreed to stipulate that he broke into the home. Br.Aplt. 29. Defendant argues that the danger for unfair prejudice was high because Defendant used the f-word twice and “exhibited extreme animosity” towards Barbara. Br.Aplt. 27, 28-29.

The trial court properly exercised its discretion in admitting the brief recording. First, the recording had substantial probative value. Evidence is relevant “if it has any tendency to make a fact more or less probable than it would be without the evidence.” Utah R. Evid. 401(a). The recording was relevant here because it allowed the jury to hear Defendant admit that he broke into Barbara’s home. This was a key element of the burglary charge. *See* Utah Code Ann. §76-6-202.

The recording also allowed the jury to get a sense of Defendant’s animosity towards Barbara. The fact that Defendant was still hostile towards Barbara a week after the burglary made it more likely that he had entered or remained in her home with the intent to assault or to steal from her.

The brief part of the recording preceding Defendant’s admission was also relevant to put that admission in context. *See State v. Labrum*, 2014 UT App 5, ¶22, 318 P.3d 1151 (holding that “other acts evidence may be admissible under rule 404(b) to show context”). The prosecution has “the right to present evidence with broad ‘narrative value’ beyond the establishment of particular elements of a crime.” *State v. Verde*, 2012 UT 60, ¶28, 296 P.3d 673.

Defendant’s later testimony that he broke into Barbara’s home did not decrease the probative value of the recording. When the prosecutor offered the

recording during his case-in-chief, there was no guarantee that Defendant would take the stand and admit to breaking into Barbara's home.

Nor did Defendant's offer to stipulate negate the recording's probative value. The "prosecution retains wide discretion to reject such an offer." *Verde*, 2012 UT 60, ¶28. This is because "'a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.'" *Id.* (quoting *Old Chief v. United States*, 519 U.S. 172, 189 (1997)). A "prosecutor may not be compelled to accept a stipulation as to an element of a crime since a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate moral force of his evidence." *State v. Florez*, 777 P.2d 452, 455 (Utah 1989) (quotations and citations omitted).

The substantial probative value of Defendant's voicemail was not "substantially outweighed by a danger of ... unfair prejudice." Utah R. Evid. 403. Defendant's use of the f-word twice did not have "an undue tendency to suggest decision upon an improper basis," *Lucero*, 2014 UT 15, ¶32, because that word has "lost much of [its] shock value in contemporary culture," *State v. Alzaga*, 2015 UT App 133, ¶51, 352 P.3d 107. In *Alzaga*, for example, this Court affirmed the admission of the defendant's recorded statement in which he employed a variety of profanity, including using the f-word five times in just two sentences. *Id.* ¶¶44, 51. This Court held that these "words alone were

unlikely to induce the jury to return a conviction based on a generalized assessment of character.” *Id.* ¶51 (quotation and citation omitted).

Defendant relies on *State v. Maurer*, 770 P.2d 981 (Utah 1989), to support his argument. But *Maurer* bears no resemblance to this case.

There, the trial court admitted Maurer’s entire letter taunting his murder-victim’s father. *See* 770 P.2d at 982. Maurer’s letter proclaimed his satisfaction in killing his victim—his ex-fiancé—boasting that it was “a great feeling to watch her die,” that she kept saying, “It hurts, it hurts,” that he hoped so because he used “a 13-inch kitchen knife,” and that her new boyfriend “got to watch her die too. It was great.” *Id.* Maurer also denigrated his victim as “nothing but a fucking whore,” who drifted “from one man to another.” *Id.* He declared his hope that the victim’s death “hurt” her father, and Maurer concluded with, the “laugh[']s on you.” *Id.*

Defendant’s voicemail clip bears no resemblance to Maurer’s letter. As this Court observed in *Alzaga*, Maurer wrote his letter “to inflict additional emotional pain upon the victim’s father.” 2015 UT App 133. Defendant’s voicemail lacked that characteristic and, at worst, evidenced only his frustration with his ex-wife. And whereas Maurer’s feelings towards his victim’s father were irrelevant, Defendant’s feelings toward Barbara were relevant to his state

of mind when he broke into her home. Defendant's reliance on *Maurer* is therefore misplaced.

In sum, the 41-second voicemail clip was highly probative and contained little, if any, danger for unfair prejudice. The trial court therefore acted well within its discretion in admitting it. *See Lucero*, 2014 UT 15, ¶35.

III.

DEFENDANT CANNOT SHOW THAT HIS COUNSEL WAS INEFFECTIVE FOR AGREEING TO THE TRIAL COURT'S AND BAILIFF'S INTERACTIONS WITH THE JURY

Defendant argues that the trial judge and bailiff had improper contact with the jury. Br.Aplt. 33. Defendant first complains that, without counsel or Defendant present, the trial court explained to the jury why a recess had taken longer than expected. Br.Aplt. 33. He also complains that during jury deliberations, the court directed the bailiff to supervise the replaying of already admitted recordings. Br.Aplt. 33. Defendant argues that he preserved these arguments, but that if he did not, the trial court plainly erred or his counsel provided ineffective assistance. Br.Aplt. 39-41. Regardless of whether he preserved his arguments, Defendant asserts that he is entitled to a presumption of prejudice that the State cannot rebut on this record. Br.Aplt. 36-41.

Defendant did not preserve either argument. In fact, he invited any error because his counsel agreed with the court's plans to explain the delay to the jury and to have the bailiff supervise replaying the recordings. Thus, the only

issue is whether counsel was ineffective for doing so. Defendant cannot show that his counsel was, because conceivable tactical reasons support counsel's decisions. And because Defendant did not preserve his arguments, he is not entitled to a presumption of prejudice. Rather, he must demonstrate prejudice, which he cannot do.

A. Defendant invited any error because his counsel agreed to the interactions.

1. Background.

After the defense rested, the trial court announced a ten-minute recess. R348:49. The jury left the courtroom and counsel and the court discussed whether the prosecutor would introduce rebuttal evidence. R348:49-50. Defense counsel asked what witnesses the prosecutor would be calling. R348:50. When the prosecutor said that he was not sure, the court gave the prosecutor "10 or 15 minutes to decide." R348:50.

When the court reconvened, still out of the jury's presence, the prosecutor said that he would not introduce any rebuttal evidence. R348:50-51. The parties then discussed several necessary modifications to the jury instructions and verdict forms. R348:51-55.

As that discussion ended, the court told counsel that it intended to go to the jury room and explain why the recess had taken longer than planned. R348:55. The court specifically stated:

Okay. We need time to do all those things. I'm going to tell the jury that we're working on all this, that there's no rebuttal. That we're going to be copying jury instructions so it may take a few minutes more than 15 so they don't blame it on you.

R348:55. Defense counsel responded, "Okay." R348:55 (Addendum D contains the discussion regarding the jury contacts).

When the court and counsel reconvened, still out the jury's presence, the court made of record of what it had told the jury about the delay. R348:55-56. The court added that the jury had asked whether it would be able to listen to the recordings of Defendant's voicemail and Barbara's 911 call, which had been admitted into evidence. R348:55-56. The court stated:

Ummm, we got the jury instructions copied. The—I went in and told the jury that it had been longer than a 15-break [sic] because we were copying all the jury instructions and putting in the ones that you had all brought this morning that I had given you the opportunity to bring and the State was deciding whether to do rebuttal and all that and they said, Well, when we get this case are we going to be able to listen to the tapes? Is there a transcript of the tapes? So I said there's no transcripts of the tapes, we will discuss whether you get to hear the tapes.

R348:55-56. The court said that it was inclined to allow the jury to hear the recordings because "they are admitted into evidence." R348:56. The court suggested that both counsel could go into the jury room while the voicemail clip was played to ensure that the jury heard only the admitted portion. R348:56.

Defense counsel objected, but not to the court's contact with the jury. R348:56 (Add. D). Rather, he objected only to the jury hearing the recordings again because in his view, the recordings had not actually been admitted into evidence. R348:56. Counsel also objected to the court having both counsel go into the jury room during deliberations to replay the recordings. R348:56. The court decided that it would allow the jury to hear the recordings. R348:58.

The court then instructed the jury, counsel made their closing arguments, and the jury retired for deliberations. R348:58-99. Apparently taking part of defense counsel's earlier objection to heart, the court suggested having "the prosecutor show the bailiff how to play those things, probably just the bailiff will go in." R348:99. Defense counsel did not object. R348:99-106. Rather, he asked only "to be present when [the prosecutor] gives the instructions to the bailiff." R348:100 (Add. D).

2. Defendant invited any error.

Defendant argues that his counsel preserved both of his appellate challenges because his counsel objected after the judge reported her off-the-record contact with the jury and again objected "to the juror-bailiff contact." Br.Aplt. 39. But neither objection preserved the arguments that Defendant now raises on appeal, because counsel never objected to either jury contact; rather, counsel actually invited any error because he agreed to those contacts.

Counsel did object after the court made a record of how it explained the delay to the jury, but counsel did not object to the court's doing so. R348:56. Rather, counsel objected only to the court's decision to replay the recordings for the jury and to allow both counsel to supervise that process. R348:56. Neither objection asserted that the court should not have explained the reasons for the delay to the jury.

Defendant suggests that his counsel had no notice that the court would speak with the jury off-the-record. Br.Aplt. 33. He asserts that the judge did so "without notice to or in the presence of counsel." Br.Aplt. 33. Defendant misstates the record.

Defense counsel not only knew of the court's plan to explain the delay to the jury off-the-record, but he actually agreed to that plan. When the court told counsel that it was "going to tell the jury that we're working on all this, that there's no rebuttal" and that "we're going to be copying jury instructions so it may take a few minutes more than the 15," counsel responded, "Okay." R348:55. Counsel therefore endorsed the court's plan to explain the delay to the jury.

Operating under the misconception that his counsel objected to the court's off-the-record contact with the jury, Defendant argues that any "further objection" would have been futile because the judge had already engaged in the

contact. Br.Aplt. 39. But if counsel believed that the interaction was improper, he could have preserved the issue by moving for a mistrial, or for a new trial, after the contact happened. *See State v. Jonas*, 793 P.2d 902, 907 (Utah App. 1990) (mistrial motion after learning of jury contact preserved issue of improper jury contact); *State v. Pike*, 712 P.2d 277, 279 (Utah 1985) (motion for new trial preserved issue of improper jury contact). Counsel did not do so. R348:55-106. Defendant therefore did not preserve his appellate challenge to the court-jury contact. *See State v. Low*, 2008 UT 58, ¶17, 192 P.3d 867.

Nor did Defendant preserve his appellate challenge to the bailiff-jury contact. Rather, defense counsel implicitly endorsed that contact. Br.Aplt. 39. Defense counsel objected after the court suggested that both counsel supervise replaying the recordings during deliberations. R348:56-58. But again, the bases for that objection were that (1) the jury should not be able to hear the recordings again; and (2) it would be improper to have counsel in the jury room. R348:56-58.

When the court suggested having the bailiff supervise the replaying, defense counsel did not object. R348:99-100. Rather, he implicitly endorsed that plan and asked to be present when the prosecutor instructed the bailiff on how to replay the recordings. R348:100.

Because his counsel endorsed both of the jury contacts that Defendant now complains of, Defendant invited any error. A party invites error when “counsel, either by statement or act, affirmatively represented to the trial court that he or she had no objection to the proceedings.” *State v. Winfield*, 2006 UT 4, ¶14, 128 P.3d 1171 (quotation and citation omitted). As explained, defense counsel endorsed both the trial court- and bailiff-jury interactions. Defendant therefore invited any error arising from those interactions. *See id.*

B. The invited error doctrine precludes any plain error review.

Defendant argues that if he did not preserve his arguments, this Court should nevertheless review them for plain error. Br.Aplt. 39-41. But “invited error precludes appellate review of an issue under the plain error standard.” *State v. Lee*, 2014 UT App 4, ¶20, 318 P.3d 1164. Thus, this Court may review this issue only to determine whether Defendant’s counsel was ineffective for not objecting to the jury contacts.

C. Defendant cannot show that his counsel was ineffective for not objecting to the jury interactions.

Defendant argues in three sentences that his counsel was ineffective for not objecting to the jury contacts. Br.Aplt. 41. Defendant cannot satisfy either element of the ineffective assistance analysis.

As explained, to prove that his counsel was ineffective, Defendant must prove both that his counsel’s performance was deficient and that the deficient

performance prejudiced him. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

1. *Defendant cannot show deficient performance because his counsel had sound tactical reasons for not objecting.*

Defendant cannot show deficient performance because conceivable tactical bases explain why he would agree to allowing the judge to explain the delay to the jury and to having the bailiff supervise replaying the recordings.

This Court's review of counsel's performance begins with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997) (quoting *Strickland*, 466 U.S. at 689). This presumption exists because of the "variety of circumstances faced by defense counsel" and "the range of legitimate decisions regarding how to best represent a criminal defendant." *State v. Tyler*, 850 P.2d 1250, 1254 (Utah 1993); see also *Strickland*, 466 U.S. at 689. The presumption recognizes that, "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011).

To rebut the strong presumption of reasonable performance, Defendant must "persuad[e] the court that there was *no conceivable tactical basis* for counsel's actions." *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (emphasis in

original) (quotations and citation omitted); *Benvenuto v. State*, 2007 UT 53, ¶19, 165 P.3d 1195 (holding that the “defendant” must “overcome the presumption” of competent representation”). “If a rational basis for counsel’s performance can be articulated, [this Court] will assume counsel acted competently.” *State v. Tennyson*, 850 P.2d 461, 468 (Utah App. 1993). Thus, any conceivable tactical basis for trial counsel’s actions defeats a claim of deficient performance. See *Clark*, 2004 UT 25, ¶7, 89 P.3d 162; *State v. Holbert*, 2002 UT App 426, ¶58, 61 P.3d 291.

Conceivable tactical bases explain counsel’s decision not to object. First, counsel could have reasonably concluded that allowing the court to explain the reasons for the delay to the jury would reduce the likelihood that the jury would become irritated or frustrated with the proceedings, or even with counsel, especially immediately before closing argument. Second, counsel could have reasonably concluded that having the bailiff supervise replaying the recordings would eliminate the risk that the jury would hear portions of Defendant’s voicemail that counsel had successfully argued to keep the jury from hearing.

Counsel could have also reasonably concluded that both the court’s and the bailiff’s interactions with the jury were innocuous. A judge’s brief communication with the jury to address scheduling matters is not presumed to

be prejudicial. *State v. Maestas*, 2012 UT 46, ¶¶68-70, 299 P.3d 892. Indeed, “[t]here is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial.” *Id.* ¶69 (quoting *Rushen v. Spain*, 464 U.S. 114, 115 (1983)).

Defendant argues that the “judge’s off-the-record conversation with the jury involved ‘substantive matters,’ not mere trial logistics.” Br.Aplt. 36 (quoting *Maestas*, 2012 UT 46, ¶70). Defendant asserts that the judge discussed with the jury whether the prosecution would introduce rebuttal evidence. Br.Aplt. 36. He further argues that the judge’s use of the phrase, “‘and all that,’” shows that she engaged the jury in “a detailed off-the-record conversation about matters directly related to trial.” Br.Aplt. 36.

The record does not support Defendant’s reading. Rather, it shows that the court merely reported the reasons that the recess was taking longer than announced, which included finalizing the jury instructions and the prosecutor’s decision about rebuttal. R348:55-56. When the jury raised a substantive matter—whether they would receive transcripts of Defendant’s voicemail and Barbara’s 911 call, or whether they could hear those recordings again—the court expressly declined to answer that question without first consulting counsel. R348:56.

Defendant's speculation about what the judge meant by the phrase "and all that" does not establish that the judge discussed substantive matters with the jury. The most reasonable interpretation of the judge's colloquialism is that she was merely referring to the various factors she had already mentioned as contributing to the delay.

Defendant argues that the discussion might have created a sense of familiarity with the judge. Br.Aplt. 36. But as *Maestas* recognized, the jury would not have considered it unusual for the judge to explain scheduling matters. See 2012 UT 46, ¶¶69-71. Indeed, "it seems unlikely that jurors would feel any differently toward the judge than if" she had explained the reasons for the delay "with counsel and [Defendant] present." *Id.* ¶71. And because "the judge was not an adversary ... it would not have been problematic if jurors felt appreciative toward the judge after" she explained the reasons for the delay. *Id.* For all these reasons, counsel could have reasonably concluded that there was nothing improper about the court's interaction with the jury, and therefore no reason to object.

Defendant argues that the bailiff's contact was improper because he "was present while the jury actually deliberated." Br.Aplt. 38. To support this proposition, Defendant cites *United States v. Pratt*, 351 F.3d 131, 138-39 (4th Cir. 2003), where the Fourth Circuit held that no error occurred when a bailiff "cued

up the audiotape to the designated spot" and then left. Br.Aplt. 38. The Fourth Circuit distinguished that circumstance from the one in *United States v. Freeman*, 634 F.2d 1267, 1268 (10th Cir. 1980), where the Tenth Circuit held that reversible error occurred after a "technician" played a tape to a jury during deliberations, because "the technician [was] present during actual deliberations." *Pratt*, 351 F.3d at 139. But the Tenth Circuit held that the *Freeman* procedure was prejudicial because the "technician" who played the recording during deliberations was an FBI agent who was "the chief government investigator in the case" and who had testified for the government during the trial. 634 F.2d at 1268-69.

That did not happen here. The bailiff was not a witness, nor was he associated with either party. Thus, the events here more closely resemble the innocuous bailiff-juror contact in *State v. Jonas*, 793 P.2d 902, 907-10 (Utah App. 1990).

In *Jonas*, a juror was excused mid-trial because of a family emergency and asked the bailiff to explain his absence to the other jurors, which the bailiff did off the record. *Id.* at 907-08. This Court held that this bailiff-jury contact was innocuous because there was no discussion between the bailiff and the jury about the dismissed juror, the bailiff had not been a witness, he did not

interrupt the jury's deliberations, and the bailiff's report concerned something tangential to the trial. *Id.* at 909-10.

While the bailiff's contact here did occur during deliberations, that fact alone does not make the contact prejudicial. There is no evidence that the bailiff did anything other than replay the already admitted portions of the recordings to the jury. There is no evidence that any deliberating happened while the bailiff did so. And the bailiff's presence was necessary to ensure that the jury heard only the portion of the Defendant's voicemail that had been admitted. Thus the jury would have viewed the bailiff's presence during deliberations as routine and necessary. Bailiff-jury contact is "expected and unavoidable since the bailiff is assigned to minister to the jurors' needs and to be the contact person." *Jonas*, 793 P.2d at 909.

Because these reasons establish conceivable tactical bases for not objecting to the jury contacts, Defendant has not rebutted the presumption that his counsel's performance was objectively reasonable.

2. Defendant cannot show prejudice because the contacts were innocuous.

Nor can Defendant show prejudice. Defendant argues that he is entitled to a presumption of prejudice that the State must rebut. Br.Aplt. 40-41. Utah courts do take "a strict approach" to claims of improper juror contact. *State v. Pike*, 712 P.2d 277, 280 (Utah 1985). Under this approach, "a rebuttable

presumption of prejudice arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors which goes beyond a mere incidental, unintended, and brief contact.” *Id.*

But this presumption applies only to preserved claims. *See Maestas*, 2012 UT 46, ¶¶59, 67-71. In *Maestas*, for example, the defendant did not preserve his claims of improper juror contact. *Id.* ¶¶70-71. The Utah Supreme Court therefore refused to apply a presumption of prejudice and instead required *Maestas* to show that any error was harmful. *Id.* ¶71 (“Without a presumption of prejudice, Mr. *Maestas* must show harm in order to prevail on his claim.”).

Moreover, because this Court must review this issue under an ineffective assistance of counsel analysis, Defendant bears the burden of proving prejudice as a necessary element of his claim. *See Strickland*, 466 U.S. at 684-87. A defendant cannot prove that his counsel was ineffective unless he carries the burden to prove that his counsel’s deficient performance was prejudicial. *State v. Bond*, 2015 UT 88, ¶46, 796 Utah Adv. Rep. 4 (citing *Strickland*, 466 U.S. at 684-87). And while prejudice may be presumed for certain ineffective assistance claims, “this class of error is extremely limited, including, for example, an actual or constructive denial of the right to counsel or when counsel labors under an actual conflict of interest.” *Id.* ¶46 n.18 (citing *Strickland*, 466 U.S. at 692). Defendant’s claim does not involve those kinds of presumptively prejudicial

circumstances. He must therefore prove prejudice. *Id.* ¶46; *Maestas*, 2012 UT 46, ¶71.

Defendant cannot do so for the reasons already explained. The trial court's brief contact with the jury involved only scheduling—not substantive—issues. The jury would not have seen such interaction as unusual, nor would the interaction have had the potential to improperly influence the jury. Additionally, Instruction 15 told the jury that the judge was “neutral,” that if the jury believed that something the judge did indicated favoritism for one side or the other “that was not [the judge's] intention,” and that jurors should “not interpret anything” the judge said or did as indicating that the judge had “any particular view of the evidence or the decision you should reach.” R263. All of these factors mitigated any potential for prejudice arising from the judge's contact with the jury.

Likewise, the jury would not have viewed the bailiff's replaying of already admitted recordings as unusual, nor would they have been improperly influenced thereby. There is no record that the bailiff did anything but replay the recordings for the jury. For all these reasons, Defendant cannot prove prejudice. He therefore cannot establish either element of his ineffective assistance of counsel claim.

IV.

AFTER DEFENSE COUNSEL REFERRED TO THE VICTIM'S WRITTEN POLICE STATEMENT DURING CROSS-EXAMINATION, THE TRIAL COURT PROPERLY ADMITTED THE ENTIRE STATEMENT UNDER RULE 106, UTAH RULES OF EVIDENCE

Defendant argues that the trial court erroneously admitted Barbara's one-paragraph written witness statement under the rule of completeness found in rule 106, Utah Rules of Evidence, and as a prior consistent statement under rule 801(d)(1)(B), Utah Rules of Evidence. Br.Aplt. 41-47. Defendant argues that the entire statement was inadmissible under rule 106 because that rule admits only those portions of a statement that are "'necessary to rebut the charges of recent fabrication.'" Br.Aplt. 45 (quoting *State v. Bujan*, 2008 UT 47, ¶10, 190 P.3d 1255). Relying on *Bujan*, Defendant argues that Barbara's written statement was inadmissible as a prior consistent statement because it was made after she had a motive to fabricate. Br.Aplt. 42-43.

The trial court properly admitted the statement under rule 106. After defense counsel repeatedly referred to portions of the statement in cross-examining Barbara, the trial court properly exercised its discretion to find that fairness required the jury to see the entire statement. Regardless, any error was harmless where Barbara had already testified to most of the details in her statement, Defendant's testimony corroborated most of Barbara's testimony,

and Defendant's assertion that Barbara fabricated the uncorroborated details was weak.

Defendant did not preserve his *Bujan* argument. He argues that his counsel was ineffective for not objecting to the statement, and that the trial court plainly erred for not sua sponte excluding it, on that basis. But Defendant cannot prove the prejudice element of either theory because the statement was independently admissible under rule 106 or, at best, any error in admitting the statement under that rule was harmless.

A. Background.

The trial court admits, but then withdraws the written police statement

During Barbara's direct examination, the prosecutor moved to admit her written witness statement. R347:97 (Addendum E is the discussion on admitting the witness statement). Defense counsel objected that the statement was hearsay. R347:97-98. The trial court initially overruled the objection and admitted the written statement under rule 801(d)(1)(B). R347:98-102. That rule allows admission of a witness's prior consistent statement that "is offered to rebut an express or implied charge that the declarant recently fabricated it or

acted from a recent improper influence or motive in so testifying.”⁶ Utah R. Evid. 801(d)(1)(B).

The trial court allowed the exhibit to be published to the jury. R347:102,107-08. But the jury did not have the exhibit for long because the trial court quickly reversed its ruling. R347:106-08,111 (Add. E).

After a recess, the trial court reversed itself because it realized that it had misread rule 801 as placing no restrictions on admitting a prior consistent statement. R347:106-08. Defense counsel moved for a mistrial, but the trial court denied the motion because it did not believe that the jury’s having had the exhibit “for two minutes” required such a drastic remedy. R347:106-07. The court then explained to the jury that after having re-read the hearsay rule, defense counsel was “correct” that the written statement was “not admissible under Rule 801” and that the court “was wrong” to have admitted it. R347:111. The court explained that it was retracting the exhibit from the jury. R347:111 (Add. E).

⁶ The transcript has the prosecutor arguing that Barbara’s witness statement was admissible as a prior “inconsistent” statement. R347:98. Later discussion clarifies, however, that the prosecutor was arguing that the statement was admissible as a prior “consistent” statement and that the trial court initially admitted the statement on this ground. R347:100-02,105-06.

*Defense counsel repeatedly refers to portions of
the withdrawn exhibit during cross-examination*

While cross-examining Barbara, defense counsel repeatedly asked her about her police statement. R347:122-23. He first asked her to confirm that she did not write that Defendant had grabbed her. R347:122-23. When Barbara replied that she could not remember exactly what she wrote, counsel showed her a copy of the statement and asked "isn't it true that the word grab, grabbing, grabbed, none of those words appear in that statement?" R347:123. Barbara agreed. R347:123. Counsel then emphasized that the detective had instructed Barbara to "write down what happened" and "tell him everything." R347:123.

Counsel then asked whether Barbara had written that Defendant had fainted punches at her face. R347:128-29. Barbara admitted that she did not. R347:129. Counsel again emphasized that the police had asked Barbara "to tell them the full details of the incident." R347:129.

Counsel then reiterated that although Barbara had testified at the preliminary hearing that Defendant had grabbed her wrist, she did not include that detail in her police statement. R347:131. Counsel emphasized that "the word wrist doesn't even appear" in the statement. R347:132.

On redirect, Barbara explained that she did not mention the fainted punches because she "didn't really think about it or remember it until later." R347:143.

The trial court readmits the written witness statement

Barbara's testimony concluded and the trial court excused the jury. R347:145. The trial court ruled that counsel's cross-examination had opened the door to admitting Barbara's written witness statement because counsel had "implied" that she had "fabricated at some point." R347:147 (Add. E). The court thus admitted Barbara's entire police statement as a prior consistent statement under rule 801(d)(1)(B). R347:151.

Defense counsel objected to admitting the entire statement and argued that only those portions that were consistent with challenged portions of Barbara's testimony were admissible. R347:148-54. Counsel conceded that two of Barbara's written statements were admissible: (1) that she "was still trying to get [her] phone back to call 911"; and (2) that Defendant "said he should just push [her] down the stairs." R347:153.

The prosecutor responded that the rule of completeness allowed admission of the entire statement. R347:154. Defense counsel disagreed, arguing that the rule of completeness did not override the hearsay rule. R347:154.

The trial court ultimately overruled defense counsel's objections and admitted Barbara's one-paragraph statement as State's Exhibit 4. R347:155 (Addendum F is a copy of the statement). The court explained that defense counsel had "referred too much to the statement" and could not "keep pulling bits and piece[s] of it out and expect that it's not going to go into evidence." R347:155,160. The court was also concerned that counsel's cross-examination had taken "a bunch of stuff out of context." R347:149. The court reasoned that because counsel had "thrown into question things that [Barbara] did not include in here ... it only seems fair" to admit the entire statement "to show the things that she did include." R347:160 (Add. E).

The prosecutor then recalled Barbara and reoffered her witness statement as an exhibit, which the trial court received. R347:162-63;SE#4. That statement reads:

My ex[-]husband came to my home drunk[.] I did not want to answer the door. He started kicking the back door. I grab[b]ed my phone and was yelling at him to leave[.] He broke the door in[.] I called 911 and [h]e took my phone and would not give it back[.] He was still yelling at me telling me I owe him money and I will not get it back. We got to the front door and I was still trying to get my phone back to call 911[.] He pushed me and said [h]e should just push me down the stairs. He got in his truck and I ran to [the] neighbor[']s [h]ouse[.]

SE #4 (Add. F).

B. The witness statement was admissible under rule 106.

Defendant argues that the trial court erroneously admitted Barbara's entire witness statement under rule 106, because that rule allows admission of only "information necessary to rebut the charges of recent fabrication." Br.Aplt. 45 (quoting *Bujan*, 2008 UT 47, ¶10). Defendant argues that although he impeached Barbara's testimony by showing that her witness statement omitted any mention of him grabbing or feinting punches at her, the statement was nevertheless inadmissible under rule 106 because it "was not relevant to rehabilitating Barbara's testimony regarding these claimed inconsistencies." Br.Aplt. 45. On the contrary, Barbara's entire statement was relevant to dispel Defendant's notion that she could not accurately report the event and was embellishing her trial testimony.

Known as the rule of completeness, rule 106 "permits introduction of an otherwise inadmissible statement if the opposing party introduces a portion of the statement." *State v. Jones*, 2015 UT 19, ¶40, 345 P.3d 1195. The rule provides that when "a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Utah R. Evid. 106. The rule is designed "to prevent a 'misleading impression created by taking matters out of context.'" *Id.*

(quoting *State v. Leleae*, 1999 UT App 368, ¶44 n.6, 993 P.2d 232). “The rule establishes a ‘fairness’ standard that requires ‘admission of those things that are relevant and necessary to qualify, explain, or place into context the portion already introduced.’” *Id.* (quoting *State v. Cruz-Meza*, 2003 UT 32, ¶14, 76 P.3d 1165).

Fairness required admission of Barbara’s entire witness statement. While cross-examining Barbara, counsel repeatedly highlighted that while she had testified that Defendant had grabbed her and feinted punches, she omitted those details from her written statement, even though she had been instructed to explain “everything that happened.” R347:122-23,128-29,131-32. That line of questioning suggested that Barbara’s entire testimony was unreliable because she could not accurately report the events. It further suggested that she was embellishing her testimony with events that did not happen because her witness statement alone did not fully support Defendant’s charges.

To rebut these suggestions, the jury needed to see exactly how Barbara had described the events in her written statement. Only by reviewing the entire statement could the jury understand what details of her trial testimony she had included in her written statement. Comparing Barbara’s entire statement with her testimony thus allowed the jury to fairly assess Barbara’s ability to accurately report the events. Reviewing the entire statement also allowed the

jury to see that the statement alone contained sufficient detail to support the charges. This allowed the jury to accurately assess whether the omissions in Barbara's written statement resulted from her desire to fabricate details necessary to support the charges, or whether the omissions had an innocent explanation. Given counsel's cross-examination, the trial court did not abuse its discretion in finding that fairness required the jury to see Barbara's entire written statement.

This Court reached a similar result in *State v. Montgomery*, 2007 UT App 24U, ¶4. There, during cross-examination, the defendant's counsel questioned a detective about a paragraph of his police report. *Id.* On redirect, the State had the detective read the first and second paragraphs of his report "to clarify questions addressed in the cross-examination." *Id.* This Court held that the trial court did not abuse its discretion in admitting those portions of the police report under rule 106, because the defendant "introduced the police report and the State merely used the report to clarify issues raised by" the defendant. *Id.*

The Oklahoma Court of Criminal Appeals has likewise explained that under the rule of completeness: "Counsel cannot be permitted, for the purpose of impeaching a witness, to introduce extracts of the former testimony of such witness, and then be heard to complain that the whole of such testimony was

introduced, and the whole truth given to the jury.” *Goode v. State*, 236 P.3d 671, 678 (Okla. Crim. App. 2010) (quotation and citation omitted).

Defendant argues in a footnote that rule 106 cannot apply here because he did not introduce any portion of Barbara’s written statement, but rather referred only to omissions from her statement. Br.Aplt. 46 n.13. But that logic would frustrate the fairness concerns that rule 106 protects. For that reason, the South Carolina Court of Appeals rejected a similar argument in *State v. Patterson*, 625 S.E.2d 239, 227-28 (S.C. App. 2006). The *Patterson* court refused to construe “Rule 106 in such a way that inquiries that probed at alleged omissions from a statement would not open the door to the admission of the statement” because that would frustrate the rule’s purpose. *Id.* at 228. The *Patterson* court therefore held that “the rule of completeness applies to insinuations, innuendos, and omissions.” *Id.*

That reasoning equally applies here. As this Court recognized in *Leleae*, a “trial court has considerable discretion in determining issues of fairness.” 1999 UT App 368, ¶45. Here, after defense counsel repeatedly highlighted omissions in Barbara’s statement, fairness required that the jury see Barbara’s entire statement to “qualify, explain, or place into context” those omissions. *See id.* (quotation and citation omitted). The trial court therefore acted well within its discretion in admitting the entire statement under rule 106. *See id.* ¶46.

- C. Any error was harmless because almost all of the statement's details were already before the jury, Defendant's testimony corroborated most of those details, and his argument that the victim fabricated the uncorroborated details was weak.

In any event, any error in admitting Barbara's one-paragraph witness statement was harmless because the jury had already heard almost all of the details in the statement and Defendant's testimony corroborated most of those details. When erroneously admitted evidence is cumulative or corroborated by the defendant's own statements, the error is harmless. *See State v. Bundy*, 684 P.2d 58, 61 (Utah 1984); *see also State v. McClellan*, 2009 UT 50, ¶32, 216 P.3d 956 (any error in admitting defendant's recorded police interrogation was harmless because "[i]dential evidence was already before the jury in the form of the testimony of the interviewing officer").

Here, Barbara had already testified to almost all of the details in her written statement. And Defendant corroborated many of those details when he testified that he kicked in Barbara's back door, entered her home, took her phone, and fled. R348:23-25.

The only portion of her statement that Barbara did not testify to was her statement that Defendant "was still yelling at me telling me I owe him money and I will not get it back." SE #4 (Add. F). Defendant argues that this statement was prejudicial because the jury "might have relied" on it to find that Defendant entered or remained in Barbara's home with the intent to

permanently deprive her of her cellphone. Br.Aplt. 47. But it is not clear that Barbara was reporting that Defendant said she would not get her phone back. Rather, the more logical reading of her statement is that Defendant was saying that Barbara would not get her money back. The relevant portion of the statement reads:

I called 911 and [h]e took my phone and would not give it back[.]
He was still yelling at me telling me I owe him money and I will
not get it back.

SE #4 (Add. F). In context, the “it” that Barbara refers to is the “money” that she mentioned in the same sentence, not the “phone” that she mentioned in the previous sentence.

But even if Defendant’s reading is plausible, he still cannot show prejudice because he cannot show a reasonable probability that the jury would have read the statement that same way. To show prejudicial error, Defendant “must demonstrate that absent the error, there is a reasonable likelihood of a more favorable outcome.” *State v. Perea*, 213 UT 68, ¶97, 322 P.3d 624 (quotation and citation omitted). Because the statement is ambiguous at best, there is no reasonable probability that the jury seized on it as evidence of Defendant’s intent to commit theft, especially where the prosecutor did not refer to it in his closing arguments. R348:80-86,95-98.

Additionally, Defendant's basis for insinuating that Barbara fabricated this detail was weak. As the trial court recognized, the outcome of this case could not affect whether Barbara owed Defendant money. R347:130-31. There was no evidence that Barbara would be relieved of her debt if Defendant were convicted of a felony. Additionally, Defendant's own testimony demonstrated that Barbara did not fabricate the event because he corroborated much of her account. The only portions of Barbara's statement that Defendant did not corroborate were her statements: (1) that he yelled at her that she owed him money and she would not get it back; and (2) that he pushed her and threatened to push her down the stairs. But Defendant does not offer a viable reason that Barbara would have fabricated these statements in the short time between calling police and writing her statement that same day.

Defendant argues that admitting the statement was harmful because the court "emphasized" it by admitting it, withdrawing it, and then readmitting it. Br.Aplt. 47-48. On the contrary, if the court's actions suggested anything about the statement, it was only that an exhibit that the court had improperly admitted was now admissible because defense counsel had referred to it while cross-examining Barbara.

Finally, Defendant argues that admitting the witness statement was prejudicial because the jury must have believed his version of events when it

acquitted him of making a threat of violence. Br.Aplt. 21, 47. But the jury's split verdict does not demonstrate that it necessarily believed Defendant. The "most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Dunn v. United States*, 284 U.S. 390, 393 (1932) (quotation and citation omitted); *see also United States v. Powell*, 469 U.S. 57, 64-65 (1984).

"[I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Powell*, 469 U.S. 64-65.

There were several reasons that the jury might acquit Defendant of making a threat of violence even without believing his story. Barbara gave inconsistent reports about Defendant's threats. As explained, Barbara did not include the details about Defendant's threats in her written witness statement, nor did Barbara tell the 911 operator that Defendant had feinted punches towards her face. R347:131;SE#4. And although Barbara testified that

Defendant did not try to throw her down the stairs, she told the 911 operator that Defendant did try to push her down the stairs. R347:127-28. Barbara also told the 911 operator that she did not want to get Defendant in trouble. R347:167;SE#6 at 3:11-3:14. Given these inconsistencies, the jury could have disbelieved Defendant but still found that the prosecution had not proven beyond a reasonable doubt that he threatened her with violence. Thus, the split verdict does not demonstrate that the jury necessarily believed Defendant.

In sum, Barbara had already testified to almost all of the details in her witness statement, Defendant corroborated most of those details, and the jury's verdict does not demonstrate that they necessarily believed Defendant. Defendant therefore cannot show that any error in admitting the written statement was harmful. *See Perea*, 213 UT 68, ¶97.

D. Defendant did not preserve his argument that the witness statement was inadmissible under *Bujan* and cannot show that the trial court plainly erred or that his counsel was ineffective.

Defendant did not preserve his argument that Barbara's police statement was inadmissible under *Bujan* because he did not make that argument below. *See State v. Low*, 2008 UT 58, ¶17, 192 P.3d 867. Rather, counsel conceded that two parts of Barbara's witness statement were admissible as prior consistent statements under rule 801(d)(1)(b), even though they were allegedly made after the alleged motive to fabricate that Defendant now formulates arose. R347:153.

If anything, this concession signaled that counsel was not concerned about the timing of the police statement. Rather, defense counsel's only objection was that, other than those two statements that were consistent with her trial testimony, the rest of Barbara's police statement was hearsay and therefore inadmissible, even under the rule of completeness. R347:97-98,148-54. Because that was the only basis for Defendant's objection, that was the only argument that he preserved. *See Low*, 2008 UT 58, ¶17.

Defendant briefs his *Bujan* challenge as if preserved, but argues in the closing paragraphs that if he did not preserve the argument, then the trial court plainly erred and his counsel was ineffective for not raising it. Br.Aplt. 49. As explained, plain error requires a showing of obvious, prejudicial error. *See State v. Isom*, 2015 UT App 160, ¶28, 354 P.3d 791. To show that his counsel was ineffective, Defendant must prove both that his counsel's performance was deficient and that the deficient performance prejudiced him. *See Strickland*, 466 U.S. at 687. The plain error and ineffective assistance of counsel standards "share a common standard of prejudice." *State v. McNeil*, 2013 UT App 134, ¶42, 302 P.3d 844.

Defendant cannot show either plain error or ineffective assistance because he cannot establish the prejudice element of either theory. Even if Barbara's statement were inadmissible under rule 801(D)(1)(B), it was

independently admissible under rule 106 or, at most, any error in admitting it under that rule was harmless. Therefore, Defendant cannot show that the trial court plainly erred for not sua sponte excluding Barbara's written statement under *Bujan*, or that his counsel was ineffective for not objecting to the statement on that basis, because he cannot show that any error in admitting the statement was prejudicial.

V.

THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE


Finally, Defendant argues that he is entitled to relief under the cumulative error doctrine. Br.Aplt. 50. This Court "will reverse a jury verdict under the cumulative error doctrine only 'if the cumulative effect of the several errors undermines ... confidence that a fair trial was had.'" *State v. Killpack*, 2008 UT 49, ¶ 58, 191 P.3d 17 (quoting *State v. Widdison*, 2001 UT 60, ¶ 73, 28 P.3d 1278 (omissions in original)). As demonstrated, Defendant has not shown any error, or at most, only one harmless error. His cumulative error claim therefore fails. *See id.* (rejecting a cumulative error claim where the defendant failed to demonstrate any error).

CONCLUSION

For the foregoing reasons, the Court should affirm.


Respectfully submitted on December 23, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 13,732 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.


CHRISTOPHER D. BALLARD
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CERTIFICATE OF SERVICE

I certify that on January 15, 2016, two copies of the Complete Brief of Appellee were ☐ mailed ☒ hand-delivered to:

Alexandra S. McCallum
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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant on December 23, 2015.

☐ will be filed and served within 14 days.

Jee Nakamura

ADDENDA

- Addendum A: Statutes and Rules
- Addendum B: Relevant Jury Instructions (R272-81)
- Addendum C: Jury questions and trial court's answers (R249,251)
- Addendum D: Discussion about court's off-the-record contact with jury and playing of the voicemail for jury (R348:49-58,99-104)
- Addendum E: Discussion on admission of Victim's written witness statement (R347:97-111, 145-60)
- Addendum F: Victim's written witness statement (State's Exhibit #4)

ADDENDUM A

Statutes and Rules

Utah Code Ann. § 76-6-202 (West 2015). Burglary.

(1) An actor is guilty of burglary who enters or remains unlawfully in a building or any portion of a building with intent to commit:

- (a) a felony;
- (b) theft;
- (c) an assault on any person;
- (d) lewdness, a violation of Section 76-9-702;
- (e) sexual battery, a violation of Section 76-9-702.1;
- (f) lewdness involving a child, in violation of Section 76-9-702.5; or
- (g) voyeurism under Section 76-9-702.7.

(2) Burglary is a third degree felony unless it was committed in a dwelling, in which event it is a second degree felony.

(3) A violation of this section is a separate offense from any of the offenses listed in Subsections (1)(a) through (g), and which may be committed by the actor while in the building.

Amended by Chapter 303, 2012 General Session

Utah Code Ann. §76-6-401 (West 2015). Definitions.

For the purposes of this part:

(1) "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

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

(b) To restore the property only upon payment of a reward or other compensation; or

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

(4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

(5) "Deception" occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or

(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or

(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official record; or

(e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

Enacted by Chapter 196, 1973 General Session

Utah Code Ann. §76-6-404 (West 2015). Theft—Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Enacted by Chapter 196, 1973 General Session

Utah R. Evid. 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim. Utah Rules of Evidence (1971) was not as specific, but Rule 106 is otherwise in accord with Utah practice.

Utah R. Evid. 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These

changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 403. *See also* Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." *See also Smith v. Estelle*, 445 F. Supp. 647 (N.D. Tex. 1977)(surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979); *State v. Johns*, 615 P.2d 1260 (Utah 1980); *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982).

Utah R. Evid. 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

- (A) is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten, or

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

2011 Advisory Committee Note. - The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE

Subsection (a) is in accord with Rule 62(1), Utah Rules of Evidence (1971).

Subsection (b) is in accord with Rule 62(2), Utah Rules of Evidence (1971). The hearsay rule is not applicable in declarations of devices and machines, e.g., radar. The definition of "hearsay" in subdivision (c) is substantially the same as Rule 63, Utah Rules of Evidence (1971).

Subdivision (d)(1) is similar to Rule 63(1), Utah Rules of Evidence (1971). It deviates from the federal rule in that it allows use of prior statements as substantive evidence if (1) inconsistent or (2) the witness has forgotten, and does not require the prior statement to have been given under oath or subject to perjury. The former Utah rules admitted such statements as an exception to the hearsay rule. See *California v. Green*, 399 U.S. 149 (1970), with respect to confrontation problems under the Sixth Amendment to the United States

Constitution. Subdivision (d)(1) is as originally promulgated by the United States Supreme Court with the addition of the language "or the witness denies having made the statement or has forgotten" and is in keeping with the prior Utah rule and the actual effect on most juries.

Subdivision (d)(1)(B) is in substance the same as Rule 63(1), Utah Rules of Evidence (1971). The Utah court has been liberal in its interpretation of the applicable rule in this general area. *State v. Sibert*, 6 Utah 2d 198, 310 P.2d 388 (1957).

Subdivision (d)(1)(C) comports with prior Utah case law. *State v. Owens*, 15 Utah 2d 123, 388 P.2d 797 (1964); *State v. Vasquez*, 22 Utah 2d 277, 451 P.2d 786 (1969).

The substance of subdivision (d)(2)(A) was contained in Rules 63(6) and (7), Utah Rules of Evidence (1971), as an exception to the hearsay rule.

Similar provisions to subdivisions (d)(2)(B) and (C) were contained in Rule 63(8), Utah Rules of Evidence (1971), as an exception to the hearsay rule.

Rule 63(9), Utah Rules of Evidence (1971), was of similar substance and scope to subdivision (d)(2)(D), except that Rule 63(9) required that the declarant be unavailable before such admissions are received. Adoptive and vicarious admissions have been recognized as admissible in criminal as well as civil cases. *State v. Kerekes*, 622 P.2d 1161 (Utah 1980).

Statements by a coconspirator of a party made during the course and in furtherance of the conspiracy, admissible as non-hearsay under subdivision (d)(2)(E), have traditionally been admitted as exceptions to the hearsay rule. *State v. Erwin*, 101 Utah 365, 120 P.2d 285 (1941). Rule 63(9)(b), Utah Rules of Evidence (1971), was broader than this rule in that it provided for the admission of statements made while the party and declarant were participating in a plan to commit a crime or a civil wrong if the statement was relevant to the plan or its subject matter and made while the plan was in existence and before its complete execution or other termination.

ADDENDUM B

Relevant Jury Instructions (R272-81)

INSTRUCTION NO. 24

OFFENSE REQUIRES CONDUCT AND MENTAL STATE:

A person cannot be found guilty of a criminal offense unless that person's conduct is prohibited by law, AND at the time the conduct occurred, the defendant demonstrated a particular mental state specified by law.

"Conduct" can mean both an "act" or a failure to act when the law requires a person to act. An "act" is a voluntary movement of the body and it can include speech.

As to the "mental state" requirement, the prosecution must prove that at the time the defendant acted (or failed to act), he/she did so with a particular mental state. For each offense, the law defines what kind of mental state the defendant had to have, if any. For some crimes the defendant must have acted "intentionally" or "knowingly". For other crimes it is enough that the defendant acted "recklessly", "with criminal negligence" or with some other specified mental state.

Later, I will instruct you on the specific conduct and mental state that the prosecution must prove before the defendant can be found guilty of the crime(s) charged.

INSTRUCTION NO. 25

INTENTIONAL, KNOWING AND RECKLESS MENTAL STATES:

As I stated in another instruction, the prosecution must prove that at the time the defendant acted, he/she did so with a particular mental state. For each offense, the law defines what kind of mental state the defendant had to have, if any.

For the crime(s) charged in this case, the defendant must have acted "intentionally" or "knowingly" or recklessly. The prosecution must prove beyond a reasonable doubt that the defendant acted intentionally or knowingly or recklessly before the defendant can be found guilty of the crime charged.

A person engages in conduct intentionally or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

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

A person engages in conduct recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

INSTRUCTION NO. 26

INFERRING THE REQUIRED MENTAL STATE:

The law requires that the prosecutor prove beyond a reasonable doubt that the defendant acted with a particular mental state.

Ordinarily, there is no way that a defendant's mental state can be proven directly, because no one can tell what another person is thinking.

A defendant's mental state can be proved indirectly from the surrounding facts and circumstances. This includes things like what the defendant said, what the defendant did, and any other evidence that shows what was in the defendant's mind.

INSTRUCTION NO. 27

MOTIVE:

A defendant's mental state is not the same as "motive". Motive is why a person does something. Motive is not an element of the crime(s) charged in this case. As a result, the prosecutor does not have to prove why the defendant acted (or failed to act).

However, motive or lack of motive may help you determine if the defendant did what he/she is charged with doing. It may also help you determine what his/her mental state was at the time.

INSTRUCTION NO. 28

The defendant, KEN JOHNSON, is charged in Count I, with Burglary (Domestic Violence), on or about March 30, 2014. You cannot convict of this offense unless, based on the evidence you find beyond a reasonable doubt each of the following elements:

1. In Salt Lake County, State of Utah, the defendant KEN JOHNSON;
2. Knowingly, intentionally or recklessly;
3. Entered or remained unlawfully in the dwelling of another; and
4. With the specific intent to commit:
 - a. A theft; or
 - b. An assault on any person.

If, after careful consideration of all of the evidence you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty. On the other hand, if you are not convinced that one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant not guilty.

INSTRUCTION NO. 29

Count 1 charges the defendant with burglary. Trespassing is a lesser included offense of that charge. As you deliberate, you must determine whether the defendant is guilty of burglary_guilty of trespassing or not guilty of either offense. The law does not require you to make these determinations in any particular order. However, you cannot find the defendant guilty of both burglary and trespass. In other words, you can only return one verdict on count 1: guilty of burglary, guilty of trespassing, or not guilty of either offense.

The elements for burglary] are set forth in Instruction 28

The elements for trespassing are set forth in Instruction 30.

INSTRUCTION NO. 30

The crime of trespassing consists of a number of elements each of which must be proved beyond a reasonable doubt. If the prosecution fails to prove even one element beyond a reasonable doubt you must find the defendant not guilty.

A person is guilty of criminal trespass if under circumstances not amounting to burglary :

(a) the person enters or remains unlawfully on property and:

(i) intends to cause annoyance or injury to any person or damage to any

Property *OR*

(ii) intends to commit any crime, other than theft or a felony; or

(iii) is reckless as to whether his presence will cause fear for the safety of another;

or

(b) knowing the person's entry or presence is unlawful, the person enters or remains on property as to which notice against entering is given by personal communication to the actor by the owner or someone with apparent authority to act for the owner.

INSTRUCTION NO. 31

Under the laws of the State of Utah, a person commits Burglary if that person enters or remains unlawfully in a dwelling or any portion of a dwelling with intent to ~~commit a felony or~~ theft or to commit an assault on any person.

The following definitions apply to Count I:

1. "Dwelling" means a building which is usually occupied by a person lodging in the building at night, whether or not a person is actually present.

2. Theft. A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

"Purpose to deprive" means to have the conscious object:

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

(b) To restore the property only upon payment of a reward or other compensation; or

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

3. Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

INSTRUCTION NO. 33

Under Utah law a person can commit an offense known as wrongful appropriation. Wrongful appropriation is defined as:

A person commits wrongful appropriation if he obtains or exercises unauthorized control over the property of another, without the consent of the owner or legal custodian and with intent to temporarily appropriate, possess, or use the property or to temporarily deprive the owner or legal custodian of possession of the property.

ADDENDUM C

Jury questions and trial court's answers (R249,251)

We have a question regarding intent.

p. #28-4

Does the person need to have intent before they enter the home to committ theft OR can intent happen after they are in the home?

See instruction # 31

Intent can be formed before entry or while remaining in the home.

Jury is confused about the reason for the addition of p. 33

Is there a ~~specific~~ specific reason it is included?

Use your collective memory of counsels argument/ ^{and testimony} to determine its significance.

See Instructor # 11

ADDENDUM D

Discussion about court's off-the-record contact with jury and
playing of the voicemail for jury (R348:49-58,99-104)

14-907022

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

KEN MONTEY JOHNSON,

Defendant.

: Case No. 141907022 FS

: Appellate Court Case No. 20141155

: Volume II of II

: With Keyword Index

JURY TRIAL OCTOBER 7 & 8, 2014

BEFORE

JUDGE KATIE BERNARDS-GOODMAN

FILED DISTRICT COURT
Third Judicial District
FEB 06 2015
SALT LAKE COUNTY
Deputy Clerk

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way
Sandy, Utah 84092

801-523-1186

FILED
UTAH APPELLATE COURTS

MAR 18 2015

ORIGINAL

20141155 (A)

APPEARANCES

For the Plaintiff:

CRAIG M. STANGER
Deputy District Attorney

For the Defendant:

ROBERT B. BREEZE
Attorney at Law

* * *

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1 A Yes.

2 Q Okay, when's the last time you were there? Just -

3 A Just a few months ago.

4 Q Okay. So a few months ago. Okay. And were you

5 present on March 30, 2014?

6 A I was not.

7 Q Okay, the day before or the day after?

8 A I was not.

9 MR. STANGER: No further questions.

10 MR. BREEZE: Nothing further.

11 THE COURT: Thank you.

12 MR. BREEZE: The defense rests.

13 THE COURT: All right. Let's take a break.

14 MR. BREEZE: Ten minutes?

15 THE COURT: Yes, but I have a few things, don't

16 leave, just let the jury go.

17 (Whereupon the jury left the courtroom)

18 THE COURT: Is the State planning on putting on

19 rebuttal?

20 MR. STANGER: Ummm, I believe so, Judge.

21 THE COURT: Okay. I would now just comment that

22 there's been some concern about 39 seconds of that tape being

23 played. I now think it was relevant since the defendant has

24 claimed he was not - had only had one drink - it becomes

25 relevant to hear how he sounded on that day.

1 MR. BREEZE: Now, may I inquire as to what rebuttal
2 evidence they intend to bring?

3 THE COURT: You two can talk about that.

4 MR. BREEZE: Well, I don't want to have to object
5 in the presence of the jury and I'm not asking for details
6 just give -

7 MR. STANGER: It's kind of what we have to do,
8 Judge.

9 THE COURT: What?

10 MR. STANGER: It's kind of what we have to do for a
11 (inaudible). I don't even know that I -

12 THE COURT: I don't know that they have
13 (inaudible).

14 MR. STANGER: - will but I need to go out and have
15 a conversation with Ms. Johnson, Heather Johnson.

16 THE COURT: I'm going to give you 10 or 15 minutes
17 to decide if you're going to and what it might be and then he
18 can discuss it with you. You can let me know before the jury
19 comes in (inaudible) sometime outside the presence of the
20 jury.

21 (Whereupon a recess was taken)

22 THE COURT: All right, is the State going to do any
23 rebuttal?

24 MR. STANGER: Judge, I have spoken with Ms. Johnson,
25 with Ms. Heather Johnson, I'm sorry, and State will not be

1 calling her. I don't have any rebuttal evidence. I would
2 just ask that she be allowed to leave. She does have work.
3 So...

4 THE COURT: Okay. Any objection to that?

5 MR. BREEZE: No, and the other two witnesses also
6 have the same request.

7 THE COURT: Okay, then they are excused. Thanks
8 for being here.

9 No rebuttal. So we're moving to closings. Are you
10 ready for that?

11 We are not ready for jury instructions. All right.
12 The defendant did testify. I assume defense wants to put in
13 their wrongful appropriation?

14 MR. BREEZE: Yes.

15 THE COURT: How about the lesser included?

16 MR. BREEZE: Just one second.

17 MR. STANGER: Less, that would be (inaudible)
18 wrongful.

19 THE COURT: Wrongful, commit the offense of
20 wrongful appropriation.

21 MR. STANGER: A lesser included of theft that he's
22 already admitted it?

23 THE COURT: He's just defining it obviously so he
24 can claim that was the intent he performed while he was
25 inside rather than - since there has been some evidence of

1 that, I'm inclined to let him have it.

2 MR. STANGER: Okay.

3 THE COURT: We've got a definition of wrongfully,
4 wrongful appropriation but then we have argument behind it.

5 MR. BREEZE: It's just the theory of the case.

6 THE COURT: Which you can argue. I don't think you
7 get to submit your theory of the case in a jury instruction.
8 You can submit the wrongful appropriation definition but then
9 you've got to make your own argument.

10 MR. BREEZE: Well, I think that you can instruct
11 them that - actually isn't that what a theory of the case
12 instruction is, that the defendant says this is my theory
13 and, you know, I mean, I think at the very bottom we're very
14 gracious and say, hey, but you still need to consider the
15 theft or the assault count and -

16 THE COURT: You could but are not required to. If
17 they find that the facts meet the elements then they are
18 required to find someone guilty.

19 MR. BREEZE: Would you read that last part again?

20 THE COURT: However, bear in mind that if you were
21 convinced beyond a reasonable doubt that the defendant
22 entered or remained unlawfully with the intent to commit an
23 assault, you could but are not required to find the defendant
24 guilty of burglary under the theory or burglary by assault.
25 You know, and you don't talk about if they do - and if they

1 find him guilty of the theft they could also - and you don't
2 mention that in here. Yeah, I'm going to give you the
3 wrongful appropriation definition but you're going to have to
4 make your own arguments.

5 MR. BREEZE: Okay. And of course of objection is
6 noted, right?

7 THE COURT: Uh-huh (affirmative).

8 MR. BREEZE: And -

9 THE COURT: And you're talking about the lesser
10 included?

11 MR. BREEZE: Right. Yeah, let's go ahead and give
12 them that lesser included.

13 THE COURT: Do you have a verdict form for me
14 including the lesser included?

15 MR. BREEZE: I don't.

16 MR. STANGER: How is that a lesser included of this
17 (inaudible)? I don't think there's been any evidence of
18 trespass. The evidence is that he kicked her door in.

19 MR. BREEZE: Entering -

20 MR. STANGER: How does that become a trespass?

21 MR. BREEZE: It is a trespass. Trespassing is
22 entering unlawfully and, in fact, if you don't have the
23 intent, then it is trespassing.

24 MR. STANGER: He's testified that he had the intent
25 to kick the door down.

1 MR. BREEZE: Well, that's not the intent I'm
2 talking about.

3 THE COURT: He's talking about the intent to commit
4 theft while he was in the house.

5 MR. BREEZE: I mean, it's right here, enter or
6 remain unlawfully and criminal trespass is definitely a
7 lesser included of burglary and if they believe that he
8 entered unlawfully then -

9 THE COURT: But never committed a theft or an
10 assault, it's a potential lesser included.

11 MR. BREEZE: Right.

12 MR. STANGER: He admitted that - I -

13 THE COURT: Your issue is the intent and the intent
14 was formed on the theft.

15 MR. STANGER: Yeah.

16 THE COURT: Okay. So I'll put them in. I need to
17 copy this without the argument. I need to figure out where
18 I'm putting them in and I need to number them so that I can
19 put (inaudible) instruction which number is which jury
20 instruction and then we need to copy them.

21 MR. STANGER: Do they have - I'm trying to type
22 this up but Mr. Johnson's element instruction on the - I'm
23 sorry, on the burglary, it says entered or remained in a
24 dwelling. I think it needs to say entered or remained
25 unlawfully in a dwelling so I'm trying to type that up and

1 get it to the clerk.

2 THE COURT: Okay. The other thing, could you put a
3 lesser included in your verdict form?

4 MR. STANGER: I did not.

5 THE COURT: Could you or do you have it? Or can
6 you email me -

7 MR. STANGER: I can make one. I don't have it.

8 THE COURT: Oh, you don't have a copy of it?

9 MR. STANGER: This is the wrong computer. This is
10 my team computer so I don't...

11 THE COURT: Okay.

12 MR. STANGER: I can get it to you.

13 THE COURT: Okay, (inaudible) verdict form. Okay.
14 We need time to do all those things. Let's - I'm going to
15 tell the jury that we're working on all this, that there's no
16 rebuttal. That we're going to be copying jury instructions
17 so it may take a few minutes more than 15 so they don't blame
18 it on you.

19 MR. BREEZE: Okay.

20 (Whereupon a recess was taken)

21 THE COURT: Okay, we're back in the matter of state
22 of Utah vs. Ken Montey Johnson. Ummm, we got the jury
23 instructions copied. The - I went in and told the jury that
24 it had been longer than a 15-break because we were copying
25 all the jury instructions and putting in the ones that you

1 had all brought this morning that I had given you the
2 opportunity to bring and the State was deciding whether to do
3 rebuttal and all that and they said, Well, when we get this
4 case are we going to be able to listen to the tapes? Is
5 there a transcript of the tapes? So I said there's no
6 transcripts of the tapes, we will discuss whether you get to
7 hear the tapes. So, since they are admitted into evidence I
8 think they should get to hear the 911 tape and the 39 seconds
9 that I allowed of the other tape. We'll have to have counsel
10 go in and make sure that's all they hear.

11 MR. BREEZE: Ummm, I object. Number one, I don't
12 believe that they actually were admitted into evidence and as
13 - I mean they were marked at my request so that they would be
14 on the record for appeal purposes but I don't think they were
15 ever formally admitted and we can't let - we can't let the
16 lawyers go back and be part of jury deliberations.

17 THE COURT: Well, the lawyers are not going to be
18 saying anything when they go back.

19 MR. BREEZE: Well, I still don't think that it's
20 proper and the idea that they're going to have back there a -
21 that we're going to have to back and supervise their
22 listening to the tape is -

23 THE COURT: The only reason I would let the lawyers
24 back is so that you can see that nothing is said to the jury.

25 MR. BREEZE: And then we're into this thing that

1 you brought up, sounded like you were trying to help the
2 prosecutor but you brought up that, oh, the whole 39 seconds
3 is now relevant, I think that's what you said.

4 THE COURT: What I'm doing is supporting my rule in
5 admitting it.

6 MR. BREEZE: But when it was originally admitted,
7 the ruling was that only the part about the, that I went
8 over. That -

9 THE COURT: When I originally admitted it I told
10 the State they could start from the beginning and go through
11 to the part where the defendant made an admission. The
12 reason we did that was because it's too out of context to
13 just pull the four seconds out of it. He did what I said.
14 That's what I allowed, that's what's been admitted. If they
15 want to listen to it, I'm going to let them listen to it. You
16 can put your objection on the record.

17 MR. BREEZE: Well, we're objecting and one of the
18 reasons is that the only reason that you allowed them to play
19 the whole 39 seconds was because in the beginning they told
20 you there was nothing of significance, it was all innocuous
21 until the comment, until the four seconds that mattered.

22 THE COURT: No one told me things were innocuous.
23 I allowed it because it needs to be in the context of the
24 phone call that's made and since it was at the beginning of
25 what was it, a 4-minute phone call, I felt like 39 seconds

1 was reasonable compared to allowing the whole four minutes.
2 Okay.

3 MR. BREEZE: And so my objection is on the record,
4 right?

5 THE COURT: (Inaudible).

6 CLERK: (Inaudible).

7 THE COURT: As I've said before. The only things
8 that last in that record are what is scanned in. We no
9 longer take physical things any more. You just have to keep
10 it (inaudible).

11 (Inaudible conversation)

12 THE COURT: Oh no, it's admitted as evidence.
13 (Inaudible).

14 MR. BREEZE: But just so the record is clear, it's
15 my position that it was never admitted as evidence, neither
16 one of those disks, that they were admitted only at my
17 request so that they would be available for appellate review.

18 THE COURT: They were admitted. I was not thrilled
19 with allowing the jury to listen to them but we said we'll
20 wait and see if they really want them. Now they want them,
21 they've been admitted, we'll let them have them.

22 (Whereupon the jury entered the courtroom)

23 THE COURT: We're back in the matter of, in the
24 presence of the jury, in the matter of the state of Utah vs.
25 Ken Montey Johnson. We have jury instructions. We will pass

1 but first I'm going to tell you that the - we have eight
2 jurors and one alternate. Our alternate is No. 23 and I'm
3 sorry that we do that to you but we've had so many times
4 where someone gets in a car wreck or somebody gets sick or
5 something like that happens and it's very difficult to do a
6 jury trial so we want to make sure that we don't have to do
7 it more than once. So you're going to get your lunch and be
8 excused. I want you to leave your phone number in case we
9 have to call you back.

10 (Whereupon the bailiff was sworn)

11 (Whereupon the jury left the courtroom at 12:31:00)

12 THE COURT: Have a seat. Anything we need the
13 record for?

14 MR. BREEZE: Not really, I just assume we just need
15 to give our cell numbers to the clerk and stay within 15
16 minutes.

17 THE COURT: Ten would be better. Ummm, I'm going
18 to have the prosecutor show the bailiff how to play those
19 things, probably just the bailiff will go in.

20 MR. STANGER: Are they going to eat lunch first?

21 THE COURT: Yeah.

22 MR. STANGER: Okay, I wonder how long that will
23 take.

24 THE COURT: So yeah, leave your numbers. Your
25 office is 10 minutes, isn't it? You're still on Broadway,

1 aren't you?

2 MR. BREEZE: No, I sold that place and I moved down
3 to 3900 South.

4 THE COURT: Oh. The problem is we often have
5 questions and stuff that we'll end up having to call you back
6 for.

7 MR. BREEZE: I plan on staying close by.

8 THE COURT: Okay.

9 MR. BREEZE: I would like to be present when he
10 gives the instructions to the bailiff. So do we have any
11 idea of when that is going to be?

12 THE COURT: No, probably within the next half hour
13 I would hope.

14 CLERK: I can have him come back in (inaudible).

15 THE COURT: Lock them up and then we'll get him out
16 here. Ask Jason to come on back.

17 (Whereupon a recess was taken until 2:14:34)

18 THE COURT: We're back in state vs. Ken Montey
19 Johnson. There were a couple of questions while the jury was
20 out. We kept them so that you could take a look at them and
21 how I answered them. Do we have them?

22 CLERK: (Inaudible).

23 THE COURT: They asked whether you could formulate
24 intent only before entering or after entering and they asked
25 why was the one jury instruction included. Let me give that

1 to you in case you want to put any objections on the record.

2 MR. BREEZE: Do you remember what the Instruction
3 33 was?

4 THE COURT: Yes, it's the one about, ummm, the
5 temporary taking, what's it called?

6 MR. STANGER: Appropriation.

7 MR. BREEZE: Oh, appropriation?

8 THE COURT: I think so. So I basically said what's
9 in that jury instruction, you determine which instructions
10 are important and to read them as a whole and...

11 MR. BREEZE: But it doesn't say read them as a -
12 well you said -

13 THE COURT: Yes, it does in that jury instruction.

14 MR. BREEZE: Let me just take a look here.

15 (Inaudible conversation)

16 THE COURT: These instructions I gave you before
17 the trial, any instructions I may give to you and these
18 instructions. All instructions are important, you should
19 consider them as a whole. The order in which the
20 instructions are given does not mean that some instructions
21 are more important than others. Whether any particular
22 instruction applies may depend upon what you decide are the
23 true facts of the case.

24 Also refers to the argument because I know that was
25 part of your argument you wanted them to consider. So that's

1 why I mentioned argument as well.

2 MR. BREEZE: And so just for the record, we object
3 to what you gave on the question regarding the reason for
4 Instruction No. 33. We believe that Your Honor should have
5 said because, words to the effect of because the defendant's
6 theory of the case is that he only wanted to temporarily
7 deprive and so for that reason we move for a mistrial.

8 THE COURT: Allowing them to decide the
9 significance of the instruction based on their own theories
10 of argument and testimony is the appropriate way to go rather
11 than to restate defendant's theory so I'm going to deny your
12 motion for a mistrial and allow it to stand.

13 Okay, I guess we're ready to bring the jury in.

14 (Whereupon the jury entered the courtroom at 2:22:10)

15 THE COURT: We're back in the matter of state of
16 Utah vs. Ken Montey Johnson. The jury has indicated that
17 they have a verdict. The foreperson, give me their number.

18 FOREPERSON: No. 3.

19 THE COURT: All right, and you've reached a
20 verdict?

21 FOREPERSON: Yes, we have.

22 THE COURT: Would you hand it to the bailiff
23 please? We'll have the clerk read that.

24 CLERK: We, the jury empaneled in the above
25 entitled action, find the defendant, Ken Montey Johnson,

1 Count 1, burglary, guilty. Count 2, threat of violence, not
2 guilty. Signed and dated.

3 THE COURT: All right. Would anyone like the jury
4 polled?

5 MR. BREEZE: Yes, Your Honor.

6 THE COURT: Okay. I'll go through each one and
7 I'll just ask you to tell me if that was your verdict.

8 Number 1?

9 JUROR 1: Yes.

10 THE COURT: Number 2?

11 JUROR 2: Yes.

12 THE COURT: Number 3?

13 JUROR 3: Yes.

14 THE COURT: Number 8?

15 JUROR 8: Yes.

16 THE COURT: Nine?

17 JUROR 9: Yes.

18 THE COURT: And ten?

19 JUROR 10: Yes.

20 THE COURT: Eleven?

21 JUROR 11: Yes.

22 THE COURT: Seventeen?

23 JUROR 17: Yes.

24 THE COURT: Your service is now completed. You can
25 discuss the case with anybody that you want to. We'll take

1 you back to your jury room. You're welcome to leave if you
2 want or if you have any questions I'll be back in just a
3 couple of minutes.

4 (Whereupon the jury left the courtroom)

5 THE COURT: Have a seat. So we need to set a
6 sentencing date. Are we going to get a presentence report
7 from AP&P?

8 MR. STANGER: Yes, Your Honor.

9 THE COURT: All right, it takes them 45 days.
10 That's going to put us out to about November 21st. Do we
11 have a calendar on that date?

12 MR. STANGER: I think I have a sentencing on that
13 date.

14 CLERK: Yes.

15 THE COURT: All right. Does that work for you?

16 MR. BREEZE: Yes.

17 THE COURT: All right.

18 MR. STANGER: Judge, based on the conviction the
19 State would ask that he be taken into custody. We believe he
20 poses a danger based on his conduct throughout this case and
21 pursuant to the statute the presumption is that he goes into
22 custody on the felony two conviction.

23 THE COURT: Okay. Go ahead. Do you wish to respond
24 to that?

25 MR. BREEZE: Yes, it's under 77-20 and the - you

ADDENDUM E

Discussion on admission of Victim's written
witness statement (R347:97-111, 145-60)

SALT LAKE COUNTY, STATE OF UTAH

Defendant.

: With Keyword Index

JUDGE KATIE BERNARDS-GOODMAN

Deputy Clerk

MAR 18 2015

ORIGINAL

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APPEARANCES

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* * *

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1 after Mr. Johnson had left the home did you fill this out, do
2 you remember?

3 A I don't remember how long it was exactly but it was
4 pretty quickly after. The officer was there pretty quickly.

5 Q Okay. So you were still shaking?

6 A Oh yeah, yes.

7 Q Okay. And is that the statement written to the best
8 that you could remember at that time?

9 A Yes.

10 Q Describe your thoughts at that time.

11 A I still just couldn't believe everything that had
12 just happened. I was scared. I've never been scared like
13 that before, ever.

14 Q And is that - is that your statement actually?

15 A Yes.

16 Q And how do you know that's your statement?

17 A 'Cause that's what happened and that's what I
18 wrote.

19 Q Okay. And is your name written on that?

20 A Yes.

21 Q Has your signature on the document?

22 A Yes.

23 MR. STANGER: State would move to admit State's
24 Exhibit 4 into evidence.

25 MR. BREEZE: It's clearly hearsay. She can testify

1 about what she wants to testify about. This is a statement
2 made by a declarant, the declarant does not make while
3 testifying at the trial or hearing. It's hearsay.

4 MR. STANGER: Inconsistent statement, Judge.

5 THE COURT: Prior inconsistent statement?

6 MR. STANGER: (Inaudible). This particular
7 statement was made under penalty of perjury.

8 THE COURT: I'm going to admit it.

9 MR. BREEZE: Wait, Your Honor, is it - maybe the
10 prosecutor could tell us what this is offered to rebut as
11 required by Rule 801D(1)(b).

12 THE COURT: (Inaudible) cross examination.
13 (Coughing). Sorry.

14 MR. STANGER: If i could retrieve that document.

15 THE COURT: Uh-huh (affirmative).

16 Q (BY MR. STANGER) So, when you talked to 911 and
17 you told them about him breaking in -

18 MR. BREEZE: Objection -

19 Q (BY MR. STANGER) Is that right? She's already
20 testified to it.

21 MR. BREEZE: You just testified. You told them
22 about blank, he wants her to say yes. The proper form of the
23 question is what did you tell them.

24 MR. STANGER: She's previously testified to it. I
25 can ask it again.

1 Q (BY MR. STANGER) When you spoke with 911 did you
2 tell them about -

3 MR. BREEZE: Objection, leading question. He
4 should ask what did she tell 911.

5 THE COURT: It's hard to respond for me right now.
6 Why don't you just ask her what she said.

7 Q (BY MR. STANGER) What did you say to 911 about
8 what he did to you?

9 MR. BREEZE: First we would like foundation to show
10 that she actually remembers what she said to 911.

11 MR. STANGER: She's already testified to that.

12 MR. BREEZE: I'm just asking for a foundation.

13 THE COURT: Do you know what you said to 911?

14 THE WITNESS: Yes.

15 THE COURT: What did you say?

16 THE WITNESS: About him pushing me, grabbing my
17 wrist and pushing me down the stairs.

18 Q (BY MR. STANGER) Did he actually push you down the
19 stairs though?

20 A No.

21 Q And what did you say in your statement regarding
22 that same incident?

23 A In my written statement I believe I said the same
24 thing, that he threatened to throw me down the stairs - or
25 push me.

1 Q Do you remember - did you talk to a Detective
2 Herbert -

3 A Yes.

4 Q - about this case? Do you remember when that
5 occurred?

6 A Ummm, I think it was a week, week and a half later.

7 Q Okay. At that time did you talk about - what did
8 you tell -

9 MR. BREEZE: I'm going to object -

10 MR. STANGER: I haven't even asked the question,
11 Judge.

12 MR. BREEZE: The cats out of the bag. He's about
13 to say did you tell the detective blank, have her say yes.
14 The proper form of the question is what did you tell the
15 detective.

16 MR. STANGER: I've got to be able to ask the
17 question.

18 THE COURT: All right. Go back a step (coughing).
19 Under hearsay - I don't know what is happening to me now, of
20 course now (coughing). The declarant's prior - if the
21 declarant testifies (coughing) and is subject to cross
22 examination under D-1 about a prior statement and the
23 statement is consistent with the declarant's testimony,
24 that's all it takes. The rest are 'or' or that denies
25 (inaudible). It just has to be a consistent prior statement.

1 I'm going to admit it.

2 MR. BREEZE: Well, wait a minute, Your Honor.

3 THE COURT: I've ruled (coughing). (Inaudible).

4 MR. BREEZE: Well, I wanted to make my objection
5 and say a - the rule says a prior consistent statement if
6 it's offered to rebut an express or implied charge that the
7 declarant recently fabricated. There's nothing to rebut.

8 THE COURT: That's under an 'or', D-1(a) says, "is
9 consistent with the declarant's testimony."

10 MR. BREEZE: It says 'and'.

11 THE COURT: It says 'or' in my rules.

12 MR. BREEZE: Well, you're looking at D-1(a).

13 THE COURT: So it's admissible under D-1(a). The
14 other ones are 'or's.

15 MR. BREEZE: If you look at D-1(b) you and the
16 prosecutor both claimed that this is a consistent statement.
17 Under D-1(b) a consistent statement can only be offered to
18 rebut.

19 THE COURT: Now where (coughing).

20 MR. BREEZE: It says it has to be consistent with
21 the declarant's testimony and is offered to rebut.

22 THE COURT: Where, what one are you under?

23 MR. BREEZE: That's D-1(b), that's Rule 801A-D-
24 1(b).

25 THE COURT: That's an 'or'.

1 MR. BREEZE: No, it says 'and'. You're looking at-
2 THE COURT: I'm looking at D-1(a), it finishes with
3 'or'. So if it's under D-1(a) it's admissible or it could be
4 admissible under 1(b). I don't need both 1(a) and 1(b). It
5 says 'or'.

6 MR. BREEZE: Well, Your Honor -

7 THE COURT: I'm going to admit it.

8 MR. STANGER: I apologize to the jury then?

9 THE COURT: Yes.

10 Q (BY MR. STANGER) Did you speak with Detective
11 Herbert?

12 A Yes, I did.

13 Q And did you recount what happened?

14 A Yes, I told him everything that -

15 Q On the 30th?

16 MR. BREEZE: Excuse me, I couldn't hear that last
17 comment.

18 THE COURT: He asked if she recounted what
19 happened.

20 MR. BREEZE: No, the answer.

21 THE WITNESS: I said yes, I told him everything
22 that happened.

23 Q (BY MR. STANGER) Did you talk to - did you talk to
24 him about these punches that you testified about?

25 A I don't remember if I did.

1 Q Okay. Did you receive a phone call from Mr.
2 Johnson after this happened?

3 A Yes.

4 Q Okay, did he talk to you about - what was the phone
5 call that you received?

6 A The phone call was a voice mail.

7 Q Okay, and what was that regarding?

8 A Ummm, he was still very angry with me, yelling at
9 me, pretty much telling me that, Go ahead, get him arrested
10 for kicking down my door. I don't really remember exactly
11 everything he said on there because I only heard it two or
12 three times.

13 Q Did you record - you have that voice mail?

14 A Yes.

15 Q Okay. And did you provide that to Detective
16 Herbert?

17 A Yes.

18 MR. STANGER: I don't know if you want to break. I
19 need to set up the phone call.

20 THE COURT: Oh, all right.

21 MR. STANGER: If you want to break for lunch.

22 THE COURT: We'll go ahead and have a break for
23 lunch. Come back at 1:00, you're on your own (coughing).

24 (Whereupon the jury left the courtroom)

25 THE COURT: Maybe I'll be better by 1:00.

1 MR. BREEZE: Your Honor, I have to again I'm moving
2 for a mistrial. You've misread the rule of evidence allowing
3 the statement in is completely unlawful. D-1(a) says that it
4 is -

5 THE COURT: It starts with D-1, "A declarants
6 witness prior statement. The declarant testifies and is
7 subject to cross examination about a prior statement and the
8 statement D-1(a) is consistent with the declarant's testimony
9 or the declarant denies having made the statement, or has
10 forgotten or" all these things. It only has to be one of
11 those things.

12 MR. BREEZE: Well, number one, nobody is claiming
13 that it was inconsistent with her testimony -

14 THE COURT: That's why it's -

15 MR. BREEZE: - that she's just given and a
16 declarant had not denied making the statement or has
17 forgotten and then (coughing) you get to (b) it's allowed if
18 it's consistent and offered to rebut an express or implied
19 charge that the declarant (coughing) fabricated.

20 THE COURT: Didn't she just say she didn't remember
21 whether she told them that he threw punches, so we have
22 something that's been forgotten.

23 MR. BREEZE: There may be one thing; however, if
24 you look at the statement itself, it doesn't mention anything
25 about punches. In fact -

1 THE COURT: So it's inconsistent.

2 MR. BREEZE: Right. But inconsistent is only
3 allowed if it's offered to rebut a charge that she fabricated
4 and so you've allowed this in, in the absence of - there's no
5 claim that she fabricated this. (Coughing). And I don't
6 know where the exhibit it but -

7 THE COURT: So which are you going after,
8 inconsistent or consistent?

9 MR. BREEZE: Well, it's not admissible under either
10 because first of all -

11 THE COURT: She's already testified - you're saying
12 it's inconsistent -

13 MR. BREEZE: I'm not saying -

14 THE COURT: - a second ago.

15 MR. BREEZE: - they're the ones that are offering
16 it. They're claiming - actually they didn't claim anything.
17 You claimed that this written statement is inconsistent with
18 the defendant's testimony.

19 THE COURT: I've been going - I was assuming
20 they're going under consistent. Why don't we have you tell
21 me?

22 MR. STANGER: We are going with it's consistent,
23 prior consistent statement.

24 MR. BREEZE: Well, I think he just said consistent,
25 is that what he said?

1 THE COURT: Uh-huh (affirmative).

2 MR. BREEZE: Okay, if it's consistent, I see he
3 doesn't have his rules of evidence here, if it's consistent
4 it has to be offered to rebut a claim of fabrication. I'm
5 unaware of any claims at this stage of the trial of a
6 fabrication.

7 THE COURT: (Coughing). Let's wait and see what
8 happens on cross. Is there anything else?

9 MR. STANGER: No, Judge.

10 MR. BREEZE: I take it you're denying our motion
11 for a mistrial at this stage?

12 THE COURT: Yes.

13 (Whereupon a noon recess was taken)

14 THE COURT: All right, we're back in the matter of
15 state of Utah vs. Ken Montey Johnson. After I stopped having
16 a coughing fit, which I've had this since Friday, that's the
17 first time that has happened. I got a chance to read through
18 the hearsay and I think Mr. Breeze is correct. I was reading
19 them all as consistent, but that first one is inconsistent,
20 the other ones are consistent.

21 MR. STANGER: Judge, I think it comes in under
22 alternative theories as well, so it comes in as a present
23 sense impression. She testified that she -

24 THE COURT: (Inaudible).

25 MR. STANGER: - was at or near the time of the

1 event that happened, so...

2 THE COURT: So at any rate, let's hold it back
3 until we get through cross and decide about all of these
4 together. In the meantime I don't think, I do think it may
5 qualify under some of these other exceptions under 803. I
6 don't think having it in the jury's hands for two minutes is
7 a big enough error yet to declare a mistrial.

8 MR. BREEZE: Your Honor, I am concerned that I kind
9 of had to tussle with you in the presence of the jury -

10 THE COURT: And I will tell the jury that you were
11 being insistent because you were right, okay?

12 MR. BREEZE: Okay. And then I guess -

13 THE COURT: I'll let them know I was wrong, you
14 were right. Okay.

15 MR. STANGER: I don't know if you wanted to hear
16 the - that he had made a motion that to hear the phone call
17 before -

18 THE COURT: Oh yeah, how long is it? Why don't you
19 just play it read quick. You got it all keyed up?

20 MR. STANGER: It's like three minutes.

21 THE COURT: Okay, let's hear it before the jury
22 comes back in. It is not in right now. So that's another
23 reason I'm going to leave it away from them so that they know
24 that you were right and I didn't, I shouldn't have given it
25 to them yet.

1 MR. BREEZE: Was it published?

2 THE COURT: I don't know. Did you ever hand it to
3 the jury?

4 MR. STANGER: Yes, I handed it to the jury.

5 THE COURT: Okay. So we'll take it back from them
6 so they know -

7 MR. STANGER: It should be with you now. Ummm,
8 you've got to get the right amount -

9 THE COURT: They were looking at me like what's the
10 matter with you, so...

11 MR. STANGER: I'll get it level so it's not
12 vibrating (inaudible).

13 (Phone message played - not transcribed)

14 THE COURT: It's pretty hard to understand. Is
15 there any way to make it clearer or do you have a transcript?

16 MR. STANGER: I don't have a transcript of it.

17 Ummm -

18 MR. BREEZE: May I just comment? I think that to
19 the extent that the comment is, you know, that there's a
20 confession in there that "I entered the house," I think it's
21 allowable although the whole tape is extremely prejudicial
22 and we're willing to stipulate that he entered the home
23 without consent and that he kicked in the door. We're
24 willing to stipulate to that -

25 MR. STANGER: I don't understand why we're in trial

1 if that's the stipulation -

2 THE COURT: Because then you've got the element of
3 commit a theft or an assault.

4 MR. STANGER: He's already admitted to the theft.
5 So what are we trying? I don't understand. If he's
6 stipulating that he entered the home -

7 MR. BREEZE: Obviously now I understand why we're
8 in trial here. The prosecutor doesn't understand the
9 elements of the offense. At any rate, all of the stuff, it's
10 too prejudicial, all of this f-you this, vindictive, f-you,
11 all of that is too prejudicial. None of that goes to prove
12 any element. To the extent that there is a confession in
13 there, the four seconds of that, we don't object -

14 THE COURT: At what point does the four seconds of
15 that come? I was listening for that and I'm having a hard
16 time -

17 MR. STANGER: Arrest me for the breaking and
18 entering, whatever you think I did to you. It's kind of at
19 the front end of that.

20 MR. BREEZE: But we're willing to -

21 THE COURT: Why don't you just play the front end
22 of it then?

23 MR. BREEZE: We're willing to stipulate to that and
24 - but here's a problem. All the rest of that, everything
25 else that doesn't have anything to do with the elements of

1 the offense is 404B evidence. We made a request for them to
2 produce, they've never given us notice and now they want to
3 come in and bring all this, you know, f-you, you're a
4 b-i-t-c-h, you know, and all of this horribly prejudicial
5 material that doesn't have anything to do with any element in
6 the case. So our position is if they want to play the four
7 seconds, fine. It's technically not a confession but we'll
8 still not object to that or in the alternative you can just
9 tell them that we've agreed and stipulated that he did in
10 fact enter the house without - over her objection and he
11 kicked in the door, kicked the door open.

12 THE COURT: Do you want a stipulation or do you
13 want the front part of that tape?

14 MR. STANGER: I mean, I want the front part of the
15 tape 'cause I've already told the jury I'm going to play it
16 for them. Ummm - but I...

17 THE COURT: I'm going to allow the part where he
18 discusses coming into the house. We don't have to go through
19 the whole three minutes. You can discuss that it's three
20 minutes long but that's the only pertinent part. Okay.

21 MR. BREEZE: All right and then - okay, you're
22 going to explain to the jury about the -

23 THE COURT: Uh-huh (affirmative). Let's get the
24 jury back.

25 MR. BREEZE: We should make sure that he's got it

1 cued up to that part before we bring them in.

2 THE COURT: It's the beginning, isn't it?

3 MR. BREEZE: Well, I think there's a little before.
4 It would just be nice to have it cued up.

5 THE COURT: Yeah, you may get stuck with what's
6 before. It's going to be hard to cue it up to exactly before
7 the statement he's looking for.

8 (Tape played again)

9 MR. STANGER: I mean, that's what he's talking
10 about so I think that's -

11 THE COURT: Yeah, start at the beginning. It's so
12 hard to understand.

13 MR. BREEZE: We'd object.

14 (Whereupon the jury left the courtroom)

15 THE COURT: Okay, we're back in the presence of the
16 jury on the matter of the State of Utah versus Ken Montey
17 Johnson. I'm going to tell you after (inaudible) done and
18 I'm starting with a cough drop early before I have a problem.
19 After getting my tears out of my eyes and reading the hearsay
20 statement, defense counsel is correct, which is probably why
21 he's having a hard time with me, because he's right that the
22 statement is not admissible under Rule 801. So we have taken
23 it back from you for now. It's not admissible at this point
24 in the trial. He's right; I was wrong. So we'll go ahead
25 and let the state -

1 A No.

2 MR. BREEZE: Nothing further.

3 MR. STANGER: Sorry.

4 FURTHER REDIRECT EXAMINATION

5 BY MR. STANGER:

6 Q Did you think Mr. Johnson was going to give you
7 your phone back?

8 A No.

9 Q So at the time he left your house, did you believe
10 you were ever going to get your phone back?

11 A No.

12 MR. STANGER: No further questions.

13 THE COURT: All right, you can step down. Do we
14 need a break?

15 MR. STANGER: I think so, yeah.

16 THE COURT: Okay, we'll take a 10-minute break.

17 (Whereupon the jury left the courtroom)

18 THE COURT: Have a seat. Anything we need to
19 discuss outside the presence of the jury?

20 MR. BREEZE: Excuse me, just one second.

21 THE COURT: Yeah.

22 MR. BREEZE: I had made another motion for a
23 mistrial at the bench conference because the prosecutor
24 didn't just play the four seconds indicated in the tape. He
25 played that part about where Mr. Johnson is saying f-this and

1 f-that, very prejudicial. We asked that that not happen and
2 then all of a sudden, boom, there it goes right in front of
3 the jury.

4 THE COURT: I didn't say that there wasn't ever
5 going to be an f-this or f-that. What I said was just play
6 the beginning of the tape.

7 MR. BREEZE: And we had argued that if you allowed
8 him to do that, that there's - what's going to happen is that
9 bad things are going to come in and we asked that you have
10 him cue it up to the relevant portion and play that only.

11 THE COURT: And I told him he could play it from
12 the beginning.

13 MR. BREEZE: Yes, and for that reason and in light
14 of the prejudicial f-this and f-that that came in, we're
15 asking for a mistrial.

16 THE COURT: That's all in the context of what he
17 said. They didn't play more than what, 10 seconds of that
18 tape?

19 MR. STANGER: It went, it went -

20 MR. BREEZE: Thirty-nine seconds.

21 THE COURT: Thirty-nine seconds. That's cutting it
22 pretty tight.

23 MR. BREEZE: That's -

24 THE COURT: I'm not going to declare a mistrial
25 because the f-word might have been heard along with his

1 statements about kicking the door in.

2 MR. BREEZE: One followup on that point, at some
3 point the prosecutor is going to need to just make, have a
4 copy burned of only the relevant four seconds because if it's
5 going to go back -

6 THE COURT: Well, let's just not have it go back
7 unless he wants to try to burn the four seconds.

8 MR. STANGER: I think if they request we can
9 probably do it, but...

10 THE COURT: Okay. Right now I'm just thinking I'd
11 hate to think of them playing it back and forth and back and
12 forth, you know, trying to make out every word of it.

13 Anything else?

14 MR. BREEZE: No.

15 MR. STANGER: And Judge, I think the door was
16 opened to the 911 tape being played.

17 MR. BREEZE: We totally disagree. We played one
18 discreet section that dealt only with - to impeach her
19 because of prior existing statement, that's all we did and
20 we're entitled to do that.

21 THE COURT: I think, ummm, you have expressly or
22 implied that the declarant has fabricated at some point both
23 on her 911 tape and in her statement. So I think you have
24 opened the door for both of those things to be admissible at
25 this point.

1 MR. BREEZE: Well, I think that the record would
2 have to disclose what - instead of just a general you have
3 opened, I think you have to say this question or that
4 question has -

5 THE COURT: Saying that she didn't discuss punching
6 in the statement, saying that whether it was a should throw
7 you down the stairs or could or whichever.

8 MR. BREEZE: So now under Rule 801 the prosecutor,
9 if they want to can come back with a consistent statement.
10 That's their, that's all they can do. She's been impeached
11 with prior inconsistent statements. Now they can come back
12 and show prior consistent statements. That's all they -
13 doesn't have any -

14 THE COURT: There are things consistent in that
15 statement with what her testimony has been.

16 MR. BREEZE: Well, not really but I guess they
17 could try. They could come back with prior - they can come
18 back now since she's off the stand, they could come back and
19 offer prior consistent statements. But that's all they can
20 do.

21 THE COURT: But they have offered it. They've
22 offered in that written statement. They don't have to put
23 her back on the stand.

24 MR. BREEZE: Well -

25 THE COURT: At any rate -

1 MR. BREEZE: - and -

2 THE COURT: I don't know what they're going to
3 offer, so...

4 MR. BREEZE: Well, they'd have to articulate
5 exactly what statement it is in that document that they're
6 talking about that is a consistent statement. The whole
7 thing doesn't come in, just only the consistent statement
8 that they believe is in there, they can get that in. They
9 can have it read into the record by the detective.

10 THE COURT: Well, all these bits and pieces of
11 things... You're taking a bunch of stuff out of context and I
12 don't think it's appropriate or helpful for the jury and when
13 we start taking bits and pieces of things, it just makes me
14 want to admit the whole thing.

15 MR. BREEZE: Well, unfortunately we find ourselves
16 in situations where a witness in a diary might have 390
17 pages-

18 THE COURT: Well, this isn't a diary -

19 MR. BREEZE: That's just an example.

20 THE COURT: - it's a paragraph.

21 MR. BREEZE: They have 390 pages of comments in a
22 diary -

23 THE COURT: Three hundred and ninety pages is not a
24 helpful example -

25 MR. BREEZE: - and there's one -

1 THE COURT: - when we are dealing with one
2 paragraph.

3 MR. BREEZE: If there's one statement in a 390-page
4 diary that is prior consistent, they can elicit that prior
5 consistent statement. They do not get to admit the entire
6 diary.

7 THE COURT: How about if the entire diary is
8 consistent -

9 MR. BREEZE: Well, then they need to-

10 THE COURT: - with -

11 MR. BREEZE: - go through and itemize every
12 statement in there that's consistent and make their argument
13 to Your Honor. But they can't just go, Oh, let's throw the
14 whole diary in, there's a one-page or one-sentence consistent
15 statement on Page 294, let's throw the whole thing in there.

16 THE COURT: Everything is looking pretty consistent
17 to me. All right.

18 What's the State's response?

19 MR. STANGER: The State stated what she's
20 testified, as to what's in that statement. She was crossed
21 on it, she's been alleged to have been not truthful and that
22 there are inconsistent - I think the statement can come in to
23 show that -

24 MR. BREEZE: You need to tell us what statement in
25 that -

1 MR. STANGER: The entire statement is consistent.

2 MR. BREEZE: We need to go through -

3 THE COURT: No, we do not need to go through line

4 by line. It's consistent. It's a consistent statement

5 offered to rebut an express or implied charge that the

6 declarant recently fabricated that (inaudible) improper

7 influence which you have also put in by talking about the

8 money owed. It is admissible under 801-D(1)(b). It's also

9 admissible under 803 -

10 MR. BREEZE: Okay, here's -

11 THE COURT: - recorded recollection, No. 5.

12 MR. BREEZE: No. 1, though, Your Honor, we have to

13 address each of those. It is not a recorded recollection.

14 It doesn't meet the requirement of that. A recorded

15 recollection is only a matter that the witness once knew

16 about but now cannot recall well enough to testify.

17 THE COURT: Fully and accurately.

18 MR. BREEZE: Right, and that's -

19 THE COURT: Well you're saying she's not accurate.

20 MR. BREEZE: Well, as to various comments.

21 THE COURT: And then there's things she says I

22 don't remember.

23 MR. BREEZE: And then the present sense impression,

24 this is - she testified herself -

25 THE COURT: I didn't say present sense - I just

1 said recorded recollection.

2 MR. BREEZE: Well, this is - doesn't meet the
3 requirements of a recorded recollection and if we look at the
4 report, Your Honor, the -

5 THE COURT: What report?

6 MR. BREEZE: I'm sorry, the 1102 statement -

7 THE COURT: Oh, okay.

8 MR. BREEZE: It starts out "my exhusband came home
9 drunk and I did not want to answer the door." That's not in
10 dispute.

11 THE COURT: "Came to my home drunk, I did not want
12 to answer the door." That is a consistent -

13 MR. BREEZE: That is -

14 THE COURT: - it's consistent with the testimony
15 she's given.

16 MR. BREEZE: But we - it doesn't - it does not
17 rebut any of the claims that we've made allegedly of
18 fabrication. This has nothing to do with any of her
19 inconsistent statements. He started kicking the back door.
20 That's not disputed. There's nothing in there about -

21 THE COURT: It's another consistent statement.

22 MR. BREEZE: But you can only bring in a statement
23 - if we were claiming, if we were making a claim that he
24 never kicked in the door. If we were claiming that she made
25 that up and fabricated that, then they could come in and try

1 to have a prior consistent - neither one of those address
2 something that's, that we've challenged and "I grabbed my
3 phone and was yelling at him to leave the broke door and I
4 called 911. He took my phone and would not give it back."

5 THE COURT: To leave, period. "He broke the door
6 in. I called 911."

7 MR. BREEZE: And none of these - there's been no
8 allegation that any of these particular statements are
9 fabricated. "He was still yelling at me, that I owe him
10 money and will not give it back." That is not - we are not,
11 we have not said that that is fabricated.

12 Then we got to the front door and he was still
13 trying to get my phone back or excuse me, "I was still trying
14 to get my phone back" to call 911 and then - and so that last
15 statement arguably could be read in by the detective. Then
16 he pushed me and said, she never claimed at any time during
17 her testimony that he pushed her. And so they can't read in
18 that one. And I should just push - or he should just push me
19 down the stairs. That is, could arguably come in. But then
20 he got in his truck and I ran to the neighbor's house, that's
21 undisputed. That is not something that we've claimed
22 fabrication on.

23 So the whole report doesn't come in. They can get
24 the detective up there and ask him, you know, those three
25 sentences that are allegedly fabricated but the whole, entire

1 report does not come in.

2 THE COURT: Is that everything?

3 MR. BREEZE: Yes.

4 THE COURT: All right. Does the State have a
5 response to that?

6 MR. STANGER: Judge, I think the rule, the rule of
7 completeness, I don't we can just put these bits and pieces
8 in. It has to be complete statement for the jury to read and
9 be able to judge for itself. It goes to the weight of her
10 testimony and he's challenged her, as to her bias and
11 everything else. So I think to get the complete, the rule of
12 completeness requires that we do this, that they be allowed
13 to look at it and judge for themselves.

14 MR. BREEZE: The hearsay rule -

15 THE COURT: You said you were done.

16 MR. BREEZE: - the rule -

17 THE COURT: We're not going to go back and forth
18 and back and forth forever.

19 MR. BREEZE: Okay, the hearsay rule says what it
20 says. This alleged rule of completeness does not overrule
21 the hearsay rule. These statements are, none of them except
22 the three that I pointed out, are prior consistent statements
23 that are going to be offered by the government to rebut an
24 implied or express charge of fabrication, only those three
25 can come in. I mean those are the ones that matter anyway.

1 THE COURT: All right. We have referred too much
2 to the statement of what's in it and what's not in it to just
3 not let the jury read this paragraph. So I'm going to admit
4 State's Exhibit No. 4.

5 MR. BREEZE: And of course, we object and make a
6 motion for a mistrial.

7 THE COURT: You have objected.

8 MR. BREEZE: I mean, it's clearly not admissible
9 and Your Honor wants to let it in for some reason that there
10 is not, that is unknown to me. I'm unaware of any legal
11 authority to support your position.

12 THE COURT: I have given you the legal authority to
13 support it. You have referred to it repeatedly. You can't
14 keep pulling bits and piece of it out and expect that it's
15 not going to go into evidence.

16 MR. BREEZE: That's what we do, we refresh
17 recollection -

18 THE COURT: We are done -

19 MR. BREEZE: - through documents.

20 THE COURT: - discussing this topic. I allowed you
21 to say everything you had to say and I've ruled.

22 Are there any other topics we need to discuss?

23 MR. STANGER: Judge, the State wishes to play the -

24 THE COURT: The 911 tape.

25 MR. STANGER: Yep.

1 MR. BREEZE: It's prejudicial -
2 THE COURT: I haven't heard the whole 911 tape.
3 Let me hear it.
4 MR. STANGER: I have that. I mean from the - I
5 think we've already talked about - no putting the part on
6 where the neighbor is talking.
7 THE COURT: Uh-huh (affirmative).
8 (911 tape is played for the Court - not transcribed)
9 THE COURT: Any more clear with the volume down?
10 MR. STANGER: I can....
11 THE COURT: No. It's just (inaudible).
12 MR. BREEZE: Do you want it up or down?
13 THE COURT: No, it's, you know, it's not any more
14 understandable either way.
15 (Tape played)
16 THE COURT: That's it?
17 MR. BREEZE: I think so. Here's the problem, Your
18 Honor. The - if they want to take statements out of this
19 tape so that they can rehabilitate her testimony by showing
20 that she made prior consistent statements, that's fine. Let
21 them take it step-by-step, statement-by-statement and let's
22 go through each one and see if it actually is admissible.
23 First we'll have to determine whether that particular
24 statement relates to some allegation of fabrication. Then we
25 have to go and decide well is it too prejudicial and each

1 statement in there has to be analyzed and because here's the
2 definition of statement - hearsay means a statement that
3 declarant does not make while testifying at the current trial
4 or hearing, definitely this; and a party offers in evidence
5 to prove the truth of the matter asserted in the statement.
6 So obviously we've got a statement that she made while not
7 testifying and I cannot imagine the State is offering it for
8 any other reason than to claim that all these statements are
9 true and now if they're getting up to say, Hey, we're not
10 claiming that any of these statements are true, you know,
11 then they can claim that it's not hearsay but why would they
12 want to put it in and then tell the jury first that they're
13 not claiming it's true?

14 So it's all hearsay. Some of it could possibly
15 come in as consistent prior statements but we have to get
16 each one itemized. If you just listen to the whole thing,
17 there's nothing really new in the whole tape that we haven't
18 already got testimony of.

19 THE COURT: Which makes it a prior consistent
20 statement except for the one that you pulled out.

21 MR. BREEZE: Well no, it's - you're missing the
22 point, Your Honor, they don't take each statement that's in
23 there so we have to look at each sentence -

24 THE COURT: Yes, I understood that and I listened
25 to all the statements and most of them has been testified to

1 and is consistent with what she has said so far and is
2 consistent with what she has in this written statement except
3 for the "he tried to push her down the stairs" versus "he
4 threatened to push me down the stairs."

5 MR. BREEZE: First, it's they have to - you know -
6 they have to be able to identify a statement in there and
7 say, Hey, the defense made an implied charge of fabrication
8 against her with regard to this statement, therefore, we want
9 to play this statement to show that it's prior and it's
10 consistent.

11 THE COURT: Yes, I heard that.

12 MR. BREEZE: And they cannot just play the whole
13 tape. If you really look through this thing of the five
14 minutes of the tape, there's probably about 17 seconds of
15 consistent statements that are legitimate material here and
16 that's all and so we've got, you know, four minutes and 43
17 seconds of irrelevant material that's prejudice, it's
18 irrelevant too.

19 THE COURT: (Inaudible) stuff about the address and
20 the property out back and stuff like that. The only reason I
21 don't want to let you play it because it's so horrible to
22 hear and there's no transcript to help the jury understand.
23 I mean, it's - I hear some consistent statements and I hear
24 some stuff that I can't even tell what it is and I hear some,
25 the one statement you pointed out that doesn't sound

1 consistent.

2 All right, I'm going to think about it. Let's be
3 back in five minutes. The jury has already been out there
4 for...

5 (Whereupon a recess was taken)

6 THE COURT: Okay, we're back in the matter of the
7 state of Utah vs. Ken Montey Johnson, outside the presence of
8 the jury.

9 Just wait a minute.

10 Ummm, we discussed earlier the statement which I'm
11 going to allow and I was taking my time to make a decision on
12 the 911 tape. I've listened to the 911 tape, you can hear
13 the defendant's excitement on the tape. She testified that
14 she was still shaking as she stood at the front door and ran
15 out and called 911. I hear many statements on that tape
16 which are consistent with testimony she has given prior, I
17 hear one that is not consistent. I'm going to allow the
18 State to play it based on excited utterance and then existing
19 emotional and physical condition as well as consistent
20 statements that have been brought into question now.

21 So if you want to put her back on the stand to do
22 that, go ahead or you can just play it.

23 MR. BREEZE: One question, the - I guess it's
24 Exhibit No. 4, the statement, just so the record is clear,
25 what was the legal justification for that one? I just

1 couldn't remember.

2 THE COURT: It is now a consistent statement which
3 is offered to rebut and express an implied charge the
4 declarant recently fabricated it or acted from an improper
5 influence or motive. You've indicated she had an improper
6 influence or motive that she was trying to make this stuff up
7 in order to not have to pay money and you've also thrown into
8 question things that she did not include in here and so it
9 only seems fair that it should be put in to show the things
10 that she did include. And again, on both of these, if we're
11 going to show bits and pieces and constantly refer to them,
12 it only seems fair that the jury gets to hear it. Okay.

13 So are you going to put her back on the stand?

14 MR. STANGER: Yes, yeah, I don't know if Mr. Breeze
15 (inaudible) Ms. Fowers. I have subpoenaed her. I have been
16 trying to get her here since this morning. She is supposedly
17 on her way and didn't - is moving and did not, said she
18 wasn't aware but I have - I mean, I was in - I was sending
19 her emails and Mr. Herbert was contacting her for me as well
20 trying to get her here. So she knew about this hearing. I
21 don't - she is the next witness. I've tried to get her to
22 respond as to how far she is away and she said she's changing
23 her clothes and is on her way.

24 THE COURT: You're calling Detective Herbert aren't
25 you?

ADDENDUM F

Victim's written witness statement (State's Exhibit #4)

James M. Winder
Sheriff, Salt Lake County

Scott Carver
Undersheriff



UNIFIED
POLICE
GREATER SALT LAKE

Shane Hudson
Deputy Chief

Official Statement

Notice

You are being asked to give a statement regarding the incident being investigated under case number [REDACTED]
Which is classified as an _____

76-8-504 Written False Statement

A person is guilty of a class B misdemeanor if, (2) with intent to deceive a public servant in the performance of his official function, he: a) Makes any written false statement which he does not believe to be true.

(Utah Code Annotated)

Your statement is as a: _____ Complainant, _____ Witness, _____ Victim

Name: Barbara Johnson

DOB: [REDACTED]

Age: [REDACTED]

Address: [REDACTED]

City, [REDACTED]

State, [REDACTED]

Zip Code [REDACTED]

Phone: Home [REDACTED]

Work: [REDACTED]

I have read and understand the above warning.

Signature [REDACTED]

3/30/14
Date

Witness by: _____

Officer _____

Date _____

My ex husband came to my home drunk I did not want to answer the door. He started kicking the back door. I grabbed my phone and was yelling at him to leave. He broke the door in. I called 911 and he took my phone and would not give it back. He was still yelling at me telling me I owe him money and I will not get it back. We got to the front door and I was still trying to get my phone back to call 911. He pushed me and said He should just push me down the stairs. He got in his truck and I ran to neighbors house.

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