

2015

**State of Utah, Plaintiff/ Appellee, v. Tim G. Wager, Defendant/  
Appellant.**

Utah Court of Appeals

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Case No. 20140812-CA

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IN THE  
UTAH COURT OF APPEALS

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STATE OF UTAH,  
*Plaintiff/Appellee,*

*v.*

TIM G. WAGER,  
*Defendant/Appellant.*

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Brief of Appellee

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Appeal from convictions for possession of methamphetamine, enhanced to a second degree felony; and possession of marijuana, a class A misdemeanor, in the Third Judicial District, Salt Lake County, the Honorable Denise P. Lindberg presiding

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Oral Argument Not Requested

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UTAH APPELLATE COURTS

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Brief of Appellee

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for possession of methamphetamine, enhanced to a second degree felony; and possession of marijuana, a class A misdemeanor. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2014).

INTRODUCTION

While executing a search warrant on Wager's house, officers found marijuana on his bedroom dresser in a pill bottle that had his name on the prescription label. Wager lived with a roommate, but the two had separate bedrooms. In Wager's garage, officers found methamphetamine stored next to Wager's power tools in a locked cabinet. Wager kept a key to the cabinet on his keychain. The roommate did not have a key to the cabinet.

## STATEMENT OF THE ISSUES

Wager testified at trial and denied that the drugs were his. He claimed that no one used drugs in his house. The State sought to impeach this testimony with a photograph of him in his bathroom where he appears to be smoking an illegal substance. The State offered the photograph through the arresting officer, who obtained it from Wager's ex-fiancé. The officer, while searching Wager's house, took a photograph of the same bathroom. The trial court allowed both photographs. Wager challenges only the admission of the photograph with him in it.

**Issue 1:** Does rule 608, Utah Rules of Evidence—which does not apply to evidence used to impeach testimony—bar the photograph's admission?

*Standard of review.* This Court grants a trial court "broad discretion to admit or exclude evidence and will disturb its ruling only for an abuse of discretion." *Daines v. Vincent*, 2008 UT 51, ¶17, 127 P.3d 382.

**Issue 2:** Was the photograph properly authenticated?

*Standard of review.* Same.

**Issue 3:** Should this Court address Wager's unpreserved and inadequately briefed claim that the photograph violates best evidence?

*No standard of review applies.*



**Issue 4:** Should this Court address Wager's unpreserved and inadequately briefed claim that the State should have provided pretrial notice of the photograph?

*No standard of review applies.*

**Issue 5:** Was any error in the photograph's admission harmless?

*Standard of review:* This Court will not overturn a jury verdict for the admission of improper evidence if it "did not reasonably [a]ffect the likelihood of a different verdict." *State v. Housekeeper*, 2002 UT 118, ¶26, 62 P.3d 444.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

Utah R. Evid. 401 (relevance)  
Utah R. Evid. 403 (unfair prejudice)  
Utah R. Evid. 608 (witness's character for truthfulness)  
Utah R. Evid. 901 (authentication)  
Utah R. Evid. 1002 (best evidence)

## STATEMENT OF FACTS AND PROCEDURE

*Officers find marijuana in Wager's bedroom and methamphetamine in his garage*

Officers began surveilling Wager's house after receiving tips of drug activity occurring there. R199:69. About a month into the surveillance,

officers conducted a "trash cover," where they removed Wager's garbage bin from the curb and inspected its contents.<sup>1</sup> R199:70-71.

Among the waste, officers found two pipes containing methamphetamine residue and a bong used for smoking marijuana. R199:71; St's Ex. (SE) 22. They also found a bank statement addressed to Wager. R199:71, SE1.

Officers obtained a warrant to search Wager's house. R199:72-73. They found marijuana on his bedroom dresser. R199:74-75; SE3. It was kept in a prescription pill bottle that had Wager's name on the pharmacy label. R199:74-75; SE3.

In Wager's garage, officers found a red cabinet that was locked. R199:78. Wager provided officers with the key, which he kept on his keychain. R199:73,78. When officers opened the cabinet, they found a wooden box that held several small plastic baggies containing methamphetamine. R199:79-80; SE5. Wager also kept several power tools in the cabinet. R199:78,138; SE5.

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<sup>1</sup> Both the federal and state constitutions allow for a warrantless search and seizure of garbage left for collection beyond the curtilage of a home. *California v. Greenwood*, 486 U.S. 35, 40-41 (1988); *State v. Jackson*, 937 P.3d 545, 549-50 (Utah App. 1997).

Lacy Singleton, Wager's roommate and ex-girlfriend, was at the house during the search. R199:74. Singleton had a separate bedroom, where officers found marijuana paraphernalia. R199:98,136,165-66. Singleton did not have a key to the garage cabinet. R199:98.

Wager and Singleton had lived in the house for less than a year before the arrest and search. R199:70,94-95,145.

*Wager's version*

At trial, Wager disclaimed any knowledge of the drugs being in his house and sought to establish that the methamphetamine belonged to his ex-fiancé, Jenny Stewart, who lived at the house "off and on." R199:118,139,146-47,162.

Wager first called his roommate, Singleton, to testify. *Id.* Singleton said that Stewart had left the house about a week before the police search. R199:118,122. According to Singleton, Stewart left behind a pile of belongings, which included "some glass things" that Singleton claimed were drug paraphernalia. R199:122-23. Singleton claimed that after Stewart left, she "broke it all up" and threw it into the trash. R199:123.

When asked why she did that, Singleton said, "because it's illegal and we don't do drugs and I didn't want it there." *Id.* Singleton also testified that Stewart was jealous of her for taking care of Wager, who was legally

blind. R199:118,123. On cross-examination, Singleton admitted to calling DCFS on Stewart for mistreating her children. R199:135-36.

Singleton claimed that Stewart also had a key to the red cabinet in the garage and that the wooden box belonged to Stewart, not Wager. R199:125-26,138.

Wager also testified. R199:139. He claimed that he did not know that the pill bottle found in his bedroom contained marijuana or that the wooden box found in the garage contained methamphetamine. R199:139,162.

During cross-examination, Wager denied that anyone in the house used methamphetamines or other drugs. R199:146-47,162. He testified that he "wouldn't allow it." R199:146. Immediately following Wager's denial, the prosecutor asked for a recess. R199:146-47,162.

#### *Admission of photographs*

During the recess, the prosecutor informed the trial court that he had a photograph of Wager smoking what appeared to be methamphetamine in the bathroom of his house. R199:148; SE24 (attached at Addendum B). The prosecutor argued that Wager had opened the door to this evidence and sought to admit it through Officer Sanderson, who had obtained it from Stewart, Wager's ex-fiancé. R199:148,150.

The prosecutor later proffered a second photograph, which Officer Sanderson had taken while conducting the search of Wager's house. R199:152. It showed Wager's bathroom without anyone in it. R199:152; SE23 (attached at Addendum B).

Defense counsel objected that Officer Sanderson could not provide sufficient foundation for the first photograph. *Id.*

The Court initially stated that under rule 608, Utah Rules of Evidence, the prosecutor could "pose the question directly, but I don't believe that you can bring extrinsic evidence." R199:151. Defense counsel agreed and asked the court to "[a]dd that to the list" of his objections. *Id.* But the court later reversed its ruling by determining that rule 608 did not apply because there had been no "challenge to truthfulness." R199:152.

Defense counsel nevertheless appeared to maintain his objection that the photograph was inadmissible under rule 608. R199:156 (Defense counsel stating that "A, it shouldn't come in at all; B, I still don't think it— 608(b), extrinsic evidence is relevant. But if it comes in, this is a mistrial"). However, defense counsel agreed that the evidence was relevant for impeachment purposes. R199:161 (Defense counsel: "It's relevant, I guess, but it doesn't have the foundation for admission").



The court ruled that both photographs were admissible. It first determined that Wager had opened the door to this evidence and that it was admissible to impeach his testimony. R199:156-57.

The court then concluded that Officer Sanderson could properly authenticate the two photographs given his first-hand knowledge of the room where the photographs were taken and of Wager as the individual shown in the earlier photograph. R199:156-57,175-76. Noting the similarities between the two photographs, the court concluded that Sanderson could provide sufficient foundation for their admission. R199:153. The court rejected defense counsel's argument that Officer Sanderson could not authenticate the earlier photograph because he did not take it. R199:156-57.

Defense counsel then sought to introduce a notarized affidavit from Wager's ex-fiancé, Stewart, claiming that Officer Sanderson tried to get information from her "to set Tim up." *Id.*; Def's Ex. (DE) 2. R199:158. The court rejected the affidavit as inadmissible hearsay. *Id.*

At the close of the defense's case in chief, the State called Officer Sanderson as a rebuttal witness and presented both photographs of Wager's bathroom. R199:164. The State first presented the photograph taken the day the search warrant was executed. R199:167. Officer Sanderson testified

that he took the photograph and described the location of the bathroom in reference to other rooms in Wager's house. *Id.*

The State then presented the photograph of Wager in the bathroom. R199:168-69. Officer Sanderson testified that it was same bathroom and that Wager was the person in the photograph. *Id.* Sanderson did not opine—nor did the prosecutor ask—about what Wager was doing in the photograph. *Id.*

Defense counsel reiterated his objection that the photograph was not properly authenticated. *Id.*

During cross-examination, Sanderson admitted that he did not know the date the photograph was taken. R199:170.

*The jury convicts*

In closing argument, the prosecutor relied on a constructive possession theory to argue that Wager was guilty of both the marijuana and methamphetamine possession counts. R199:191-92. The prosecutor did not initially mention the photograph of Wager in the bathroom. *Id.*

Defense counsel argued that the drugs belonged to Stewart and that Wager had no knowledge of them being in the house. R199:192-93. Counsel challenged the relevance of the photograph showing Wager in the bathroom. R199:196-97. Counsel argued that it was not clear what Wager

was doing in the photograph, that the State had not been able to date the photograph, and that it had nothing to do with Wager's current possession charges. *Id.*

During rebuttal, the prosecutor showed the jury the photograph of Wager to refute his testimony that no drugs were used in his home. R199:200-01.

The jury convicted Wager on both counts. R90-91; R199:204.

In a bifurcated hearing, the court enhanced Wager's methamphetamine possession conviction to a second degree felony based on evidence of two prior convictions for possession of a controlled substance with intent to distribute, second degree felonies. SE25; R199:205; *see* Utah Code Ann. § 58-37-8(2)(c) (providing for enhancement of simple possession by one degree based upon prior conviction for possession with intent to distribute).

The trial court sentenced Wager to one-to-fifteen years' prison for possession of methamphetamine and 365 days' jail for possession of marijuana, but suspended the entire sentence in favor of 10 days' jail with three years' probation. R178-80.

Wager timely appealed. R183.

## SUMMARY OF ARGUMENT

Point 1: Wager argues that the trial court should have excluded the photograph under rule 608, Utah Rules of Evidence. But rule 608 does not apply because the photograph was not offered to prove Wager's general character for untruthfulness; it was offered to impeach Wager's specific testimony that no one used drugs in his house. It is well settled that the prosecution may introduce rebuttal evidence to contradict or cast doubt upon the credibility of a defendant's testimony. The trial court properly allowed the photograph for that limited purpose. Any prejudice in admitting the photograph did not substantially outweigh its impeachment value.

Point 2: Wager next argues that the photograph was improperly authenticated because the officer through whom it was offered did not take it and did not know the precise date it was taken. But the State needed only to establish that the photograph was what it purported to be—a photograph of Wager in his bathroom. The State did this by first laying foundation with a later photograph of Wager's empty bathroom taken by the officer who searched his house. The State then introduced the photograph of Wager, whom the officer identified as being in the same bathroom. The officer also testified that Wager's ex-fiancé gave him the photograph. The jury knew

that Wager had lived in the house for less than a year before his arrest. This was sufficient for purposes of authentication.

Points 3 & 4: Wager's arguments that the photograph violated best evidence and that the State should have provided him pretrial notice of this evidence are unpreserved and inadequately briefed and should not be addressed. Even if reached, both claims fail plain error scrutiny because the best evidence rule does not apply and the record suggests that Wager did, in fact, receive the photograph before trial.

Point 5: Any error in the photograph's admission was harmless where other evidence already undermined his testimony and amply supported both possession convictions.

## ARGUMENT

### I.

**The trial court properly admitted an impeaching photograph of Wager.**

Wager argues that the trial court abused its discretion in admitting a photograph showing him smoking what appears to be an illegal substance in his bathroom. Br.Aplt. 7-12. Wager asserts that the photograph was inadmissible under rule 608, Utah Rules of Evidence, and that it was not properly authenticated under rule 901, Utah Rules of Evidence. *Id.* He also appears to claim for the first time on appeal that the trial court erred by not



sua sponte excluding the photograph under Utah's best evidence rule and that the State was required to give him pretrial notice of its intent to introduce the photograph.

But the trial court acted well within its discretion in determining that rule 608 did not bar the photograph's admission and that the State properly authenticated it. The court should not address Wager's remaining best evidence and notice challenges because they are unpreserved and Wager argues no appellate justification for review. These challenges are also inadequately briefed. In any event, Wager cannot demonstrate that the verdict would likely have been any different had the photograph been suppressed.

**A. The trial court properly admitted the photograph of Wager for the limited purpose of impeaching his testimony that no one used drugs in his house.**

Wager argues that the photograph of him in his bathroom violated rule 608, Utah Rules of Evidence, because it constituted extrinsic evidence intended to impermissibly prove his character for untruthfulness. Br.Aplt. at 10-11. Wager also argues that the photograph was irrelevant to his possession charges and prejudicial. Br.Aplt. 7-9.

But Wager has misunderstood the photograph's import. It was not offered to prove his general character for truthfulness. Rather, the State

offered it to directly refute his trial testimony that no one used drugs in his house. R199:148-50. Rule 608 thus did not apply. And Wager conceded below that the photograph was relevant for impeachment purposes. This was the sole relevance inquiry. His complaint that the photograph did not bear on his possession charges is correct, but wide of the point. And the test under rule 403, Utah Rules of Evidence, is not whether the evidence is “prejudicial,” but whether it is unfairly prejudicial—i.e., whether the prejudicial value of the evidence substantially outweighs its probative value. Any prejudice arising from the photograph’s admission here did not substantially outweigh its impeachment value.

Rule 608 prohibits the admission of extrinsic evidence when it is used “to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness or untruthfulness.” Utah R. Evid. 608(b). This ban applies “‘only when the specific act is being used to show character.’” *State v. Thompson*, 2014 UT App 14, ¶28, 318 P.3d 1221. When the extrinsic evidence is being offered for a proper non-character purpose—such as to directly rebut or cast doubt upon a witness’s testimony—it is not covered by the ban. *Id.* ¶29. Once the defendant “makes an assertion as to any fact,” the State may “introduce on rebuttal any testimony or evidence ‘which would tend to contradict, explain or cast

doubt upon the credibility of *his testimony*.'" *Id.* ¶30 (quoting *State v. Green*, 578 P.2d 512, 514 (Utah 1978)).

Here, the State presented the photograph of Wager through its rebuttal witness, Officer Sanderson, to impeach Wager's testimony that nobody in his house used methamphetamine or other drugs. R199:148-50. The photograph was not offered to prove character, but rather for the limited purpose of rebutting Wager's testimony. Thus, rule 608 did not apply, and the trial court properly admitted the photograph as non-character impeachment evidence.

Wager nevertheless complains that the photograph was not relevant to proving his possession charges because the State did not show that it was taken on the date alleged in the information. Br.Aplt. 9. Wager's argument is correct, but inconsequential.

Even if evidence is intended for a proper purpose, it must also be relevant and not unfairly prejudicial. *State v. Housekeeper*, 2002 UT 118, ¶29, 62 P.3d 444. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Utah R. Evid. 401. Here, the State did not offer the photograph to prove counts on the information. It offered it for the limited purpose of rebutting Wager's testimony that he would not

allow people to smoke methamphetamine or use other drugs in his house. R199:148-50. Wager conceded at trial that the photograph was relevant for this purpose. R199:161. His concession ends the relevance inquiry.

Wager claims that the photograph was "prejudicial," although he does not explain why he thinks so. Br.Aplt. 8-9. In any event, the question is not whether the evidence was prejudicial, but whether it was unfairly prejudicial. Rule 403 requires that relevant evidence be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Utah R. Evid. 403. Officer Sanderson's testimony about the photograph was limited to identifying Wager and his bathroom in the photograph and Wager's ex-fiancé as the person from whom the photograph was obtained. The prosecutor did not ask Sanderson about the photograph beyond those facts. Defense counsel further minimized any prejudicial effect of this evidence by eliciting during cross-examination that Sanderson did not know when the photograph was taken, and by arguing during closing that it had nothing to do with his current possession charges. R199:170. Certainly, the potential prejudice of the evidence did not "substantially outweigh" its importance to the probative question of Wager's credibility.

**B. The State properly authenticated the impeaching photograph.**

Wager argues that the photograph was not properly authenticated under rule 901, Utah Rules of Evidence. Br.Aplt. 8-9. Since Officer Sanderson did not take the photograph and could not say precisely when it was taken, Wager concludes that Sanderson could not lay proper foundation for its admission. *Id.* But Wager asks for much more than the rule requires.

Rule 901(a) requires that the proponent of an item of evidence authenticate it with "evidence sufficient to support a finding that the item is what the proponent claims it is." Testimony from a witness with knowledge "that an item is what it is claimed to be" satisfies the requirement. Utah R. Evid. 901(b)(1). If "a competent witness with personal knowledge of the facts represented by a photograph testifies that the photograph accurately reflects those facts, it is admissible." *State v. Purcell*, 711 P.2d 243, 245 (Utah 1985) (citation omitted).

Here, the State presented two photographs, both through Officer Sanderson. The first showed Wager's empty bathroom on the day officers searched his house. R199:167-68; St's Ex. 23. Officer Sanderson testified that he took this photograph during the search. R199:167.



The first photograph laid foundation for the second, which showed Wager in his bathroom where he appeared to be smoking drugs. R199:168; St's Ex. 24. Officer Sanderson testified that he received this photograph from Stewart, Wager's ex-fiancé, and that it showed the same bathroom only now with Wager in it. R199:139-40,121,168,169. Officer Sanderson did not testify—nor did the prosecutor ask—about what Wager was doing in the bathroom.

Wager nowhere asserts that Officer Sanderson was not competent to testify about the photographs. Nor does he contend that Officer Sanderson lacked personal knowledge of the bathroom—which he searched—or of Wager—whom he arrested and later identified a trial. Although Officer Sanderson lacked personal knowledge of the event depicted in the photograph as it occurred, he had sufficient knowledge of the location and individual to authenticate it.

The State was not required to provide an exact date on which the photograph was taken. *See Shiozawa v. Duke*, 2015 UT App 40, ¶21, 344 P.3d 1174 (holding “absence of an exact date” did not render inadmissible photographs of latent foundation cracks in real estate dispute); *see also Purcell*, 711 P.2d at 245 (holding photographs of stolen furniture properly authenticated despite “minor discrepancies” in the testimony, which “went

only to details of the time and place the pictures were taken"). Wager lived in the house for less than a year before his arrest. R199:70,94-95,145. Jurors thus had a date range for when the photograph was taken. R199:153. Anything more precise was unnecessary and would not have altered the photograph's impeachment value, which went to Wager's open-ended denial of drug use in the house.

Nor does it matter that Officer Sanderson did not take the impeaching photograph and was not present when it was taken. Br.Aplt. 8. Sanderson had only to establish that the contents of the photograph were what they purported to be. Utah R. Evid. 901(b)(1). As shown, he satisfied that requirement by identifying Wager's ex-fiancé as the person who gave him the photograph, then identifying the location and individual pictured in it. *Cf. Jackson v. State*, 714 S.E.2d 584, 589 (Ga. 2011) (holding that "any witness familiar with the subject depicted can authenticate a photograph; the witness need not be the photographer nor have been present when the photograph was taken") (citation and quotations omitted).

Wager misplaces reliance on *State v. Horton*, 848 P.2d 708 (Utah 1993), when arguing lack of authenticity. There, the supreme court affirmed the exclusion of a photograph offered by Horton to show that the trunk of his vehicle was too small to transport stolen items. *Id.* at 713-14. The supreme

court held that the trial court did not abuse its discretion in determining that the photograph did not accurately depict the trunk. *Id.* at 714.

Wager, however, does not dispute that the impeaching photograph accurately depicts his bathroom and him inside it. And the trial court here, after noting the similarities between the two photographs of the bathroom, concluded that Officer Sanderson could provide sufficient foundation for both. *Horton* affords Wager nothing.

**C. This Court should not address Wager's unpreserved and inadequately briefed argument that the State was required to produce an original of the impeaching photograph.**

Wager claims for the first time on appeal that the trial court did not consider other rules that can apply to photographic evidence—namely, Utah Rules of Evidence 1002, 1004, and 1007. Br.Aplt. 9-10. Wager appears to argue that, under these rules, the State was required to produce an original of the impeaching photograph. *Id.* This Court should not consider Wager's late invocation of the best evidence rule because he never gave the trial court an opportunity to address it and he argues no justification for appellate review.

"As a general rule, claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶11, 10 P.3d 346. This rule serves two purposes: "(1) it enhances efficiency and fairness and (2) it

‘generally assure[s] that most claims are raised and resolved in the first instance by the original trial court.’” *Oseguera v. State*, 2014 UT 31, ¶10, 332 P.3d 963 (alteration in original) (quoting *State v. Prion*, 2012 UT 15, ¶19, 274 P.3d 919). To preserve an issue for appeal, “the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶51, 99 P.3d 801 (citation and quotations omitted).

Wager never raised a best evidence objection to the photograph at trial. And he does not argue plain error or any other justification for his preservation failure now. Because Wager has not articulated “an appropriate justification for appellate review” of his best evidence claim, this Court should not address it. *State v. Winfield*, 2006 UT 4, ¶14, 128 P.3d 1171 (quoting *State v. Pinder*, 2005 UT 15, ¶45, 114 P.3d 551); see also *State v. Cruz*, 2005 UT 45, ¶36 n.6, 122 P.3d 543; *State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995).

Wager’s best evidence argument is also inadequately briefed. Rule 24(a)(9), Utah Rules of Appellate Procedure, requires a defendant’s brief to “contain . . . citations to the authorities, statutes, and parts of the record relied on.” An “appellate court is not ‘a depository in which [a party] may dump the burden of argument and research.’” *Allen v. Friel*, 2008 UT 56, ¶9,

194 P.3d 903 (alteration in original) (citation omitted). Briefing is inadequate when “it merely contains bald citations to authority” without “development of that authority.” *Id.* (quotations and citation omitted). If a party “fails to offer any meaningful analysis, [the court will] decline to reach the merits.” *State v. Garner*, 2002 UT App 234, ¶12, 52 P.3d 467.

While Wager quotes rules 1002, 1004, and 1007, he never goes so far as to say that the State violated the best evidence rule by not producing an original photograph. Instead, he merely complains that the trial court did not consider these rules. Br.Aplt. 9-10. But, as shown, the trial court did not consider them because Wager never invoked them at trial. And he does not develop these authorities now with reasoned analysis to show how the State could have violated the best evidence rule. His briefing of this issue is inadequate and does not warrant merits review.

Even if this Court were to overlook Wager’s preservation and briefing failures, he cannot demonstrate plain error. To do so, he would have to show obvious, prejudicial error. *See State v. Candland*, 2013 UT 55, ¶22, 309 P.3d 230. An error “is obvious only if the law governing the error was clear at the time the alleged error was made.” *State v. Maestas*, 2012 UT 46, ¶37, 299 P.3d 892 (citation and quotations omitted). Wager cannot meet this high standard because the best evidence rule applies to photographs only in the



rare instance when testimony about a photograph is offered as evidence but the photograph is not. And Wager has not demonstrated that, absent the photograph's admission, he probably would have been acquitted.

Under the best evidence rule, an "original writing, recording, or photograph is required in order to prove its content, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by statute." Utah R. Evid. 1002. "Usually when counsel seeks to introduce a photograph, the best evidence rule is not implicated because the contents of the photograph itself are not in issue." 3 Wharton's Criminal Evidence § 15:4 (15th ed.). Indeed, the best evidence rule "will seldom apply to ordinary photographs." Fed. R. Evid. 1002 advisory committee's note. This is because, in "most instances a party *wishes* to introduce the item and the question raised is the propriety of receiving it in evidence." *Id.* The rule applies only in rare instances when a party proffers testimony from a witness about "what he saw in a photograph or motion picture, without producing the same." *Id.*

Here, the State produced not one, but two photographs of Wager's bathroom through Officer Sanderson, who testified about their contents. This was not one of those rare situations where a witness testifies about the contents of an absent photograph. Thus, the best evidence rule did not

apply, and the court committed no error—let alone obvious error—by not sua sponte excluding the photograph of Wager on best evidence grounds. At bottom, Wager identifies no law—nor is the State aware of any—that clearly requires originals of photographs over their copies when a witness can testify about their contents.

**D. This Court should not address Wager’s unpreserved and inadequately briefed argument that the State was required to provide pre-trial notice of the impeaching photograph.**

Wager argues, in a single sentence unsupported by reference to the record or law, that the State should have provided him advance notice of its intent to use the photograph of him at trial. Br.Aplt. 10-11. He claims that the State should have moved to admit it in limine, allowing him to subpoena his ex-fiancé, who gave the photograph to Officer Sanderson. *Id.*

Wager’s notice claim is unpreserved because he never raised this challenge below or requested a continuance to subpoena Stewart when the State proffered the photograph mid-trial. Wager fails to argue any justification for appellate review of his unpreserved notice claim. This Court should not review it. *See Winfield*, 2006 UT 4, ¶14.

His notice argument is also inadequately briefed. As stated, briefing is inadequate “if it merely contains bald citations to authority” without “development of that authority.” *Allen*, 2008 UT 56, ¶9 (quotations and

citation omitted). When an appellant fails to present any relevant authority, the reviewing court will “decline to find it for him.” *State v. Pritchett*, 2003 UT 24, ¶12, 69 P.3d 1278. This Court simply “will not engage in constructing arguments ‘out of whole cloth’ on behalf of defendants.” *State v. Webb*, 790 P.2d 65, 72 n.2 (Utah App. 1990) (citation omitted). Wager’s complaint that the State gave him inadequate notice is limited to a single sentence bereft of any citation to the record or legal support. His cursory and inadequate treatment of this issue is reason alone to decline its review.

Even if this Court were to excuse Wager’s twin failures, he cannot demonstrate plain error because he fails to establish that he did not, in fact, receive pretrial notice of the photograph. The record supports the contrary inference. Defense counsel was prepared to meet the impeaching photograph at trial with an affidavit from Stewart, Wager’s ex-fiancé, who gave Sanderson the photograph. R199:158. In the affidavit, Stewart claims that Officer Sanderson tried to get information from her “to set Tim up.” *Id.*; DE2. Counsel’s preparedness to address the impeaching photograph with this information supports an inference that he had received or knew about the photograph before trial, which was only a one-day affair.

In any event, Wager cannot rely on gaps in the record to show that the trial court committed obvious error by not sua sponte raising a notice

complaint for him. *See State v. Powell*, 2007 UT 9, ¶43, 154 P.3d 788 (rejecting plain error claim because “given the paucity” of pertinent information in the record, any error “was far from obvious”).

Wager also identifies no rule that required the State to provide, without request, pretrial notice of impeachment evidence that was unfavorable to Wager. Indeed, “a *Brady* violation occurs only where the state suppresses information that (1) remains unknown to the defense both before and throughout trial and (2) is material and exculpatory.” *State v. Bisner*, 2001 UT 99, ¶36, 37 P.3d 1073. Defendant knew of the photograph as early as trial and it was inculpatory. Thus, the State did not violate *Brady*, much less obviously so.

And while rule 404(b), Utah Rules of Evidence, requires “reasonable notice” for prior acts evidence, it gives the trial court discretion to allow midtrial disclosure of the evidence upon “good cause shown.” Utah R. Evid. 404(b)(2)(B). As shown, the existing record supports an inference that the State had given Wager pretrial notice of the photograph. But even assuming midtrial disclosure, Wager has not argued—let alone demonstrated—that the State lacked good cause. Again, any record gaps here must be construed against Wager. *See Powell*, 2007 UT 9, ¶43.

**E. Any error in the photograph's admission was harmless.**

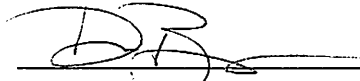
Wager cannot show that, absent admission of the impeaching photograph, the jury likely would have acquitted him. *See Horton*, 848 P.2d at 714 n.5 (applying harmless error to authentication challenge); *State v. Johnson*, 2007 UT App 184, ¶34, 163 P.3d 695 (declining to reverse despite improper admission of evidence because it did not reasonably affect likelihood of different verdict). The State presented evidence that officers found marijuana in Wager's prescription pill bottle on his bedroom dresser and methamphetamine stored next to his power tools in a locked cabinet to which he had the key. This evidence amply supported Wager's possession convictions. And, together with drug paraphernalia found in his house and trash, this evidence already undermined Wager's testimony that he would not allow anyone to use drugs in his house. Wager cannot demonstrate a reasonable likelihood that the jury would have acquitted him on this evidence.

**CONCLUSION**

For the foregoing reasons, the Court should affirm.

Respectfully submitted on September 10, 2015.

SEAN D. REYES  
Utah Attorney General

  
\_\_\_\_\_  
DANIEL W. BOYER  
Assistant Attorney General  
Counsel for Appellee

### CERTIFICATE OF SERVICE

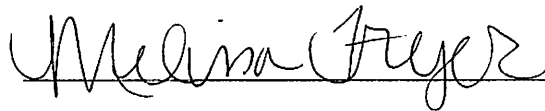
I certify that on September 10, 2015, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

Paul E. Remy  
1885 W. 4400 S.  
Roy, Utah 84067

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.

☐ will be filed and served within 14 days.

  
\_\_\_\_\_  
Melina Freyer

Addenda

Addenda



# Addendum A



### **Utah R. Evid. 401. Definition Of "Relevant Evidence"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

### **Utah R. Evid. Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

## Utah R. Evid. 608. Evidence of Character and Conduct of Witness

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

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

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

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

## Utah R. Evid. 901. Authenticating or Identifying Evidence

**(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

**(b) Examples.** The following are examples only--not a complete list--of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion About Handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion About a Voice.* An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence About a Telephone Conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence About Public Records.* Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence About Ancient Documents or Data Compilations.* For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) *Evidence About a Process or System.* Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods Provided by a Statute or Rule.* Any method of authentication or identification allowed by court rule or statute of this state.

### **Utah R. Evid. 1002 Requirement of The Original**

An original writing, recording, or photograph is required in order to prove its content, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by statute.

## Addendum B







