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State of Utah, Plaintiff/Appellee, v. Percy L. Wilder, Defendant/ Appellant : Reply Brief of the Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. PERCY L. WILDER, Defendant/Appellant.	Case No. 20140416-CA

REPLY BRIEF OF THE APPELLANT

Appeal from a conviction for aggravated kidnapping and aggravated sexual assault, first degree felonies in the Second District Court, State of Utah, the Honorable Mark R. DeCaria, Judge, presiding.

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INTRODUCTION

The State is incorrect in its response. Mr. Wilder was entitled to question a juror about his knowledge of his family. There was insufficient evidence to convict him of the aggravated kidnapping charge. Mr. Wilder's aggravated kidnapping conviction should have merged into his aggravated sexual assault conviction.

ARGUMENT

POINT I

Mr. Wilder did not have an opportunity to question the juror as to his familiarity with Mr. Wilder and his family

According to the State, Mr. Wilder had "an unfettered opportunity to question the juror" and was unable to "refute any fact in the juror's sworn statement that was material to bias." Aple's Br. at 16, 22. In essence, the State argues that because Mr. Wilder had been in contact with the juror outside of a legal proceeding and failed to provide any evidence actually showing the juror was biased, the court was not required to hold an evidentiary hearing. Aple's Br. at 16-30.

There are several problems with the State's reasoning. First, the State assumes that because Mr. Wilder spoke to the juror outside of court, that he was aware of all of the implications of juror bias during that first conversation. This clearly was not the case. Mr. Wilder, at three court hearings following his interview of the juror, asserted that he had evidence to contradict not only what he told the State, but what he told the defense team. He repeatedly asked the court to present this evidence and these requests were denied. Mr. Wilder did not fail to proffer evidence. Rather, the court did not allow him the opportunity to show the juror's biases or the juror's fabrications regarding his knowledge of Mr. Wilder's family.

At the first hearing, following Mr. Wilder's interview of the juror, the State proffered the same argument they now make on appeal: that Mr. Wilder could not show juror bias. R. 179:4. However, defense counsel immediately responded, "some of the stuff he told us—*we have evidence* wasn't true, too." R. 179:4 (emphasis added). The court asked him if he had evidence that the juror was lying. R. 179:4. Counsel responded that the juror lied about going to junior high for one year and vaguely knowing the defendant's sons. R. 179:4. He had evidence from one of the defendant's sons, who was there to testify, as well as school year books which contradicted the juror's statements. R. 179:4. The defendant's daughter also knew the juror, which also challenged the juror's assertion that he did not know the family. R. 179:4-5.

At the second hearing, Mr. Wilder again asserted that he needed to cross-examine the juror to fully make the court aware of the issues relating to its decision. R. 180:3. And at the third hearing, Mr. Wilder told the court that there were continuing credibility

problems and that they needed to cross-examine the juror and present evidence to show those contradictions. R. 181:3-4. As counsel told the court, "[o]ur conversations with him ... [were] not exactly the same as what he told the State. I think the court should hear that and make a decision based upon testimony and subject to cross-examination." R. 181:4.

The record does not show a passive defendant who idled and failed to produce evidence. While Mr. Wilder spoke with the juror, it was only *after* the conversation that he was able to procure evidence contradicting the juror's assertions. He needed an evidentiary hearing to show the court the juror's biases and misstatements.

The State's argument also fails to account for the fact that the juror was not subject to cross-examination. The reliability of evidence, the Supreme Court has said, must be tested "in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177 (2004). The exposure of a witness's bias "is a proper and important function of the constitutionally protected right of cross-examination." *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674 (1986). A defendant should not be "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Id.* at 680; *State v. Hamblin*, 2010 UT App 239, ¶ 22, 239 P.3d 300; *Olden v. Kentucky*, 488 U.S. 227, 231, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (per curiam) ("the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness") (internal quotation omitted). While the juror was not a witness in a trial, per se, the accuracy of his testimony must be tested through cross-examination.

Cross-examination has been called "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, Evidence § 1367 (Chadbourn rev. ed. 1974); *see also* William Blackstone, Commentaries, at 373-74 (1783) ("This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth . . . ."); Matthew Hale, History and Analysis of the Common Law of England 258 (1713) ("[P]ersonal and open examination, [with the] opportunity ... to propound occasional questions, ... beats and bolts out the truth much better than when the witness only delivers a formal series of his knowledge without being interrogated.").

The juror, had he been subject to cross-examination, may well have revealed the contradictions or biases that he did not state in simple interviews, both with the prosecution and with the defense. Some of this may come from the solemnity of actually facing the defendant in court. *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) ("A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts."). Or as Justice Douglas noted, the person may have distorted his testimony in private, where if forced to testify, he may state differently:

> One important benefit from confronting the [witness] ... is the opportunity to cross-examine them and rigorously test any dubious statement. As old Sir Matthew Hale says, it "beats and boults out the truth much better." Add to that the old-fashioned value of putting people face to face out in the open. Accusers who secretly confer in private with an official or two and a couple of clerks may, as in Hale's time, "oftentimes deliver that which they will be ashamed to testify publicly." An honest witness may feel quite differently when he has to repeat his story looking at the man whom he will harm

> greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is. As for the false witness, the tribunal can learn ever so much more by looking at him than by reading an F.B.I. abstract of his story. The pathological liar and the personal enemy can no longer hide behind a piece of paper.

Jay v. Boyd, 351 U.S. 345, 375-76, 76 S. Ct. 919, 936, 100 L. Ed. 1242 (1956) (Douglas, J. dissenting).

Additionally, the court can better gauge a witness's honesty by assessing his demeanor. *Id.*; Mueller & Kirkpatrick, Federal Evidence § 8:3 (2009) ("A testifying witness gives her evidence on the witness stand under the gaze of the trier of fact, and her demeanor provides valuable clues about meaning and credibility.").

Another problem with the State's claim (that Mr. Wilder could not prove the juror was biased) is that Mr. Wilder was denied an opportunity to present evidence to contradict the juror's assertions. Due process requires that criminal defendants have "[m]eaningful access to justice," and that "when a State brings its judicial power to bear on an individual defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985). In order to ensure that indigent defendants have "an adequate opportunity to present their claims fairly within the adversary system,"' the United States Supreme Court requires that indigent defendants be provided the 'basic tools of an adequate defense."' *Id.* at 77 (further citation omitted). This right applies under article I, Section 12 of the Utah Constitution and the Sixth and Fourteenth Amendments of the United States Constitution. *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Washington v. Texas*, 388 U.S. 14 (1967); *Christiansen v. Harris*, 163 P.2d 314, 317 (Utah 1945) (article I section 7 of

the Utah Constitution requires a "fair opportunity to submit evidence."); *State v. Harding*, 635 P.2d 33, 34 (Utah 1981) ("[T]he defendant's right to present all competent evidence in his defense is a right guaranteed by the due process clause of our State Constitution, Art. I, Sec. 7[.]"); *Crane v. Kentucky*, 476 U.S. 683 (1985) (federal constitution provides criminal defendants the right to "'a meaningful opportunity to present a complete defense'"); Utah Code Ann. § 77-1-6 (statutory protection).

Article I, Section 12 of the Utah Constitution mandates that defendants be able to "to have compulsory process to compel the attendance of witnesses ..." Utah Const, art I, § 12. Criminal prosecutions must be fundamentally fair, and one of the "most basic ingredients of due process" is "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary ..." *Trombetta*, 467 U.S. at 485; *Washington*, 388 U.S. at 19. Any restrictions violate a defendant's right to present a defense if they "infring[e] upon a weighty interest of the accused," and "are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *see also Taylor v. Illinois*, 484 U.S. 400, 409 (1988) ('The right to compel the witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact"); *Harding*, 635 P.2d at 34 ("[T]he defendant's right to present *all competent evidence* in his defense is a right guaranteed by the due process clause of our State Constitution, Art. I, Sec. 7[.]") (emphasis added).

Mr. Wilder had the right to compel witnesses to come to court, both for purposes of cross-examination, but also to present favorable testimony, in this case, testimony that

would contradict the juror's assertions. Without this testimony, the court was left with a one-sided and very incomplete picture. For example, one can only imagine if a jury were to find guilt based only on the witness statements collected by the police. If those witnesses were not cross-examined and if the defendant was not allowed to present evidence, then the trial would be grossly unfair. Similarly, the trial court decided the juror's lack of bias in this case without having the juror cross-examined and without allowing Mr. Wilder to present evidence in rebuttal.

Last, and most importantly, Mr. Wilder proffered some evidence that at the minimum, entitled him to an evidentiary hearing where he could question the juror and proffer other relevant evidence. It is important to note that Mr. Wilder did not proffer all of the evidence that he had. For example, Mr. Wilder said he had evidence that the juror lied about his knowledge of the defendant and his family and he mentioned this evidence came from two of the defendant's children, his son and his daughter. R. 179:4-5; 184. Mr. Wilder did not detail the nature of their testimony. However, significantly, both children correctly recalled their familiarity with this juror. Perhaps the children would say that they had a feud with this person or give other reasons why the juror would want to hide his relationship with them.

Counsel told the court that he had evidence showing the juror was lying. R. 179:4 ("some of the stuff he told us—*we have evidence* wasn't true, too."). He also told the court that some of his evidence was "not exactly the same" as what the juror told the State. R. 181:4. Counsel did not proffer the nature of all of this evidence or of the substance of the children's testimony, but he repeatedly told the court that if he were allowed to cross-

examine the juror and present his evidence that it would paint a different picture and show the juror's dishonesty. The court erred in not allowing him that opportunity.

The State also argues that because the juror bias allegation arose after trial that cases discussing pre-trial voir dire are distinguishable. Aple's Br. at 16. While these cases may resolve the procedural question differently (a biased juror can be stricken for cause, or the court abused its discretion in refusing to strike the juror versus whether a mistrial occurred), Mr. Wilder cited those cases only for their language regarding the harms from a biased juror sitting. In any event, that particular question is irrelevant because "[a] defendant who is convicted of a crime by a jury comprised of even one member who has exhibited actual bias is entitled to a new trial." *State v. King*, 2008 UT 54, ¶ 28, 190 P.3d 1283 (citing *United States v. Martinez–Salazar*, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)). "This principle of law is grounded in the presumption that the presence of a biased juror so undermines the fairness and impartiality of the verdict that the Sixth Amendment right to a fair trial can be preserved only by setting aside the conviction." *Id.* If Mr. Wilder is allowed to make this showing in the trial court—which opportunity he was denied—then whether this challenge came at the beginning or at the end, the key question was whether the juror was in fact biased.

The State's assertion that Mr. Wilder could have subpoenaed the juror himself does not account for the fact that the trial court denied Mr. Wilder that opportunity. Aple's Br. at 28. The juror failed to respond to the State's subpoena (which was returned as at a bad address). R. 180:3-4. But when Mr. Wilder asked to have his investigator locate the juror and issue a subpoena, the court declined to allow him to take this step

until it had reviewed the juror's CD interview. R. 180:3-4. After it reviewed the tape, it refused to allow any questioning or further evidence. R. 181. The fault was not Mr. Wilder's, but the court's.

Mr. Wilder agrees with the State that an evidentiary hearing, where he could question the juror and produce further evidence of bias, may be the appropriate solution were the court to remand. *See* Aple's Br at 31-32. That would afford him the opportunity he never had below—to present compelling evidence of juror bias. For these reasons, this court should remand the matter to the district court for an evidentiary hearing as to the juror's bias.

POINT II

The State failed to prove an aggravated kidnapping

The State argues that Mr. Wilder failed to preserve his insufficiency of the evidence argument because he only made a general, rather than a specific objection. Aple's Br. at 34. "In order 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, *cert. denied*, 199 P.3d 970 (Utah 2008). Mr. Wilder argued that there was a lack of substantial evidence. R. 177:33-34. This at least put the court on notice that Mr. Wilder the evidence was insufficient to establish the elements of the two charges which allowed the court to remedy the error.

But even if the issue was not preserved, Mr. Wilder has argued his counsel ineffectively failed to make the specific arguments he now asserts on appeal. Aplt's Br. 20-

21. The State responds that defense counsel could not have ineffectively failed to make the motion because "he identifies no deficiency in the evidence." Aple's Br. at 34.

The State first argues there was sufficient evidence because Mr. Wilder's "detention and assault in the apartment complex constituted a separate act of aggravated kidnapping." Aple's Br. at 41. Grabbing the victim's hair and dragging her was the unlawful detention which became an aggravated kidnapping because he had the intent to injure, terrorize, or sexually assault her. Aple's Br. at 41. As the State puts it, the jury could reasonably assume that Mr. Wilder's intent was "to kidnap the victim to resume his sexual assault." Aple's Br. at 42.

In response to Mr. Wilder's claim that kidnapping requires a more active restraint, the State argues that in the hallway Mr. Wilder's "actions confined the victim and limited her movement, even if only for a few moments." Aple's Br. at 43. The State cites *State v. Sanchez*, 2015 UT App 27, ¶ 15, 344 P.3d 191, for the proposition that this limited detention met the definition of "detain" or "restrain." Aple's Br. at 43.

The first problem with this part of the State's analysis is that detain and restrain—elements of unlawful detention—were not defined for the jury, as they were in *Sanchez*. In *Sanchez*, the jury was told that the terms meant to "keep from proceeding, delay, keep in custody, confine, control, check, repress, limit, or restrict." *Sanchez*, 2015 UT App 27, ¶ 15. Here, however, the jury was only given the elements of the statute. In the absence of a specific jury instruction, the jury would be left with the ordinary implications of those terms. The definitions of those terms do not comport with Mr. Wilder's conduct. Detain means to keep someone under confinement as a prisoner. Aplt's Br. at 19 (Oxford English

Dictionary, detain). Restrain means to use some means of restraint to confine or imprison a person or to keep a person under control. *Id.* (Oxford English Dictionary, restrain.) The implication of these terms is a form or confinement or using a form of restraint, such as chains or locking someone in a room. The very brief dragging and punch do not fit within either of these definitions.

Additionally, *Sanchez* did not deal with a sufficiency claim. In that case, the court addressed a merger argument, limitedly finding that the defendant's aggravated kidnapping conviction did not merge with his assault conviction. *Sanchez*, 2015 UT App 27, ¶¶ 15-16. *Sanchez* does not stand for the State's broad proposition that briefly dragging a person meets the elements of detain and restrain for an unlawful detention. Rather, it only stands for the principle that a trial court can consider a separate act of dragging a person fifty-eight feet into a separate apartment, closing the door and engaging in an assault as a separate act of kidnapping that did not merge with the underlying assault. Thus, *Sanchez* does not support the State's position and nor did the dragging for mere seconds act as a separate kidnapping, since it was merely incidental to the sexual assault.

To the State, Mr. Wilder did not have to commit a simple kidnapping for the conviction—he could have also committed an unlawful detention, which "requires no minimum period of detention." Aple's Br. at 44. In *Finlayson*, this court found that to prove aggravated kidnapping "the State was not required to show that [the defendant] detained [the victim] for a substantial period of time, provided that the State presented sufficient evidence that [the defendant] acted with intent to hinder or delay the discovery

or reporting of a felony, or with the intent to inflict bodily injury on or to terrorize the victim." *State v. Finlayson*, 2014 UT App 282, ¶ 38 *cert. denied*, 343 P.3d 708 (Utah 2015).

While the State correctly notes that the jury could have found an aggravated kidnapping from an underlying unlawful detention, the detention in this case did not meet those elements for the reasons stated *supra*. The terms detain and restrain were not defined for them and the very brief drag and punch were merely incidental to the assault.

One need only consider two hypotheticals to see the problem. In one case, the defendant sexually assaults the victim in the car. In the other, the victim escapes, he grabs her and continues the sexual assault. In the first case, no separate kidnapping occurs. But the defendant's kidnapping conviction depends entirely on whether a victim tries to get away or merely stays. The victim who tries to escape will elevate sexual assault into an aggravated kidnapping charge and as the court noted in *Finlayson* "would transform virtually every rape and robbery into a kidnaping as well. *Id.* at ¶ 23.

Indeed, a victim need not run away at all, according to the State. If a defendant restrains a victim "with threats" as it argues (or even an attempt to restrain it says), then an aggravated kidnapping occurs. Aple's Br. at 45-48. Problematically, every sexual assault will involve threats. Every sexual assault will involve some degree of detention in order to force the person to submit to the attacks. Therefore, an aggravated kidnapping will *automatically* occur as part of every sexual assault, making the offense a nullity. Thus, in order for aggravated kidnapping to occur, it must involve a *separate* act of detaining a person and restraining them, independent of the sexual assault itself. In this case, Mr. Wilder's conduct was merely incidental and part of the sexual assault, not a separate act

of aggravated kidnapping, and therefore, the State presented insufficient evidence for that offense.

POINT III

The *Finlayson* merger test applies because Mr. Wilder's conduct was not separated from the ongoing sexual assault nor was it sufficient to create a separate act of aggravated kidnapping

The State asserts that the *Finlayson* merger test does not apply because Mr. Wilder "did not commit aggravated kidnapping to facilitate the commission of the sexual assault." Aple's Br. at 50. To the State, Mr. Wilder had "already sexually assaulted" Peterson when he dragged her for a few seconds in the hallway. Aple's Br. at 51. The sexual assault was complete, the State says, and claims the Supreme Court recognized that a "post sexual-assault detention ... could ... theoretically support[] a separate aggravated kidnapping charge ..." Aple's Br. at 51-52.

This case is not the theoretical case the State hopes for. Notably, its reasoning contradicts the State's response in part II of its brief, in which it says "[a] jury could reasonably conclude from [the] evidence that Defendant's intent" in chasing Peterson and dragging her "was to kidnap the victim *to resume his sexual assault* ..." Aple's Br. at 42 (emphasis added); *see also id.* at 41 (Mr. Wilder "demonstrated an intent to restrain her so that he could sexually assault her again either back in his car or somewhere else"); 54 ("The subsequent detention ... likely constituted an attempt to recapture the victim so that defendant could continue his sexual assault"). The State seems to acknowledge the

high likelihood that Mr. Wilder did not terminate the sexual assault—that he intended to continue it, not start a new one, when he dragged Peterson back to the car.

However, the State reads this somewhat differently. It sees Mr. Wilder committing a sexual assault in the car, Peterson running away, Mr. Wilder assaulting her, then dragging her back to the car to commit a separate sexual assault. Aple's Br. at 53-55 ("this case consists of two separate assaults"). The State wants to break down a continuous sexual assault and split a few seconds off as a separate act. This seems rather illogical, given the continuous nature of the assault. It also ignores some of the evidence, particularly Mr. Wilder's demand that Peterson have oral sex with him and that she undress completely, which had yet to occur when Peterson escaped. R. 176:143, 147-48. Indeed, Mr. Wilder asked Peterson for oral sex before he bit her breast and then after the bite, continued to demand that Peterson undress. *Id.*

According to the State's evidence, Mr. Wilder intended to continue a much more serious sexual assault, but Peterson escaped before that could be accomplished. When Mr. Wilder chased Peterson, he had not, as the State asserts, already completed his sexual assault: he still wanted oral sex and wanted her naked, which were his demands from the beginning. The chase and brief drag of Peterson, then, were merely attempts to finish what he had already started—to sexually assault her in the way he had demanded. It was one continuous, uninterrupted sexual assault, not a sexual assault and break, followed by a kidnapping and potential second assault, as the State posits.

Finlayson, *Sanchez*, and *Lee* do not support the State's claim that Mr. Wilder's grabbing of Peterson's hair and dragging for a few seconds amounts to a separate act.

Rather, those cases support Mr. Wilder's claim that the grabbing and dragging were merely incidental to the sexual assault.

The Supreme Court has noted that the detention must be "significantly independent" from the underlying crime, something that did not occur here. *State v. Mecham*, 2000 UT App 247, ¶ 30. In *Sanchez*, the defendant assaulted the victim. She escaped and was pounding on a door when the defendant dragged her fifty-eight feet back into the apartment and shut the door, where he resumed his assault. *Sanchez*, 2015 UT App 27, ¶ 2. The court found several facts significant: 1) that the defendant dragged the victim 58 feet; 2) that he dragged her back into a shut apartment; 3) that he took her from the active aid of someone who was there. *Id.* at ¶¶ 12-15.

In *Lee*, the defendant sexually assaulted a woman who was walking with another woman. *State v. Lee*, 2006 UT 5, ¶¶ 3-4, 128 P.3d 1179. After the women escaped, and significantly, thought their encounter was over slowing to a walk, the defendant ran up from behind and attacked the women, dragging his prior victim across the highway, where he engaged in an other assault. *Id.* at ¶ 5. The Supreme Court rejected a merger claim, observing that dragging across the highway was not slight or inconsequential, that it was not in the part of the first assault and that it made the assault easier to commit. *Id.* at ¶ 34.

A common element arises from both of these cases. When a defendant assaults a victim, who later escapes, but then is recaptured, dragged or taken significant distances to a new place and then reassaulted, then a merger analysis does not apply. But here, although Peterson did escape and was caught, Mr. Wilder did not drag her a significant

distance—he had her mere seconds and did not move her—nor did he take her to a new place (across the highway or back to the apartment) where he then continued the assault. Indeed, after the brief drag, the assault ended entirely. Thus, *Sanchez* and *Lee* are inapplicable because their facts involve the relocation of the victim to a new place where a new assault occurred.

Finlayson is much more like this case. In *Finlayson*, the assault took place in a few locations and the defendant forcibly moved the victim multiple times: he grabbed her and took her into a bedroom; when she tried to escape, he grabbed her and handcuffed her. Then he forced her into his car where he then drove her home. *State v. Finlayson*, 2000 UT 10, ¶¶ 4-5, 994 P.2d 1243. Like *Finlayson*, Mr. Wilder captured an escaping victim and continued to assault her but unlike *Lee* and *Sanchez*, Mr. Wilder did not take the victim to a new location to continue the assault. Mr. Wilder's case is even lesser than that of *Finlayson* because he did not subsequently imprison, lock up or detain his victim as Finlayson clearly did.

Finally, the State argues that even if the merger test applies here, Mr. Wilder cannot show that his counsel ineffectively failed to make the motion because his counsel "could have reasonably concluded that the *Finlayson* test did not apply because the detention in the hallway was not committed 'to facilitate' the completed aggravated sexual assault." Aple's Br. at 60. However, for the reasons noted *supra* no reasonable attorney could avoid making this argument, since the kidnapping clearly was merely incidental to the sexual assault and was not a separate, independent act.

CONCLUSION

Based on the foregoing, Mr. Wilder asks this court to reverse and remand to the district court so that he can question the juror as to his familiarity with Mr. Wilder and his family. He also asks the court to either dismiss the aggravated kidnapping charge or find that it merged with Mr. Wilder's aggravated sexual assault conviction.

RESPECTFULLY SUBMITTED this 7 day of December, 2015.

SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

RULE 24 CERTIFICATE OF COMPLIANCE

Pursuant to rule 24(f)(1)(C), Utah Rules of Appellate Procedure, I certify that this brief has been prepared in a proportionally-spaced font using Microsoft Word for Mac in Baskerville 13 point, and contains 4769 words, excluding the table of contents, table of authorities, and addenda.

SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on 9th December, 2015, I have caused to be ☐ mailed ☒ hand-delivered eight copies of the foregoing to:

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I certify that on 9th December, 2015, two copies of the foregoing brief were ☐ mailed ☒ hand-delivered to:

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A digital copy of the brief was also included: ☒ Yes ☐ No