

1992

Utah v. Nicholas : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 920306-CA
v. :
WAYNE GENE NICHOLAS, : Priority No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE
- - - - -

APPEAL BY DEFENDANT OF CONVICTIONS FOR
BURGLARY, IN VIOLATION OF UTAH CODE ANN. § 76-
6-202 (1990), AND FORCIBLE SEXUAL ABUSE, IN
VIOLATION OF UTAH CODE ANN. § 76-5-404 (1990),
BOTH SECOND DEGREE FELONIES, IN THE FIFTH
JUDICIAL DISTRICT COURT, IN AND FOR WASHINGTON
COUNTY, UTAH, THE HONORABLE ROBERT T.
BRAITHWAITE, PRESIDING.

**UTAH COURT OF APPEALS
BRIEF**

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IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH, | : | |
| Plaintiff-Appellee, | : | Case No. 920306-CA |
| v. | : | |
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BRIEF OF APPELLEE

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 920306-CA
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WAYNE GENE NICHOLAS, : Priority No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant Wayne Gene Nicholas appeals his convictions for burglary and forcible sexual abuse, both second degree felonies, in violation of Utah Code Ann. §§ 76-6-202 and 76-5-405 (1990). This Court has appellate jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

ISSUES PRESENTED ON APPEAL
AND
STANDARDS OF APPELLATE REVIEW

1. Should defendant be granted a new trial solely because of "gaps" in the trial transcript? This presents a question of law which, in turn, depends upon whether defendant has demonstrated prejudice stemming from the transcription errors. See State v. Menzies, 182 Utah Adv. Rep. 3 (Utah March 11, 1992).
2. Did the trial court err in sentencing defendant to serve two consecutive, one-to-fifteen year terms on his two second degree felony convictions? Utah's appellate courts review trial court sentencing decisions deferentially, reversing only

for clear abuse of discretion. State v. Russell, 791 P.2d 188, 192-93 (Utah 1990); State v. Rhodes, 818 P.2d 1048, 1049 (Utah App. 1991).

3. Does appellate defense counsel's noncompliance with the rule for filing an "Anders" brief preclude appellate review of various other issues advanced by defendant, but which counsel represents are unappealable? By its terms, this is a question of appellate policy that cannot be answered in the trial court; hence it is reviewed de novo on appeal.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The text of any constitutional provisions, statutes, or rules pertinent to the resolution of this appeal will be contained in the body of this brief.

STATEMENT OF THE CASE

Defendant was found guilty, upon jury trial, of burglary and forcible sexual abuse, both second degree felonies (R. 75-76). Following a ninety-day diagnostic evaluation by the Department of Corrections, the trial court sentenced defendant to two consecutive one-to-fifteen year terms at the Utah State Prison (R. 91-93).

STATEMENT OF FACTS

Evidence Supporting the Guilty Verdicts

At trial, defendant was identified by Peggy Williams and her daughter, Tonya, as the person who intruded into their St. George, Utah home at approximately 5:30 on a September morning, and awakened Tonya by sexually "fondling" her (T.

12/17/91 at 41, 72). Tonya recognized defendant because he had been in her home roughly two months earlier, in the company of one of Tonya's friends; soon after that meeting, defendant had made a return visit, speaking briefly to Tonya (id. at 38-40).

During the September intrusion, Peggy Williams was awakened by Tonya's screams (T. 12/17/91 at 66). Tonya turned on the lights in the home, enabling Peggy to get a good look at the intruder (id. at 66-67). Further, the intruder complied in unhurried, seemingly casual fashion when Peggy demanded that he leave the premises (id. at 40-42, 68, 73). Thus at trial, Peggy Williams was also able to confidently identify defendant as the intruder (id. at 71-72).

Sentencing Decision

Following defendant's ninety-day diagnostic evaluation, the Department of Corrections filed a presentence report, which became part of the record on appeal (Record Index at 2). This sealed report has not been released by this Court to the State's appellate counsel; a motion for such release is pending as this brief is being prepared.

However, the transcript of defendant's sentencing hearing reflects that defense counsel reviewed the presentence report and spoke to one of the individuals involved in preparing it (T. 4/15/92 at 2; full transcript at Appendix I of this brief). The presentence report apparently made no recommendation on concurrent versus consecutive sentencing (id. at 9). However, according to the prosecutor, and not contested by defense

counsel, defendant has a lengthy criminal record (id. at 7). It was reported that defendant had threatened Peggy or Tonya Williams while in jail following trial (id.). It further appeared that during his ninety-day evaluation, defendant had been placed in "lock down" due to troublesome behavior (id.).

The trial court also found defendant's behavior in the courtroom--laughing during a matter preceding his sentencing hearing--to be unacceptable (id. at 8-9). Subsequently, in its written judgment, sentence, and commitment, the trial court specifically found that defendant "is unable to control his impulses and constitutes a serious danger to the people of the state of Utah, and therefore, it is ORDERED, ADJUDGED, AND DECREED that COUNT II [forcible sexual abuse] shall be served consecutively with COUNT I [burglary]" (R. 92).

SUMMARY OF ARGUMENT

Defendant cannot receive a new trial solely because of transcription errors or "gaps" in the original trial transcript. Such errors must be prejudicial in order to warrant a new trial. Defendant has made no showing of prejudice; further, he has failed to take measures, set forth in the Utah Rules of Appellate Procedures, to cure the transcript problems.

The trial court did not abuse its discretion in sentencing defendant. He received a statutorily permitted sentence, and the decision to sentence him consecutively for his two offenses was supported by information presented to the court.

Even if the trial court's sentencing decision was related in part to defendant's courtroom conduct, it was proper.

Defendant's appellate counsel has not met the requirements for filing an "Anders" brief with regard to the other issues identified on appeal. Counsel has not moved to withdraw from representing defendant; instead, he has advanced those issues that he identifies as having some merit. Accordingly, this Court need not review the other issues not analyzed by defense counsel. Further, it appears that those issues are indeed meritless.

ARGUMENT

POINT ONE

PROBLEMS WITH THE TRANSCRIPTION OF HIS TRIAL
DO NOT, BY THEMSELVES, REQUIRE THAT DEFENDANT
RECEIVE A NEW TRIAL.

Defendant's trial was recorded on audiotape, rather than by a live court reporter. Subsequently, the transcriber found that the trial audiotape contained inaudible sections and outright "gaps," caused by inoperable microphones and the failure at one point to have the recording equipment switched on (Certified Transcriber's Report, Exh. A to Br. of Appellant).

Such transcription problems are unfortunate, and trial courts should make every effort to prevent them. However, by themselves, they do not compel a new trial. Instead, as the Utah Supreme Court has made clear, a new trial is required only when errors in transcribing the original trial are prejudicial State v. Menzies, 182 Utah Adv. Rep. 3, 6 (March 11, 1992) (following

"clear weight of authority"). To be prejudicial, transcription errors or omissions must prevent review of substantive issues a party wishes to pursue on appeal, id.

Defendant makes no showing that transcription problems in this case prevent appellate review of any substantive issues. In Exhibit "B" of his brief, he merely lists a number of gaps in the trial transcript, making no effort to show how they relate to his other issues on appeal. The State has reviewed those omissions at Appendix II of this brief: they appear to be minor, and unrelated to any substantive issue on appeal. Thus defendant has not met the Menzies "prejudice" requirement for a new trial. Accord Utah R. Crim. P. 30(a) (errors not affecting "substantial rights" "shall be disregarded").

Further, defendant has made no effort to cure the identified transcript omissions. Rules 11(f), -(g), and -(h), Utah Rules of Appellate Procedure, allow parties to complete a deficient record on appeal, including transcript unavailability, with an agreed statement of the evidence, approved by the trial court. If the parties cannot agree on the evidence, the differences are settled by the trial court. Defendant has not attempted to do this, nor has he shown that this procedure could not adequately correct the transcript omissions. Accordingly, he cannot complain of the incomplete record now. Emig v. Hayward, 703 P.2d 1043, 1048-49 (Utah 1985) (failure to settle record under former Utah R. Civ. P. 75(m) bars complaint of incomplete record on appeal).

If transcript problems obscure evidence relevant to substantive issues on appeal, it is the appellant's duty to correct them. Sampson v. Richins, 770 P.2d 998, 1002-03 (Utah App.), cert. denied, 776 P.2d 916 (Utah 1989). Defendant has neither shown the relevance of, nor attempted to correct, the transcript problems in this case, and this failure works against him on appeal.

POINT TWO

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING DEFENDANT.

Defendant's complaint that he should not have been sentenced consecutively for the forcible sexual abuse and burglary convictions also fails. Trial courts have broad discretion to impose statutorily-permitted sentences. State v. Russell, 791 P.2d 188, 192-93 (Utah 1990); State v. Rhodes, 818 P.2d 1048, 1049 (Utah App. 1991). Consecutive sentencing is also permitted in instances where, as here, the same criminal episode encompasses distinct criminal acts. State v. Jolivet, 712 P.2d 843 (Utah 1986) (per curiam) (affirming consecutive sentences for aggravated kidnapping and sexual assault within same episode).

Here the trial court was apprised of defendant's lengthy criminal history, his apparent danger to others, and of his poor impulse control, and took particular note of these considerations (R. 92). The court also expressed concern with the "terror" defendant's crimes had inflicted upon Peggy and Tonya Williams (T. 4/15/92 at 8). These are relevant sentencing considerations under Rhodes, 818 P.2d at 1051 (citing authority),

and clearly supported the court's decision, under the discretion provided by Utah Code Ann. § 76-3-401(1) (1990), to sentence defendant consecutively, rather than concurrently.

Further, it was entirely permissible for the trial court to note defendant's courtroom behavior--which the court took as evidence of his poor impulse control--in meting out sentence. In State v. Gerrard, 584 P.2d 885 (Utah 1978), the defendant tried to escape the courtroom during his sentencing hearing. The trial court then rescinded its decision, announced just before the escape attempt, to order a ninety-day presentence evaluation; instead, it imposed sentence. Id. at 886. The supreme court squarely rejected the defendant's claim that the ninety-day evaluation should have not been rescinded: "Whether or not the trial judge changed his mind due to the conduct of the defendant or to other reasons is not our concern." Id. at 887.

Defendant's consecutive sentences here were statutorily permitted, and Gerrard demonstrates that he cannot assign his own disruptive courtroom behavior as a basis for setting the trial court's decision aside. There was no abuse of discretion by the trial court, and defendant's sentences should be affirmed.

POINT THREE

THE ADDITIONAL ISSUES IDENTIFIED BY
DEFENDANT'S APPELLATE COUNSEL, BUT NOT
ANALYZED IN "ANDERS" BRIEF FASHION, SHOULD
NOT BE ADDRESSED BY THIS COURT.

While he has only briefed two points on appeal, defense counsel identifies four other issues: sufficiency of the evidence on each of the two guilty verdicts, a claimed "speedy

trial" violation, and ineffective assistance of counsel (Br. of Appellant at 2). Regarding these issues, counsel represents that he has "made a conscientious examination of the record, such as it is, and is unable to in good faith argue any appealable issues" (id. at 5). He requests, however, that this Court independently examine the record for reversible error, citing Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967). This is unnecessary.

Anders provides the means whereby counsel can withdraw from representing a defendant on appeal, upon determining that the appeal is frivolous. In State v. Clayton, 639 P.2d 168 (Utah 1981), the Utah Supreme Court adopted and spelled out the process of what has come to be called "Anders briefing." In essence, the process requires appellate counsel to accompany his or her motion to withdraw with "a brief referring to anything in the record that might arguably support the appeal," and to serve that brief on the defendant who, in turn, is allowed to respond. The appellate court then decides the withdrawal motion. Clayton, 639 P.2d at 169-70.

Here, while he has served his brief on defendant (Br. of Appellant at 6), appellate counsel has not moved to withdraw. Instead, he has briefed the two issues on appeal that, in his judgment, appear to have merit. As to the remaining issues, he has not followed the Anders-Clayton briefing requirements.

Under these circumstances, the remaining issues identified in the Brief of Appellant should be disregarded

altogether. Appellate counsel's statement that those issues are "unappealable" merely makes explicit that which is implicit in any appellate brief: counsel has advanced the most promising issues, and discarded the hopeless ones. This is sound appellate practice. See Butterfield v. Cook, 817 P.2d 333, 336-37 (Utah App. 1991), quoting Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983) ("Experienced advocates since time out of memory have emphasized the importance of winnowing out weaker arguments on appeal . . .").

Nor is this a death penalty case. Accordingly, this Court need not scour the record for unbriefed errors. Cf. State v. Menzies, 182 Utah Adv. Rep. 3, 4 (Utah March 11, 1992). Even in such a case, the Utah Supreme Court has endorsed the principle that "a reviewing court . . . is not simply a depository in which the appealing party may dump the burden of argument and research." State v. Bishop, 753 P.2d 439, 450 (Utah 1988) (quotations and citations omitted). Absent compliance with the Anders-Clayton procedures, then, defense counsel cannot expect this Court to independently seek out error.

Briefly, it also appears that the unbriefed issues identified by defense counsel are, indeed, not worth pursuing. As set forth in this brief's statement of facts, there is adequate evidence supporting the guilty verdicts on burglary and forcible sexual abuse: defendant entered the Williams home without invitation or authorization, and committed a felony upon Tonya Williams. See Utah Code Ann. (1990) §§ 76-6-202 (burglary

is unlawful entry with intent to commit a felony); 76-5-404 (forcible sexual abuse is the taking of "indecent liberties" without consent).

Defendant was tried for the offenses within three months of his arrest (R. 4, 76). It does not appear that he ever demanded a more speedy trial, even though he was informed on October 10 of his December 17 trial date (R. 22); much longer delays have been held acceptable. See State v. Trafny, 799 P.2d 704, 708 n. 16 (Utah 1990) (citing cases).

Finally, at trial, defense counsel vigorously challenged the ability of Peggy and Tonya Williams to accurately identify defendant as the intruder in their home (e.g., T. 12/17/91 at 48-52, 73-79). A comprehensive precautionary instruction about eyewitness identification testimony was given to the jury, and stressed in closing argument (R. 63-65, T. 12/17/91 at 209-15). Thus trial counsel performed competently. Appellate counsel, in turn, has legitimately chosen to not pursue an ineffective counsel claim on appeal.

CONCLUSION

The trial transcription problems did not prejudice defendant, and therefore do not require a new trial. He was appropriately sentenced upon his convictions, which were secured by a trial that was fairly conducted. Accordingly, those convictions and sentences should now be affirmed.

RESPECTFULLY SUBMITTED this 21 day of October, 1992.

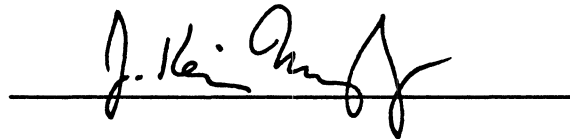
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CERTIFICATE OF MAILING

I certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to DOUGLAS D. TERRY, attorney for defendant, 150 North 200 East, Suite 202, St. George, Utah 84770, this 21 day of October, 1992.



APPENDIX I

Transcript of Sentencing Hearing

ORIGINAL

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

HON. JAMES L. SHUMATE, Judge

STATE OF UTAH,
Plaintiff,
vs.
WAYNE GENE NICHOLAS,
Defendant.

Court of Appeals: 920306-CA

Criminal No. 911500095

(Tape-Recorded Proceedings)

REPORTER'S SENTENCING HEARING TRANSCRIPT

Wednesday, April 15, 1992

APPEARANCES OF COUNSEL:

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OFFICIAL COURT REPORTER

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1 ST. GEORGE, UTAH; WEDNESDAY, APRIL 15, 1992

2 -ooo-

3
4 THE COURT: Call 911500095, State of Utah versus Wayne
5 Gene Nicholas. The record will reflect that Mr. Nicholas is
6 present, together with his counsel Mr. Terry. The State is
7 represented by Mr. Langston.

8 The Court has reviewed the recommendations of the
9 ninety-day diagnostic unit.

10 I'll hear you in mitigation, Mr. Terry.

11 MR. TERRY: Your Honor, I -- first of all, let me
12 preface my remarks by saying that I'm aware that the State
13 is going to ask that the Court follow the recommendation,
14 and I believe is probably going to ask for consecutive
15 sentences. I don't believe that -- that that is warranted
16 in this case, Your Honor.

17 I spoke with Mr. Keith Smith this morning, who --
18 it's his cover letter that accompanies the recommendation
19 from the diagnostic unit. And -- and I talked to Mr. Smith
20 about the items that are contained in the diagnostic report,
21 and I asked Mr. Smith two things. First of all, I asked him
22 if the recommendation would have been different absent
23 the -- the fight that Mr. Nicholas was engaged -- or was
24 involved in. And he told me yes, it probably would have
25 been. All things being equal, had that not occurred, the

1 recommendation probably would have not been for a prison
2 commitment.

3 And I asked him also regarding Mr. Nicholas'
4 admission and his willingness to take responsibility for
5 what happened. And I don't know if the Court is aware,
6 but -- but after -- just shortly after the recommendation --
7 the diagnostic report was prepared, Mr. Nicholas, who had --
8 who had indicated throughout the evaluation period that he
9 took responsibility but could not specifically remember
10 the -- the event that took place that formed the basis for
11 the charges that he was convicted of, he did go back into
12 group and admitted -- admitted his responsibility. Admitted
13 his participation. And I asked Mr. Smith if that, you know,
14 would -- would make a difference, all other things being
15 equal, and he indicated that yes, it would probably have
16 made a difference.

17 I talked to the victims. They're in the courtroom
18 today. And I -- I am going to make a proffer of what they
19 told me. If the State wants to cross-examine them, I guess
20 we could call them. I know they're very nervous about
21 that. But both Tonya and her mother, Mrs. Williams,
22 indicated to me -- I told them what the recommendation was.
23 I told them that -- that my client had admitted and was
24 taking full responsibility for what had happened; that he
25 harbors no -- no ill will whatsoever toward -- toward them

1 at this point; that he knows that it was -- that it is his
2 actions -- it's his responsibility. And they told me that
3 they do not necessarily feel like that prison commitment is
4 either in their best interests or in the best interests of
5 society or Mr. Nicholas' best interests. I talked to
6 victims before, who are very bitter. And -- and I'm not
7 going to say whether or not the victim in this case has a
8 right to be bitter, but I'm encouraged that she is not. I'm
9 encouraged that that is for her best interests, that she
10 does not harbor bitter feelings toward Mr. Nicholas. She
11 would like to see Mr. Nicholas get the help that he needs.
12 And her mother, Mrs. Williams, also indicated that to me.

13 And I would submit to the Court, Your Honor,
14 that -- that I guess there's -- there's two ways the Court
15 can go. The Court can follow the recommendation. Send
16 Mr. Nicholas to prison. He'll be out of prison after a
17 period of time. And I'm not sure that -- I'm not sure that
18 he will be in any better position after that experience to
19 insure that something like this or other type of criminal
20 behavior does not happen again.

21 The other option that I would submit to the Court
22 is this. That he go into a -- a treatment program -- an
23 intensive in-house treatment program. Perhaps one of the
24 halfway houses. Ogden Correctional -- or Community
25 Correctional Center. Fremont. There are -- there are

1 options available. That he be incarcerated here in the
2 Washington County Jail for a period of time, and that he
3 participate in ISAT -- go through the ISAT program while
4 here.

5 And the reason that I believe that those options
6 would serve all of the interests better than just a prison
7 commitment is because I think that that is the best chance
8 that we have of Mr. Nicholas being able to -- to conform --
9 learn how to conform his behavior that he has not been able
10 to do up to this point and -- and in so doing, not be a
11 threat to himself or to society.

12 If the victims were here today, and if they were
13 pleading to the Court to throw this man in prison for -- for
14 as long as the Court possibly can, I probably wouldn't be
15 asking for this, Your Honor. But they're not. That is not
16 what -- that is not what they feel would be in their best
17 interests or in the -- Mr. Nicholas' best interests. And
18 I -- I just think that -- that the Court has an obligation
19 to the victims. The Court has an obligation to the people
20 of the state of Utah to -- to see that this does not happen
21 again. And I strongly feel like an intensive program in --
22 in conjunction with some incarceration -- he's been -- he's
23 been incarcerated seven months. And I think that's had an
24 impact on him. I didn't represent him before, but in
25 talking to his prior counsel and others, I think that he's

1 had an attitude adjustment. He definitely has. And I think
2 that being incarcerated for the last seven months has had --
3 has had something to do with that. But we need to figure
4 out why he's doing the things -- has done the things that
5 he's done and teach him -- help him teach himself. Help him
6 to conform his behavior. And I would ask the Court to
7 consider something less harsh than a prison commitment.
8 Consider a treatment program in conjunction with -- with
9 additional jail time, if necessary, but to allow him to get
10 his problems under control so that they don't recur. I'm
11 fearful that him going to prison will only exaggerate his
12 problems, and he will come out a bigger threat to society
13 than perhaps he is now.

14 THE COURT: Thank you, Counsel.

15 Mr. Nicholas, is there anything you want to say?

16 MR. NICHOLAS: Yes, sir. I've had a lot of time to
17 analyze myself. My life-style was pretty reckless. I think
18 I deserve a chance in these programs. I know I have an
19 attitude problem inside, and I don't think going to jail and
20 putting me in that kind of atmosphere is going to help me
21 out any. I'm sorry for the things that I've done, and I --
22 I'm ready for a program, you know, to -- to prove myself.

23 THE COURT: Mr. Langston?

24 MR. LANGSTON: Your Honor, I think that the defendant's
25 attitude has been amply demonstrated even in court today by

1 his conduct over in the jury box. While the defendant has
2 been here, since he has returned from the ninety-day
3 diagnostic, he was placed in lock down because of
4 assaultive-type behavior towards one of the jailers.

5 The defendant has never demonstrated any kind of
6 remorse. And it's kind of a deathbed repentance that he's
7 talking about here today that "Well, now I'm going to accept
8 responsibility for my actions," because that's the only
9 thing he can do at this point.

10 Now, the victims, true, are saying, "We think he
11 needs help." And I -- they have a very commendable attitude
12 towards him. But there were threats made through third
13 parties in the jail by the defendant towards the victim when
14 he was incarcerated after the trial.

15 The defendant is a danger to society. He has an
16 extensive criminal record. The defendant was placed in lock
17 down up in the state prison while he was there even for a
18 ninety-day diagnostic, when he knew that he had to be on his
19 best behavior.

20 Now, if he says he wants counseling now, fine. He
21 can get it through the prison. ISAT is available through
22 the prison if he wants that. But in essence, what he's
23 attempting to do is blackmail the Court here today by
24 saying, "If you send me to prison, I'm going to be worse
25 when I get out." And I don't think the Court should give in

1 to that type of blackmail.

2 The people of the state of Utah have a right to be
3 free from fear of people like the defendant. And we would
4 demand -- ask -- we can't demand, but we would strongly ask
5 the Court to sentence the defendant consecutive time. Send
6 him up there and protect the people of the state. That's
7 the only way we can be safe. We can't believe anything he
8 says. And the only way to be safe from this threatening
9 type of individual -- a person who has been engaged in
10 criminal activity such as he has -- is to put him away for
11 as long as we possibly can. As long as the statute allows.
12 His record justifies that; his behavior before and after
13 he's been convicted justifies that. And we would strongly
14 urge the Court to follow that recommendation.

15 THE COURT: Thank you, Counsel.

16 Rebuttal to anything, Mr. Terry?

17 MR. TERRY: No, Your Honor.

18 THE COURT: Mr. Nicholas, you are fortunate in having
19 been represented by an attorney who has taken the time to
20 discuss with the victims their feelings. It speaks well of
21 the Williams family and the victim, that they have recovered
22 from the terror that you have inflicted upon their lives.
23 That speaks well of them. Since this offense, your own
24 conduct does not speak well of you, sir.

25 The record should reflect that during the

1 sentencing phase for Mr. Cannistraci earlier on the calendar
2 this morning, Mr. Nicholas, while seated in the jury box,
3 determined, for some reason known only to himself, that it
4 was appropriate to find it humorous to consider a ninety-day
5 diagnostic -- or a presentence report for Mr. Cannistraci.

6 The fact that you were before this court looking
7 at another 30 years and cannot control your impulses enough
8 to even shut your mouth, Mr. Nicholas, does not serve you
9 well, sir.

10 The ninety-day diagnostic recommendation is for
11 commitment. There is no recommendation as to whether or not
12 that should be for concurrent or consecutive time. Your
13 behavior, Mr. Nicholas, sets that recommendation, in my
14 mind.

15 It's the order of the Court on Count I, burglary,
16 that you be sentenced to the Utah State Prison for a period
17 of time not less than one year or more than 15 years. No
18 fine is imposed. The restitution order --

19 Counsel, do you have a restitution figure in front
20 of you? Has there been anything?

21 MR. LANGSTON: I don't. Perhaps -- I don't know if the
22 probation had one in the presentence report or not.

23 Your Honor, the victims have informed me that they
24 haven't sought out any counseling to help them deal with
25 this; so, there are no costs associated with that.

1 THE COURT: All right. No restitution order made.

2 MR. TERRY: Your Honor, can I interrupt the Court for
3 just a moment?

4 THE COURT: No, Counsel. I think that's the end of it.

5 MR. NICHOLAS: Sir, may I -- I wasn't laughing at
6 Mr. Cannistraci. My nieces and nephews -- I haven't seen
7 them for a long time, and they were waving at me. And I
8 can't help if they made me laugh. I was -- Mr. Cannistraci
9 is in my cell with me, and I have nothing against him. And
10 I didn't find anything funny about this thing. I'm very
11 sorry. It's just that I haven't seen my nieces and nephews,
12 and I love them a lot, and they made me laugh. I'm sorry.

13 THE COURT: Well, you should be, sir.

14 As to Count II, it's the sentence of the Court
15 that you serve not less than one nor more than 15 years in
16 the Utah State Prison. No fine is imposed. No order of
17 restitution made; none sought by the State.

18 It is the order of the Court that those sentences
19 be -- be served consecutively, one after the other.

20 If you are truly honest about your desire to
21 change your life -- change the reckless nature of your
22 behavior -- then you will be given the opportunity to do so
23 by the Department of Corrections. If you keep your nose
24 clean, they'll put you into a program inside the institution
25 and then work you into Fremont or Bonneville. Whatever

1 halfway house facility is available. Take you there. But
2 the ball is in your court. You decide. You show by your
3 own behavior that you can work with the people up there.

4 That's the order of the Court. Go back and have a
5 seat.

6 (Whereupon the proceedings in the above-entitled
7 matter were concluded.)
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C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

I, PAUL G. MCMULLIN, CSR, RPR, an Official Court Reporter in and for the Fifth Judicial District, State of Utah, do hereby certify:

That, the foregoing matter, to wit, STATE OF UTAH VS. WAYNE GENE NICHOLAS, CRIMINAL NO. 911500095, was tape-recorded at the time and place therein named and thereafter, to the best of my listening and understanding, reduced to computerized transcription under my direction.

I further testify that I am not interested in the event of the action.

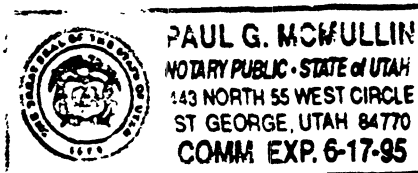
WITNESS my hand and seal this 24th day of September, 1992.

Paul G. McMullin

PAUL G. MCMULLIN, CSR, RPR

RESIDING AT: St. George, Utah

MY COMMISSION EXPIRES: 6-17-95



APPENDIX II

State's Review of Transcript Omissions

State's Review of "Inaudible" Transcript
Problems Identified by Defendant, at Exhibit "B"
of his Brief of Appellant

(page references are to trial transcript T. 12/17/91)

| <u>No.</u> | <u>Page</u> | <u>Line</u> | <u>Context</u> |
|----------------------------------|-------------|-------------|--|
| 1-12 (Exh. B, appellant's brief) | | | Jury selection and prosecutor's opening statement. |
| 13 | 37 | 14 | Problem corrected when witness directed to answer out loud. |
| 14 | 43 | 4 | Describing the Williams home, intruder's likely mode of entry. |
| 15 | 44 | 6 | Describing Williams home. |
| 16 | 49 | 13 | Reviewing witness's prior statement to police. |
| 17 | 83 | 13 | Excusing jury for discussion outside its presence. |
| 18-19 | 87 | 9-10 | Evidentiary ruling by court. |
| 20 | 88 | 2 | Noting a defense objection. |
| 21 | 91 | 4 | Witness explaining an exhibit. |
| 22 | 108 | 17 | Witness explaining an exhibit. |
| 23 | 111 | 18 | Defense opening statement. |
| 24 | 118 | 7 | Excusing a witness. |
| 25 | 155 | 5 | Defendant describing his living and job situation. |
| 26 | 156 | 18 | Defendant describing his tattoo. |
| 27 | 157 | 6 | Defendant describing prior acquaintance with Tonya Williams. |
| 28 | 165 | 14 | Defendant describing a trip to Mesquite ("car or truck?"). |
| 29 | 171 | 11 | Court comment after announcing recess. |
| 30 | 172 | 25 | Tonya Williams describing intruder's position on her bed. |
| 31 | 180 | 21 | Peggy Williams reviewing her need to wear glasses. |
| 32 | 183 | 8 | Peggy Williams re-describing intruder's exit from home. |
| 33 | 187 | 15 | Court reviewing record of another proceeding. |
| 34 | 195 | 6 | Reviewing jury instructions with counsel. |
| 35 | 218 | 22 | Defense closing argument. |