

2016

**The State of Utah, Plaintiff/Appellee v. Justin Paul Craft,
Defendant/Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff/Appellee,

v.

JUSTIN PAUL CRAFT,

Defendant/Appellant.

Case No. 20150750-CA

Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from a judgment of conviction for one count of Aggravated Robbery, a first degree felony, in violation of Utah Code §76-6-302, and one count of Aggravated Burglary, a first degree felony, in violation of Utah Code §76-6-203, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Paul Parker presiding.

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UTAH APPELLATE COURTS

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

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JUSTIN PAUL CRAFT,

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Case No. 20150750-CA

Appellant is incarcerated.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Utah Code §78A-4-103(2)(j). *See* Addendum A (Sentence, Judgment, Commitment): R. 280-81.

STATEMENT OF THE ISSUES, STANDARD OF REVIEW, PRESERVATION

Issue I: Whether trial counsel was ineffective for failing to object to the admission of two unreliable and suggestive eyewitness identifications of defendant when the victim was pistol whipped during the incident and had only a limited view of his assailant.

Standard of Review: “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law, which [this Court] review[s] for correctness.”

State v. Fowers, 2011 UT App 383, ¶15, 265 P.3d 832 (internal quotation marks omitted). Furthermore, whether an eyewitness identification violates the right to due process is a question of law that this Court will review for correctness. *State v. Hubbard*, 2002 UT 45, ¶ 22, 48 P.3d 953. “[H]owever, because this question of law requires the

application of the record facts to the due process standard, [this Court will] incorporate a clearly erroneous standard for the necessary subsidiary factual determinations.” *Id.*

Preservation: This issue is not preserved, but it need not be. *See State v. Larsen*, 2011 UT App 426, ¶3, 267 P.3d 969 (per curiam). Ineffective assistance of counsel is an exception to the preservation rule. *Id.*

Issue II: Whether trial counsel was ineffective for failing to object to the introduction of a hearsay statement by the co-defendants that implicated defendant in the crime, in violation of defendant’s Sixth Amendment right to confront and cross examine his accusers.

Standard of Review: “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law, which [the Court] review[s] for correctness.” *Fowers*, 2011 UT App at ¶15 (internal quotation marks omitted).

Preservation: This issue is not preserved, but it need not be. *See Larsen*, 2011 UT App at ¶3. Ineffective assistance of counsel is an exception to the preservation rule. *Id.*

Issue III: Whether, even if the instances of deficient performance identified in Points I and II are not sufficiently prejudicial to warrant reversal on their own, taken together, they are cumulatively prejudicial.

Standard of Review: A claim of cumulative prejudice “requires [the Court] to apply the standard of review applicable to each underlying claim of error.” *Radman v. Flanders Corp.*, 2007 UT App 351, ¶4, 172 P.3d 668.

Preservation: Inapplicable.

Issue IV: Whether the evidence was insufficient to convict defendant of aggravated robbery and aggravated burglary when the only evidence of these crimes was two unreliable eyewitness identifications of defendant, an improperly admitted co-defendant hearsay statement, and an ambiguous jail telephone call.

Standard of Review: “When a defendant challenges a jury verdict for insufficiency of the evidence, ‘[this Court] review[s] the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict.’” *State v. Noor*, 2012 UT App 187, ¶4, 283 P.3d 543 (mem.). This Court “will reverse the jury’s verdict ‘only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.’” *Id.*

Preservation: This issue is preserved by trial counsel’s directed verdict motion made at the close of the State’s case. R.558. But to the extent this Court believes it is not, it should review the issue for plain error. *See State v. Mohamed*, 2012 UT App 183, ¶3, 282 P.3d 1066 (per curiam). “When challenging the sufficiency of the evidence under the plain error doctrine, ‘a defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.’” *Id.* (quoting *State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346).

STATUTORY PROVISIONS

The following is attached hereto in Addendum B: Utah Code §76-6-203, Utah Code §76-6-302, and U.S. Constitution Amend. VI.

STATEMENT OF THE CASE

An Amended Information charged Justin Paul Craft (“Mr. Craft”) with one count of aggravated robbery in violation of Utah Code §76-6-302 and one count of aggravated burglary in violation of Utah Code §76-6-203 as a result of an incident that occurred on March 12, 2013. R.252-53. On October 24, 2013, a district court judge granted Mr. Craft’s motion to sever his case so that he would be tried separately from the co-defendants. R.46-47,70-71. At the close of a two-day jury trial held on June 16-17, 2015, Mr. Craft was convicted of both charges. R.242-243, 250-251, 257-58. On August 24, 2015, Mr. Craft was sentenced to an indeterminate prison term of not less than ten years to life for each count, with both counts to run concurrently to each other. R.278-81. Mr. Craft timely appealed. R.282. Our supreme court transferred the case to this Court. R.286-291.

STATEMENT OF THE FACTS

I. Facts Relevant to the Incident in the Home.

On March 12, 2013, sometime after 11:50 p.m., three men entered a bungalow located on Westminster Avenue in Sugar House. R.394,398,416,424. Alexander Ray Davis (Davis) and his mother, Kristin Ane Kirby (Kirby) were in the house. R.392. Davis was asleep in his bedroom, located in the basement of the bungalow, and Kirby was asleep in an upstairs bedroom. R.397,424. The house was pitch black. R.411,437.

Davis awoke to “two men punching [him] in the face... with guns pointing at [his] head.” R.395. The men pulled Davis from his bed and onto the floor. R.395,398. Davis was then pistol whipped. R.395,398,409. Because Davis was not fully awake when the

hitting started, he wasn't sure how many times he had been hit. R.398. Davis, however, was awake during the time he was pistol whipped. R.409. The beating and the pistol whipping made Davis's "whole face [] bloody." R.439.

The two men repeatedly asked Davis to tell them where they might find "the safe." R.397-98. During this time, one of the men stood over Davis and pointed a gun at him while the second man searched and "trashed" his room. R.398. In total, Davis was held in his room "for about five to ten minutes" at gun point while his room was being searched. R.398-99. Both men were wearing black "long sleeves and pants" and gloves. R.397-98. They were also wearing ski masks. R.397-98, 411. While in Davis's bedroom, the two men kept on their ski masks so that the "only part of [their] faces" that Davis could see was "around [their] eyes". R.397-398. Based upon what Davis could see, he noticed that one of the men had "darker skin, and [the other] one... white." R.398,401. (Regarding the presence of light in the bedroom, Davis testified at trial that "the lights were definitely turned on[,] " but he did not see the men turn on the lights. R.411.).

The two men then took Davis to a living room area after searching his bedroom. R.400. Davis was put in a "sacrificial position[,] " where he was ordered to stay on his knees with his head down and his "hands over his head." R.400-01,412. At this point, a man stood in front of Davis and held a gun to his head. R.401,413-14. The man holding the gun was the same man who had pointed the gun at Davis while in the bedroom. R.401. He was also the same man who had pistol whipped Davis. R.410,412. This man was "darker skinned." R.401,410,412. The second man -- the one with "lighter skin[]"-- searched the living area, including the closets and the bathrooms. R.400-01. The two men

continued to ask Davis questions about the whereabouts of a safe. R.401. Davis was in the living area for “about five to ten minutes.” R.404. While in the living room, Davis saw one of the men – “the white one” – remove his mask. R.401,412. Davis “could still look around” and saw the “white-skinned person” in his “peripheral vision”. R.412-13, 415. The white-skinned person was never directly in front of Davis, and at times was directly behind him. R.415.

During the time that these events were occurring, Kirby awoke to a flashlight shining in her eyes. R.424-25. Kirby saw a man pointing a gun at her who was wearing a mask and a jacket with “light reflecting sides.” R.425. She was able to see only “the shape of his head” and that he had “[b]lack, short hair, and a big, round face.” R.425-26. The man ordered Kirby not to look at him. R.425. Kirby “rolled up into a fetus position and put [her] hands over [her] eyes.” R.425. The man asked Kirby about jewelry and a safe, then searched the nightstand and took Kirby’s iPad and cell phone. R.425-27. He was in Kirby’s bedroom for less than ten minutes. R.427.

After searching her bedroom, the man walked Kirby downstairs to the living area. R.428. To get there, Kirby had to walk through the kitchen, where the lights were turned off. R.437. As Kirby and the man entered the living area, Kirby saw that the closet was open, the closet light was on, “and there was movement in the closet.” R 428,437-38. According to Kirby, the closet light provided “enough light that the whole room was very well visible to the eye.” R.438.

At this point, Davis, who was still on his knees, saw a “shorter, heavier set” and “dark-skinned male,” wearing “all black, with a black ski mask,” bring his mother down

the stairs into the living area. R.404-05. Davis noticed that the man was pointing a gun at his mother's head. R.404. Kirby saw Davis "laying on the ground" and a man was pointing a gun at him. R.428. The man walking with Kirby forced her into the "sacrificial position" next to Davis. R.404. Kirby and Davis were both "face down on the carpet." R.429. Two men held Kirby and Davis at gunpoint while the third man searched the closet. R.429. The man who had brought Kirby into the living area told her "don't look up at us, don't look up." R.429. Kirby never saw the third man, but "[j]ust heard him in the closet." R.438-39. During this time, Kirby and Davis were looking at each other. R. 415. Davis told Kirby that he was sorry. R. 416. He did so because he felt bad that his mother had been put in this situation and he believed that the situation had "something to do with the drugs." R.416.

After about five minutes had passed, Kirby heard one of the men say, "we've been here too long." R.429-30. Kirby and Davis "laid there" while one of the men "mov[ed] stuff all over the closet." R.430. The men then "shut off all the lights," turned on their flashlights, and pointed them at Davis and Kirby "blinding [them] with their lights." R.405,412, 417. The three men started walking up the stairs. R.405. One man told Davis and Kirby that the men knew where to find them. R.431. The men had their I.D.s -- "all of [their] information," -- so "if [they] ever tr[ied] to say anything, [the men] w[ould] come find [them]." R.405,431. The men took with them items from the house, including cellphones, Davis's wallet, an iPad, and a MacBook Air computer, a lap top, golf clubs, and two sets of car keys (one of which was for Kirby's Mini Cooper). R.402,407,432-433.

After the men left, Kirby and Davis stayed on the floor for approximately one minute. R.431. Once they got up, Kirby noticed that Davis was “bloody from head to toe,” and “his eyes... had so much blood in them” that she “thought [the men] had done something to his eyes.” R.431,439. The beating left a “scar” on Davis’s forehead. R.395.

After the men left, Kirby and Davis went to a neighbor’s house to phone the police. R.405,432. Officers arrived about five minutes later. R.406,444. K9 officers were used to search the area, but they were unable to locate a track regarding any of the suspects. R.406,444-45. When an officer learned that some of the stolen items were electronic devices, he asked Davis if those devices could be tracked through a GPS system. R.407,433,446. The iPad was tracked to a trailer park near Harrison Avenue, between Main Street and West Temple. R.407-08,448,450-51. In addition, an officer recovered two of the stolen cell phones and Davis’s wallet just three streets north of Davis and Kirby’s residence. R.407-408,446-48,472-74. The cell phones were not tested for fingerprints or DNA evidence. R.476.

Soon after arriving at the trailer park area, the officers observed two individuals run in the direction of the trailers. R.482-83,488. The individuals appeared to be “tiny, slender” and “male[,]” but no other identifying features were distinguishable. R.489. The officers yelled out commands for the individuals to stop, but they instead ran between two trailers and “disappeared.” R.483,485. In pursuing the individuals, the officers went to trailer 14, set up a “containment on all sides,” and waited there until other officers arrived on the scene. R.486. Officers secured the door to trailer 14 and began ordering people out of the trailer one-by-one. R.451,486,491-92,555-556. Seven individuals were

in the trailer, including Mr. Craft. R.529-30,555-556,608,613,621. *See also* State's Exhibits 37-41. Officers searched Mr. Craft and did not find any weapons. R.495. After officers spoke with the individuals who had been in trailer 14, they transported Mr. Craft, Jayvaughn Firethunder, and Desmond Redkettle to jail. R.532. Evidence found inside the trailer was excluded at trial. R.135-143, 469.

A silver PT Cruiser belonging to Desmond Redkettle was parked next to trailer 14. R.453,458,547,612. After getting a search warrant, Officer Tyler Lowe (Lowe) and Officer Derek Coats (Coats) searched the vehicle. R.453, 458. Both officers observed a bag of marijuana inside the vehicle. R.453,461. Lowe testified that the amount of marijuana found "wasn't a small amount." R.453. A gun holster and a mask were found inside the driver's door. R.459. In the trunk of the vehicle, officers found a Black JanSport backpack and a G. Loomis bag. R.461-62. The JanSport backpack contained an iPad, a flashlight, and a set of keys. R.461-62.¹ The G. Loomis bag contained "[s]everal bags of marijuana," video games, and a jacket. R.462. Officers also found 9mm bullets in the trunk of the car. R.462. The officers did not do a fingerprint or DNA testing of the items found in the vehicle. R.465, 551. (*But see* R.547, where Torres testified that fingerprints were taken, but that none of them came back as matching Mr. Craft. *See also* R.548, where Torres stated that the guns inside the vehicle were tested for DNA, but the

¹ The record does not indicate that the iPad found in the PT Cruiser is the one taken from Davis and Kirby. *See* R.461. When testifying about the iPad found in the PT Cruiser, Detective Coats stated that the iPad depicted in the photo marked as Exhibit 24 was the "same I-pad" as the one depicted in the photo marked as State's Exhibit 25. R.461-62. However, Detective Coats did not indicate that this was the same iPad that was taken from Davis and Kirby. *See* R.461-62.

results did not come back as matching Mr. Craft.). The keys found in the vehicle were returned to “the owner.” 462,464.²

II. Facts Relevant to the Witness Identifications of the Defendant.

Within a few hours after the incident, around 5:00am or 6:00am, Davis went to the hospital for treatment of his wound, which included getting ten stitches. R.410,418-420,434-35. Davis was at the hospital for a little over an hour. R.410,421,435. Davis testified at trial that while he was at the hospital, he saw police reports and photos of the suspects on the news. R.410,418. Detective Reuben Torres (Torres) interviewed Davis after he was released from the hospital. R.210,421,434-35, 531-32. At trial, there was a discrepancy as to when this interview took place. Davis testified that his interview with Davis took place “the next day or the day after” he went to the hospital. R.421. Kirby and Torres testified the interview with Davis occurred at 9:00 a.m. on the day of the incident. R.434-35,531. Torres testified that Mr. Craft was not formally arrested until 4:00 p.m. that afternoon, after the interview and photo line-up with Davis had been completed. R.533. Torres also testified that the police department does not release suspect photos to the media until a formal arrest is completed. R.532-33. Torres did not know “how the media got the pictures of the suspects,” and that it “had to have been later on that day”

² The “owner” of the keys was not identified by Detective Coats at trial. *See* R.462,464. When testifying about the owner and the keys, Detective Coats stated that, “it’s my recollection... I got [the keys] back to her.” R.464. *See also* R.462 where Detective Coats states, “A set of keys that I recovered out of that black—it was like a Jansport bag. And then Detective Torres advised me who the owner was and how to get them back to that person.” R.462.

because he “wouldn’t have released any information [to the press] as far as who [he] had in custody.” R.533.

At the interview, Torres presented Davis with a sequential photo lineup of six photos. R.540. Torres showed the photos to Davis one at a time. R.418, 545-56. Mr. Craft’s photo was number five. R.545-46. Davis went through the photos “one or two times,” but was unable to identify the “darker skinned” individual that was in his room. R.419. When Davis saw Mr. Craft’s photo, he indicated that Mr. Craft “looked familiar.” R.546. Torres then asked Davis if the photo of Mr. Craft was the same man that stood next to Davis’ bed. R.546. Davis responded “yes.” R.546. Davis did not provide a written statement to police about the incident prior to the photo line-up. R.543. In the interview, Davis told Torres that the man was white and that he had a goatee. R.544.

A trial was held on June 16, 2015. Davis testified that he had an immunity grant with respect to the marijuana found in his garage. R.393,409. When asked about the marijuana on direct examination, Davis testified that he only had “an eighth of marijuana” for personal use. R.393 409,418. Davis denied being involved in the sale or distribution of marijuana. R.394, 417, 419. On cross-examination, defense counsel asked Davis if he was “still sticking to [his] guns” that he had possessed only an eighth of an ounce. R.409,417. Davis responded “yes.” R. 409 However, a search of Davis’ house uncovered more than an eighth of an ounce of marijuana, as well as scales, pipes and bongs-- all items “consistent with drug distribution.” R.550, 549-550.

During the direct examination of Davis, the prosecutor asked him whether the “white” man who took off his mask in the March 2013 incident was sitting in the

courtroom. R.401-402. Davis then identified Mr. Craft. R.402. Defense counsel did not object to the in court identification of Mr. Craft. R.402. In addition, defense counsel did not file a pre-trial motion to suppress the photo line-up identification of Craft that was made by Davis in his pretrial interview with Torres.

At the close of the State's evidence, defense counsel made a directed verdict motion. R.558. The trial judge denied defense counsel's motion. R.558. In doing so, the following exchange between defense counsel and the trial court took place:

Defense Counsel: Your Honor, I'm just going to make the motion for a directed verdict at this point, just on the basis that they haven't shown the standard required of directed verdict that my client is the one that committed these crimes. And I'll submit it on that.

Trial Judge: All right. I'm going to deny it. I understand what you are saying. There's -- *the issue is whether or not the identification is proper*, but the --Mr. Davis testified and identified your client as the person being there. That is enough to take it to the jury, to allow reasonable minds to consider whether or not to find him guilty. So I'll deny the motion.

R.558. (emphasis added).

Defense counsel called only one witness, Dr. David Dodd ("Dodd"), a Doctor of Psychology at the University of Utah, who was qualified at trial as an expert witness on issues relating to eyewitness identification. R.183, 562. Dodd testified that research studies show that for any person to "remember a face, we need to process it for a significant amount of time." R.565,566. "[S]ometimes we can make an identification within less than a minute, but as a rule it takes several minutes to get enough information to later remember a face." R.566. Furthermore, "when people are highly stressed... mental processes don't work very well." R.566. In those situations where "people are

confronted with a weapon, they are likely to spend a good part of their time looking at the weapon and less of their time looking at the person... [or] at the face.” R.567. And, when “there’s more than one perpetrator [,] the division of attention to two people or more diminishes the amount of time someone spends looking at one particular person.” R.568. Dodd testified that accurate memories about faces are better if one “writes things down... preferably [with]in minutes or, if necessary, half an hour or so” of seeing a face. R.568. If this is not done, the mind “lose[s] [its] ability to remember details.” R.568. Dodd cautioned that “very subtle sorts of suggestion [that are made by others] can influence the finite recall of memory.” R.569.

Dodd testified that he had reviewed the photos that were in the photo spread given to Davis, as well as the interview that took place between Torres and Davis. R.563. Dodd noted that Davis was put in a stressful situation, with “a weapon pointed at his face for the duration of the stressful event.” R.567. Further, Davis did not provide any details about “the age of the perpetrator” and that “[t]here was also a discussion of reddish-brown hair, which did not appear in [] any of the people in the photo spread.” R.569. In fact, the only suspect identification that was given by Davis that “was written down by an officer... [was] male, white, with reddish-brown hair and a goatee.” R. 572. Dodd emphasized that Torres failed to follow some of the recommendations for how proper eyewitness identification procedures should be carried out as described in the document,

“[T]he National Institute of Justice, the US Department of Justice, the Eyewitness Evidence: A Guide for Law Enforcement.”³ R.570-71.

Torres failed to tell Davis “that the perpetrator may or may not be in the line-up.” R.571. Torres failed to tell Davis that “regardless of whether you pick anyone[,] we’ll continue to make an investigation of this case.” R.571-72. Torres also failed to conduct any “detailed interviews and detailed reports right after the crime took place.” R.572. R.572. Torres did not mention to Davis the importance of “clearing the innocent person from suspicion.” R.572. Torres also did not ask Davis about his “degree of certainty” (i.e. whether Davis was “90 percent certain or 30 percent certain”) in picking out Mr. Craft’s photo. R.573. Knowing about certainty “right after the [photo] selection is made” is important because, in general, “as soon as the witness is informed that they’ve picked the right person, then their certainty goes up, and the closer they come to trial, the higher their certainty gets.” R.573. And while the police report indicated that Davis was “confiden[t]... about his ability to identify the white guy[,]...it was hard to say whether that [type of confidence] makes a difference or not.” R.577.

Although Torres used a sequential lineup, Dodd noted that “it would have been preferable to do a double-blind procedure... to avoid any appearance of bias.” R.574. 576. In a double-blind procedure “the officer who’s presenting the photos... does not know which person is the suspect.” R.574. This double-blind procedure ensures that any

³ According to Dodd, this document, “published in 1999,” was written by a committee made up of “people in the legal system, judges and so on, ... police officers... [and] a few defense attorneys.” R.570. This committee “made a number of recommendations about how to conduct identification procedures that are strongly supported by the research.” R.570.

identification that is made is not unfairly impacted by “subtle hints, unintended by the police officer.” R.575. Lastly, Dodd emphasized that there were “hundreds of cases that [have been] overturned” because of bad eyewitness identifications, where “the main factor or the only factor in acquiring the conviction” was the eyewitness testimony. R.575-79.

The trial judge gave the jury a “Long instruction,” which listed “factors affect[ing] the accuracy of [eyewitness] identification.” See Jury Instruction 20, attached as Addendum C. See also *State v. Long*, 721 P.2d 483, 487-95 (Utah 1986). R. 245, 591, 581-82, 584, 590-592.

III. Facts Relevant to the Improper Introduction of Co-Defendant’s Hearsay Statements at Trial.

In a pre-trial motion, defense counsel filed a motion to sever trial of co-defendants pursuant to *Bruton v. United States*, 391 U.S. 123 (1968). R.46. The motion pointed out that severance was necessary “because the self-incriminating admissions of the co-defendants [would] be used against each of them at trial, but said admissions cannot be admitted as evidence in the trial of Mr. Craft.” R.46. The trial court granted Mr. Craft’s motion and ordered that Mr. Craft’s case be tried separately from the co-defendants. R.70-71.⁴ At trial, during a redirect examination of Detective Torres, the State asked Torres to explain how he went about choosing which pictures to put in the photo line-up. R.551-52. The following exchange took place between the State and Torres:

⁴ The co-defendants in the matter were listed as Jayvaughn Tyler Firethunder and Desmond Lamar Redkettle. R.70.

Counsel for State: And the defense counsel mentioned hair, goatee and white skin as the characteristics discussed with Alex during his description before the lineup, correct?

Torres: Yes.

Counsel for State: Aside from those, are there any other factors other than just the similarity to the defendant that guided you in selecting the lineup photographs?

Torres: *As far as the other two defendants saying he was there.*

Counsel for State: No. Let me --- the --- when you were picking the photographs out ---

Torres: Oh.

Counsel for State: --- was there any other information --- you said that Alex mentioned his hair, the goatee and the fact that he was white --

Torres: Light skinned.

R.551-52 (emphasis added).

Defense counsel failed to object to the admission of the co-defendant statement and failed to move for a mistrial when the statement was uttered. R. 551-52.

IV. Facts Relevant to the Phone Call from Jail.

At trial, Torres testified about a phone call that was made from the jail. R.533-58. Torres noted that the phone call was made on March 17, 2013, and that it was between a man whom Torres identified as Mr. Craft, and an unknown woman. R.536-537. Torres testified that during the phone call, the female gave the male “a hard time” and said “you messed up, what were you thinking?” R.537. Torres testified that the male responded by

saying “I’m probably going to do a nickel.”⁵ R.538. A portion of this call was admitted into evidence as States’ Ex. 23 and played for the jury. R.538. The forty second excerpt of the phone call that was played for the jury contained the following exchange between a man and a woman: ⁶

Male voice: [inaudible]

Female voice: “What up nigger? What are you doing, stupid motherfucker?”

Male voice: [inaudible]

Female voice: “You’re so fucking stupid! I’m gonna fuck you up man. I’m [inaudible] fucking mad at you.”

Male voice: “I wish I had called them too. And I was just... [voices talking over each other].”

Female voice: “What the fuck were you thinking, man?!”

Male voice: “[inaudible] It... it wasn’t supposed to [inaudible] like that, man.”

Female voice: “Stupid. Really, man.”

Male voice: “Oh you don’t even know how fucking mad I am. He got—”

Female voice: “[interrupting] I bet.”

Male voice: “He got away.”

⁵ This portion of the call was not included in State’s Ex. 23, thus the jury did not hear this part of the phone call when the phone call was played for the jury. *See* States’ Ex. 23. *See also* R.535.

⁶ A recording of the jail phone call was admitted into evidence and made part of the appellate record, but a transcript of the interview was not. *See* State’s Ex. 23. For the convenience of the Court, appellate counsel has prepared uncertified transcriptions of the portions of the interview that are important to the issues Mr. Craft raises on appeal and has made those transcriptions part of this brief.

Female voice: "Oh you know I'll have your back and I'll-I'll be taking pictures of the baby and all that shit."

Male voice: "[inaudible]."

Female voice: "It's your board hearing, we'll go."

Male voice: "We'll go."

Female voice: "Dude, that's fucked up though man. I fucking feel for you. I'm so mad at you."

Male voice: "I guess my homeboys -- my homeboys are a little crazy man. Fucking I told 'em to leave all the electronics, 'don't-don't touch nothing like that.' 'Leave it.'"

State's Ex. 23.

Torres identified the male speaker on the call as Mr. Craft based on, among other things, the information that was recorded along with the phone call. R.537. When a phone call is made from jail, a computer stores information related to the phone call including the caller's "inmate number, name...and the date and time" of the phone call. R.534. Additionally, in order to make an outgoing phone call, inmates "have to identify themselves." R.536. The phone call was listed under Mr. Craft's inmate number, the computer information was consistent with that list, and Mr. Craft identified himself on the recording. R.537. On cross-examination, Torres testified that on "one of Justin Craft's [phone calls], he actually called somebody, and then he allowed somebody else to speak to that person." R.539. Torres testified that he was aware of situations where other inmates use another inmate's code. R.539. Torres testified that he "reviewed an hour and a half of [Craft's] phone calls, and that person that was talking on this phone call was pretty much the same one as [heard in] the other... phone conversations." R.539.

SUMMARY OF THE ARGUMENT

Defense counsel provided ineffective assistance of counsel by not objecting to the admission of the two unreliable and suggestive witness identifications made of Mr. Craft by Davis (a pretrial out of court photo identification and an in-court identification). The admission of the unreliable eyewitness identifications violated defendant's due process rights under Utah's Constitution. In addition, defense counsel provided ineffective assistance of counsel by failing to object to the improper admission of an incriminating hearsay statement made by the co-defendants that placed Mr. Craft at the crime scene. This deficient performance resulted in depriving defendant of his Sixth Amendment right to confront his accuser. And, even if the two aforementioned instances of deficient performance are not sufficiently prejudicial to warrant reversal on their own, when taken together, they are cumulatively prejudicial. Lastly, there was insufficient evidence to convict Mr. Craft of aggravated robbery and aggravated burglary when the only evidence of these crimes was two unreliable eyewitness identifications of Mr. Craft, an improperly admitted co-defendant hearsay statement, and an ambiguous jail phone call.

ARGUMENT

- I. Trial counsel was ineffective for failing to object to the introduction of two unreliable eyewitness identifications of defendant when the victim was pistol whipped during the incident and had only a limited view of his assailant.**

Two unreliable and unconstitutionally suggestive eyewitness identifications were improperly introduced as evidence in this matter without being objected to by defense counsel. This was ineffective assistance. "To establish ineffective assistance of counsel,"

Mr. Craft “must show that (1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness and (2) counsel’s performance was prejudicial in that there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Miller*, 2012 UT App 172, ¶9, 281 P.3d 282. In addition, defendant must “rebut the strong presumption that under the circumstances, the challenged action [or omission] might be considered sound trial strategy.” *State v. Litherland*, 2000 UT 76, ¶19, 12 P.3d 92 (internal quotation marks omitted). Counsel performed deficiently by failing to object to the pre-trial, out of court, photo identification of Mr. Craft that was made by Davis in his interview with Torres. Counsel also performed deficiently in failing to object to the in court identification of Mr. Craft made by Davis at trial. Furthermore counsel’s deficient performance prejudiced Mr. Craft.

A. Defense Counsel Performed Deficiently by Failing to Object to the Eyewitness Identifications.

In *State v. Ramirez*, the Utah Supreme Court outlined a test to be applied for a proper admissibility of eyewitness identifications. 817 P.2d 774, 781 (Utah 1991). The *Ramirez* court held that the state due process clause of Utah’s Constitution requires “an in-depth appraisal of the identification’s reliability” because only reliable identifications pass constitutional muster. *Id.* at 780. *See also* Utah Const. art I, § 7. Furthermore, “the resulting reliability determination [under Utah’s Constitution] will meet or exceed in rigor the federal standard.” *Id.* “The ultimate question to be determined is whether, under the totality of the circumstances, [an] identification [is] reliable.” *Id.* at 781. To

determine reliability, an eyewitness identification must be analyzed according to a list of “pertinent factors” as originally outlined in *State v. Long*, 721 P.2d 483, 488 (Utah 1986).

These factors are:

- (1) The opportunity of the witness to view the actor during the event;
- (2) the witness’s degree of attention to the actor at the time of the event;
- (3) the witness’s capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness’s identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer’s.

Ramirez, 817 P.2d at 781 (brackets omitted) (quoting *Long*, 721 P.2d at 493).⁷

The list is “not an exhaustive or exclusive list of factors that may be considered.” *State v. Hubbard*, 2002 UT 45, ¶ 27, 48 P.3d 953. These factors take into account “the deleterious effects that certain variables can have on the accuracy of the memory process of an honest eyewitness.” *Ramirez*, 817 P.2d at 780 (quoting *Long*, 721 P.2d at 490).

In *Ramirez*, the Utah Supreme Court applied the “pertinent factors” in analyzing whether the eyewitness identification in that matter was reliable, admissible, and consistent with state due process guarantees. 817 P.2d at 781. In that case, two armed

⁷ The federal standard outlined in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), is similar, but also includes the level of certainty demonstrated by the witness and the length of time between the crime and the confrontation. The federal standard is not the focus of this argument because the Utah standard is both more rigorous and better suited to the facts in this case. However, because the criteria are similar and the due process analysis under the Utah Constitution is “as stringent as, if not more stringent than, the federal analysis,” a violation under the Utah Constitution would also be a violation of federal due process. See *Ramirez*, 817 P.2d at 784.

robbers confronted three victims, stole from them, and fled. *Id.* at 776. Shortly afterward, while it was still dark, the police conducted a show-up procedure. *Id.* “It was approximately one o’clock in the morning. Ramirez, a dark-complexioned Apache Indian, was handcuffed to a chain link fence. He was the only suspect present and was surrounded by police officers. The police turned the headlights and spotlights from the police cars on Ramirez to provide enough light. The witnesses viewed Ramirez by looking at him from the back seat of a police car.” *Id.* at 777. One of the witnesses identified Ramirez. *Id.* The “defense moved to suppress the out-of-court and in-court identifications” because “the initial identification procedure gave rise to a substantial likelihood of irreparable misidentification,” which tainted subsequent identifications. *Id.* The admissibility of the eyewitness identifications in *Ramirez* was “an extremely close case,” but the court ultimately found the show-up procedure admissible. *Id.* at 784.

This Court recently applied the *Ramirez* factors in *State v. Lujan* in determining that the trial court erred in admitting unreliable eyewitness identifications. 2015 UT App 199, ¶ 19, 357 P.3d 20, 25 *cert. granted*, 364 P.3d 48 (Utah 2015). In *Lujan*, the witness “came face-to face” with a man who was trying to rob him while he sat in his car in his driveway. *Id.* at ¶ 2. The witness became instantly afraid once he noticed that the man had either a gun or a knife. *Id.* at ¶ 3. The witness identified the robber as “Spanish” and that he “had black and white longish hair, which was straight and poked out of the beanie to mid-ear length.” *Id.* at ¶ 2 (internal quotations omitted). The witness later identified the defendant at a show-up that occurred soon after the robbery and identified him again at the preliminary hearing. *Id.* at ¶ ¶5,8. By contrast, at a post-arrest line-up, the eyewitness

was unable to identify anyone as being the robber, but he did note that the defendant and another man “looked familiar” to him. *Id.* at ¶ 7. In applying the *Ramirez* factors, this Court held that the trial court erred in admitting the evidence of the show-up and in-court identifications because the eyewitness description of the robber did not match defendant. *Id.* at ¶¶ 13, 14. In addition, the witness failed to identify the defendant at the line-up and the race of the eyewitness was different than the race of the defendant. *Id.* at ¶¶ 13, 14.

Consideration of all the *Ramirez* factors and the totality of the circumstances in Mr. Craft’s case leads to the conclusion that the two eyewitness identifications made by Davis were legally insufficient to “warrant a preliminary finding of reliability and, therefore, admissibility.” *See Ramirez*, 817 P.2d at 784. Furthermore, because the application of the *Ramirez* factors indicates that the two eyewitness identifications were so unreliable that they should have been excluded as evidence at trial, defense counsel committed prejudicial error in not objecting to the improper admission of both identifications on the ground that they violated Mr. Craft’s due process rights under Utah Const. art I, § 7.

1. The Opportunity of the Witness to View the Actor During the Event

The first reliability factor analyzes the witness’s opportunity to view the actor. “Pertinent circumstances include the length of time the witness viewed the actor; the distance between the witness and the actor; whether the witness could view the actor’s face; the lighting or lack of it; whether there were distracting noises or activity during the observation; and any other circumstances affecting the witness’s opportunity to observe the actor.” *Ramirez*, at 782. In Mr. Craft’s case, the eyewitness, Davis, had an extremely

short period of time to view the robbers, who were strangers to him. R.406. Davis testified that he first saw two of the robbers during the “five to ten minutes” that he was held at gunpoint in his bedroom. R.398. Davis’s ability to see the robbers was drastically hindered because even though the lights were on, the men were wearing ski masks that obscured their faces. R.397-398, 411. Davis was initially only able to see the “part of [their] faces” “around [their] eyes.” R.397-398. Davis could only see that one of the men had “white” skin. R.398, 401.

During the “five to ten minutes” when Davis was in the living area, he saw one of the men remove his mask. R.401,412. However, Davis’s opportunity to view this man was limited because Davis was face down on the carpet in a “sacrificial position[,]” so he was only able to view the man without the mask in his “peripheral vision.” R.400-01,412-15. This man was never directly in front of Davis, and at times was directly behind him. R.415. The living area was lit by the ambient light coming from a storage closet, while the rest of the house was “pitch black.” R.411-13,437-38. During this entire time, Davis was held at gunpoint. R.400-01. As the robbers were leaving, they “shut off all the lights” and used their flashlights to “blind[] [Davis] with their lights” so that they could not be seen. R.405,412,417. Thus, Davis never had an opportunity to directly view the robbers in his house, without obstruction, for a lengthy period of time, and with good lighting. *Cf. Lujan*, 2015 UT App 199 at ¶ 24 (Pearce, J. dissenting) (the witness observed the robber “face to face” for several seconds” when the “[d]efendant’s face was uncovered.”).

2. The Witness's Degree of Attention to the Actor at the Time of the Event

Other circumstances affecting the witness's ability to observe and remember a participant in a crime includes whether the degree of attention to an actor is distracted by a second actor or other object (i.e. a weapon). *See Ramirez*, 817 P.2d at 783 (stating "the [witness] testified at trial that he stared at the gunman, trying to get a good description, and that he did not see the pipe man as clearly as he saw the gunman.") *See also Lujan*, 2015 UT App 199, at ¶ 3 (where the witness became instantly afraid once he noticed that the man had either a gun or a knife.).

Expert witness Dr. Dodd testified that "the more time someone spends looking at the weapon, the less time they spend looking at the face," which "disrupt[s] later facial recognition." R.567. Here, Davis was held at gunpoint for a significant amount of time throughout the entire incident. R.398-99, 401, 413-14, 429. In addition, Davis was initially distracted by being hit and pistol whipped, leaving his "whole face [] bloody." R.395,398,400-01,412-14. Davis's attention was also distracted by the fact that there were three, not just one, uninvited men in his house. R.429. He was also distracted by his concern for his mother once she entered the room and he became focused on her in order to apologize to her. R.401,404,415-416. Thus, a number of distractions vied for Davis's attention while the robbers were in his house.

3. The Witness's Capacity to Observe the Event, Including His Physical and Mental Acuity

The third factor is the witness's capacity to observe the event. "Here, relevant circumstances include whether the witness's capacity to observe was impaired by stress

or fright at the time of the observation, by personal motivations, biases, or prejudices, by uncorrected visual defects, or by fatigue, injury, drugs, or alcohol.” *Ramirez*. at 783.

“Contrary to much accepted lore, when an observer is experiencing a marked degree of stress, perceptual abilities are known to decrease significantly.” *Long*, 721 P.2d at 489.

Here, Davis was sound asleep and awoken to “two men punching [him] in the face” who dragged him from his bed and pistol whipped him. R. 395, 398, 409. Dodd testified that Davis “must have been quite frightened” and that Davis was under a level of stress “at a point where it disrupts [one’s] mental processes.” R.567. After the men left, Davis’s mother noticed he was “bloody from head to toe” and “his eyes ... had so much blood in them” that she thought the men “had done something to his eyes.” R.431,439. Thus, Davis’s capacity to observe the event was limited not only by his heightened level of stress, but also by the extreme pain he would have experienced from the wound on his forehead that covered his face and eyes in blood. R.395,431,439,567.

4. Whether the Witness’s Identification Was Made Spontaneously and Remained Consistent Thereafter, or Whether It Was the Product of Suggestion

Relevant considerations under this reliability factor include the length of time between the incident and the identification, “instances when the witness or other eyewitnesses to the event failed to identify defendant; instances when the witness or other eyewitnesses gave a description of the actor that is inconsistent with defendant; and the circumstances under which defendant was presented to the witness for identification.” *Ramirez*, 817 P.2d at 783. A show-up is most reliable when the eyewitness was already familiar with the suspect. *E.g.*, *State v. Poteet*, 692 P.2d 760, 763 (Utah 1984). The

eyewitness is this case, Davis, however, had never seen the man who robbed him before and did not know Mr. Craft. R.406.

In addition, the length of time between the incident and the initial identification of Mr. Craft underscores the unreliability of the identification. The exact time between the incident and the initial photo identification was disputed, as Davis testified he completed the initial photo identification “the next day or the day after” the incident, while Kirby and Torres testified the photo identification occurred at around 9:00 a.m. the day of the incident. R.421,434-35,531. Torres further testified that between seven and eight hours had passed between the incident and the initial photo identification. R.544. Under either Davis’s or Torres’s timeline, there was a significant amount of time that elapsed between the robbery and the photo line-up. That is, unlike in *Ramirez*, where the time between the incident and the identification was described as “minimal” – between “thirty minutes to an hour” – here the significant lapse of time between the incident and the initial identification was from as little as seven up to 48 hours. *Ramirez*, 817 P.2d at 783; R.421,434-35,531,544.

Furthermore, the eyewitness’s description of the observed perpetrator in this case was not immediately recorded, was not detailed, and it did not accurately identify Mr. Craft. R. 543,569. That is, Davis did not provide a written statement to police about the incident prior to the photo line-up. R.543. When Davis did provide police officers a description of the robber who took off his mask; Davis described him as being “male, white, with reddish-brown hair and a goatee.” R.572, 544. Dodd, however, noted that the reddish-brown hair “didn’t appear in... any of the people in the photo spread.” R.569.

Thus, like in *Lujan*, the discrepancies between the initial description and Mr. Craft weigh in favor of excluding the photo identification in this matter. *See Lujan*, 2015 UT App 199, ¶¶13-14.

In addition, Davis's identification of Mr. Craft was the product of suggestion. That is, Davis testified that he saw the photos of the suspects on the news prior to making any identifications of Mr. Craft. R.210,421,434-35,531-32. Thus, Davis's own testimony highlights the fact that his identifications were the product of improper suggestion by the news reports that he saw prior to identifying Mr. Craft. In addition, the procedures implemented by Torres in the photo identification reveals that Davis's identification of Mr. Craft was the product of suggestion. Specifically, after Davis indicated that the photo of Mr. Craft "looked familiar," Torres asked Davis if the man in the photo was the same man that stood next to Davis's bed. R.546. Davis responded "yes." R.546. Davis, however, testified that when the men were in his bedroom, both of them were wearing masks, so he would not have been able to see the facial features of the man who stood next to his bed. R.397-98,411. Furthermore, Torres' question to Davis is even more egregiously suggestive than Dr. Dodd's example of a police officer's "subtle hint" to a witness to "[l]ook at this [photo] carefully." R.575. Davis only said that Mr. Craft looked familiar, he said nothing about Mr. Craft being one of the men involved in the robbery. R.546. And, although Dr. Dodd described the photo identification was "so far as I know... objectively done," Dodd testified that a "double-blind procedure" is preferable and was not done in this matter. R.576. Ultimately, the lack of a "double-blind" photo identification opened up the possibility that Davis was influenced by "subtle hints,

unintended by the police officer.” R.575. Further, Torres did not ask Davis about his “degree of certainty” after the identification. R.573. Torres also failed to tell Davis that the police would continue to investigate “regardless of whether [Davis] pick[ed] anyone.” R.571-72. Thus, there are a number of factors surrounding the photo identification that indicate the unreliability of Davis’s eyewitness testimony against Mr. Craft.

5. The Nature of the Event Being Observed and the Likelihood that the Witness Would Perceive, Remember and Relate It Correctly

The Utah Supreme Court noted that “[t]his last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer’s.” *State v. Long*, 721 P.2d 483, 493 (Utah 1986). As explained above, the stressful nature of the event diminishes the likelihood that the witness was able to perceive and remember the robber.

Even when the facts surrounding the identification are viewed in the light most favorable to the prosecution, the totality of the circumstances suggests that the eyewitness identification from the show-up was unreliable and should not have been admitted. The eyewitness provided a very brief and inaccurate description of a man he saw during a highly stressful robbery and burglary, with multiple distractions, and for a brief period of time.

An application of the five *Ramirez* factors shows that the out of court, pre-trial photo identification was improperly admitted at trial. In addition, the in-court identification was tainted both by the earlier photo identification and by the suggestive

circumstances of a courtroom identification. *See State v. Mincy*, 838 P.2d 648, 657 (“unnecessarily suggestive” identification procedures give rise to “the possibility of irreparable misidentification”). Mr. Craft was the only defendant sitting at counsel table and the only realistic choice. *Lujan*, 2015 UT App 199, ¶8.

The circumstances of this case indicate that both eyewitness identifications were suggestive and unreliable and therefore violated Utah’s due process clause. Defense counsel failed to object to the introduction of both of Davis’s identifications of Craft and erred in not doing so as demonstrated by the application of the *Ramirez* factors in this matter. In addition, there was no strategic reason for defense counsel to not object to the admission of the eyewitness identifications. *See State v. Litherland*, 2000 UT 76, ¶19. That is, eyewitness identifications substantially impact and persuade a jury verdict so there would be no strategic reason to allow the jury to hear evidence of unreliable identifications that implicated Mr. Craft in the crime. *See Lujan*, at ¶19.

B. Defense Counsel’s Deficient Performance Was Prejudicial.

Counsel’s deficient performance prejudiced Mr. Craft. The harmless beyond a reasonable doubt standard applies to an eyewitness identification that is admitted in violation of Utah’s due process clause. *See State v. Lujan*, 2015 UT App 199, ¶16, 357 P.3d 20, *cert granted*, 364 P.3d 48 (Utah 2015). (“[T]he State bears the burden of convincing us that the improperly admitted eyewitness identifications were harmless beyond a reasonable doubt.”). Additionally, even under the test used for non-constitutional errors for ineffective assistance of counsel claims, the introduction of the unreliable witness identifications prejudiced Mr. Craft in this case. In order to establish

prejudice for a non-constitutional error regarding ineffective assistance of counsel, Mr. Craft must demonstrate “a reasonable probability that, but for counsel’s [deficient performance], the result of the proceeding would have been different.” *State v. Eyre*, 2008 UT 16, ¶17, 179 P.3d 792 (internal quotation marks omitted). “This ‘reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *Id.*

Here, the State’s case relied heavily on the problematic eyewitness identifications. That is, apart from the two eyewitness identifications, there was a dearth of evidence to support that Mr. Craft was one of the three men involved in the robbery and burglary at Davis and Kirby’s residence on March 12, 2013. R.394. Neither Mr. Craft’s fingerprints nor DNA were found on any of the recovered stolen items. R.547-548. The vehicle that was searched next to trailer 14 did not belong to Craft. R.453,458,547,612. In addition, the ambiguous phone call made from the jail did not contain any incriminating statements and did not place Mr. Craft at Davis and Kirby’s residence at the March 2013 incident. The eyewitness identification was therefore the State’s strongest evidence in this case. *See Lujan*, 2015 UT App, ¶19 (“When the eyewitness testimony is taken away, the State loses its strongest evidence against Defendant, and we cannot say that the ... error in admitting the unreliable eyewitness identifications was harmless beyond a reasonable doubt.”). Thus, had the problematic identifications been objected to and excluded from trial, there was a reasonable probability that the jury would have acquitted Mr. Craft.

For the foregoing reasons, counsel was ineffective for failing to object to the introduction of the two unreliable eyewitness identifications in this matter. Furthermore, there is no strategic reason that can be inferred from trial counsel’s failure to object to the

two eyewitness identifications. *See Litherland*, 2000 UT 76, ¶19. Therefore, this Court should reverse Mr. Craft's convictions for aggravated robbery and aggravated burglary and remand for a new trial.

II. Trial counsel was ineffective for failing to object to the introduction of a hearsay statement by the co-defendants that implicated defendant in the crime, in violation of defendant's Sixth Amendment right to confront and cross examine his accusers.

Before trial, defense counsel filed a motion to sever trial of co-defendants pursuant to *Bruton v. United States*, 391 U.S. 123 (1968). R.46. The motion said that severance was required "because the self-incriminating admissions of the co-defendants [would] be used against each of them at trial, but said admissions [could not] be admitted as evidence in the trial of Mr. Craft." R.46. The trial court granted Mr. Craft's motion and ordered that Mr. Craft's case be tried separately from the co-defendants. R.70-71.

At trial, the State did not call either of the co-defendants, Jayvaughn Tyler Firethunder and Desmond Lamar Redkettle, as witnesses in its case. R.70. Nevertheless, an incriminating hearsay statement made against Mr. Craft by the co-defendants was improperly introduced at trial by a State's witness, Detective Torres. During a redirect examination of Torres, the State asked him to explain how he went about choosing which pictures to put in the photo line-up. R.551-52. The following exchange took place between the State and Torres:

Counsel for State: And the defense counsel mentioned hair, goatee and white skin as the characteristics discussed with Alex during his description before the lineup, correct?

Torres: Yes.

Counsel for State: Aside from those, are there any other factors other than just the similarity to the defendant that guided you in selecting the lineup photographs?

Torres: *As far as the other two defendants saying he was there.*

Counsel for State: No. Let me --- the --- when you were picking the photographs out ---

Torres: Oh.

Counsel for State: --- was there any other information --- you said that Alex mentioned his hair, the goatee and the fact that he was white –

Torres: Light skinned.

R.551-52 (emphasis added).

Defense Counsel failed to object to the introduction of the improper hearsay evidence in this case and failed to move for a mistrial. R.551-52. Defense Counsel's failure to adequately respond to the improper hearsay testimony constituted ineffective assistance of counsel because of the prejudicial impact of the hearsay statement. To prevail on an ineffective assistance of counsel claim for this issue, Mr. Craft "must show that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) counsel's performance was prejudicial in that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Miller*, 2012 UT App 172, ¶9, 281 P.3d 282.

A. Defense Counsel Performed Deficiently by Failing to Object to the Introduction of the Incriminating Co-defendant Hearsay Statement.

The Confrontation Clause provides that “in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.” U.S. Constitution, Amend. VI. *See also Crawford v. Washington*, 541 U.S. 36, 42 (2004). A defendant is deprived of his Sixth Amendment right to confront his accusers when a nontestifying co-defendant hearsay statement is introduced at trial that implicates defendant in the crime. *Bruton*, 391 U.S. at 132. The incriminating statements of a co-defendant are not only “devastating to the defendant but their credibility is inevitably suspect.” *Id.* at 136. Furthermore, “the unreliability of such evidence is intolerably compounded when the alleged accomplice ... does not testify and cannot be tested by cross-examination” *Id.*

Here, Torres improperly informed the jury that the co-defendants placed Mr. Craft at the crime scene. The co-defendants’ statement constituted testimonial hearsay because it was an out-of-court statement that was offered for the truth of the matter asserted. Utah R. Evid. 801(c)(2); *see also State v. Olsen*, 860 P.2d 332, 335 (Utah 1993). In addition, it was testimonial hearsay because the statement had a “primary purpose of establishing or proving past events potentially relevant to later criminal prosecution.” *See State v. McNeil*, 2013 UT App 134, ¶ 34, 302 P.3d 844. Testimonial hearsay is only admissible in a criminal case when the declarant is unavailable and the defendant previously had an opportunity for cross examination. *Crawford*, 541 U.S. at 68. Here, because defendant never had an opportunity to cross examine the incriminating statement, it should not have

been introduced at trial. Its admission, therefore, violated both the Confrontation Clause of the U.S. Constitution and the hearsay rules. *Id.* See also Utah R. Evid. 802.

Furthermore, trial counsel performed deficiently by not objecting to the hearsay statement that implicated defendant in the crime and by not moving for a mistrial once the statement was uttered. In determining whether trial counsel's failure falls below an objective standard of reasonableness, it is appropriate for this Court to determine whether a legitimate trial strategy existed. See *Strickland v. Washington*, 466 U.S. 668, 689–90 (1984). The presumption that counsel's performance was part of a sound trial strategy may be overcome when "there is a lack of conceivable tactical basis for counsel's actions." *State v. King*, 2012 UT App 203, ¶14, 283 P.3d 980 (internal quotes omitted). Here, there was no strategic trial reason to not object to the hearsay statement and to not ask for a mistrial as it was inherently unreliable and implicated Mr. Craft in the crime. This statement was "improper and inflammatory" in nature and had no conceivable beneficial value to the defendant. *State v. Larrabee*, 2013 UT 70, ¶ 26, 321 P.3d 1136. Thus, because the co-defendant hearsay statement was both improper and inflammatory, defense counsel's failures to object to the statement and move for a mistrial were objectively deficient.

B. Defense Counsel's Deficient Performance Was Prejudicial

Counsel's deficient performance prejudiced Mr. Craft. A defendant "is prejudiced by counsel's actions only if the result of the proceedings would have been different absent the claimed deficiency." *State v. Greuber*, 2007 UT 50, ¶ 9, 165 P.3d 1185. "To show prejudice in the ineffective assistance of counsel context, the defendant bears the

burden of proving that counsel's errors 'actually had an adverse effect on the defense' and that 'there is a reasonable probability that, but for counsel's ... errors, the result of the proceeding would have been different.'" *State v. Santana–Ruiz*, 2007 UT 59, ¶ 20, 167 P.3d 1038 (quoting *Strickland*, 466 U.S. at 693–94). "A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Taylor v. State*, 2007 UT 12, ¶ 56, 156 P.3d 739 (quoting *Strickland*, at 694).

However, here the deficient performance deprived Mr. Craft of his constitutional right to confront his accusers. *See Crawford*, 541 U.S. at 68. Because the deficient performance "result[ed] in the deprivation of a constitutional right, [this Court] [should] apply a higher standard of scrutiny, reversing the conviction unless [it] find[s] the error harmless beyond a reasonable doubt.'" *State v. Crowley*, 2014 UT App 33, ¶17, 320 P.3d 677. Regardless, the error prejudiced Mr. Craft under either standard.

Here, there is a reasonable probability that but for the admission of the co-defendant's inadmissible hearsay statement Mr. Craft would have not been convicted. Other than the improper, inflammatory, and unreliable hearsay statement, there was no reliable evidence that placed Mr. Craft at the crime scene. *See infra*, Part IV. The only other evidence in this case against Mr. Craft was unreliable eyewitness testimony and an ambiguous phone call, neither of which placed Mr. Craft at the crime scene beyond all reasonable doubt. *See supra*, Part IA; *see also infra*, Part IV. It is therefore likely that the jury improperly relied on the improper co-defendant hearsay statement to find that Mr. Craft was present at the crime scene. Thus, there is a reasonable probability that the jury

would have acquitted Mr. Craft if the improper co-defendant statement had not been introduced at trial.

III. Even if the Instances of Deficient Performance Identified in Points I and II Are Not Sufficiently Prejudicial, Taken Together They Are Cumulatively Prejudicial.

Under the doctrine of cumulative error, this Court will reverse if the cumulative effect of the several instances of deficient performance undermines the Court's confidence that a fair trial was had. *State v. Campos*, 2013 UT App 213, ¶61, 309 P.3d 1160. In other words, the Court will reverse if there is a "reasonable probability" of a different outcome had none of the instances of deficient performance occurred. *Id.* at ¶24.

Even if the two instances of deficient performance identified in Points I and II are not individually prejudicial, they are cumulatively prejudicial. Point I showed that counsel performed deficiently by failing to object to the introduction of two unreliable witness identifications of Mr. Craft. *See supra* Point I. The absence of this deficient performance increases the probability that the jury would have acquitted Mr. Craft of aggravated robbery and aggravated burglary. *See supra* Point I.

Point II showed that counsel performed deficiently by failing to object to the introduction of improper co-defendant hearsay statements that incriminated Mr. Craft. *See supra* Point II. The absence of this deficient performance increases the probability that the jury would have acquitted Mr. Craft of aggravated robbery and aggravated burglary. *See supra* Point II.

And without either of the instances of deficient performance shown in Points I and II, there is a reasonable probability of a different outcome. Therefore, under the

cumulative prejudice doctrine, this Court should reverse Mr. Craft's convictions for aggravated robbery and aggravated burglary and remand for a new trial.

IV. The evidence was insufficient to support Mr. Craft's convictions for aggravated robbery and aggravated burglary when the only evidence of these crimes were two unreliable eyewitness identifications of defendant, an improperly admitted co-defendant hearsay statement, and an ambiguous jail phone call.

This Court will reverse a jury conviction for insufficient evidence when, viewing “the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict ... the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.” *State v. Shumway*, 2002 UT 124, ¶15, 63 P.3d 94. “A guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.” *Id.* at ¶18 (internal quotation marks and alterations omitted). The Court “cannot take a speculative leap across a remaining [evidentiary] gap in order to sustain a verdict.” *Id.*; see also *State v. Cristobal*, 2010 UT App 228, ¶7, 238 P.3d 1096 (stating that a jury verdict must be based on reasonable inferences and not just “speculation and conjecture.”). “Every element of the crime charged must be proven beyond a reasonable doubt.” *State v. Harman*, 767 P.2d 567, 568 (Utah Ct. App. 1989). “If the evidence does not support those elements, the verdict must fail.” *Id.*

A person commits first degree aggravated robbery “if in the course of committing robbery, he (a) uses or threatens to use a dangerous weapon as defined in Section 76-1-

601; (b) causes serious bodily injury upon another; or (c) takes or attempts to take an operable motor vehicle.” Utah Code §76-6-302, R.252.

In *State v. Watson*, 684 P.2d 39 (Utah 1984), the Utah Supreme Court held that there was sufficient evidence to convict the defendant of aggravated robbery. There, two eyewitnesses identified the defendant as being the man who entered a 7-Eleven convenience store to rob a store clerk at gun point. *Id.* at 40. Both eyewitnesses described the man as “wearing a dark cowboy hat and a leather jacket.” *Id.* at 40. Defendant’s brother eventually confirmed that the unique articles identified by the eyewitnesses belonged to the defendant. *Id.* at 40. The defendant argued that there was insufficient evidence to support the jury’s finding of guilt for aggravated robbery because of the discrepancies that existed between defendant’s characteristics and the descriptions given by the eyewitnesses, and that one of the eyewitnesses could not identify him at the preliminary hearing as being the robber. Nevertheless, the *Watson* court held that the evidence was sufficient to support the verdict because the eyewitness identified the defendant at “a photo array shortly after the incident... [and] identified the defendant at trial. When this evidence *is combined with* the evidence previously outlined which favors the jury’s verdict, it is clear... [that] the jury verdict is amply supported.” *Id.* at 41 (emphasis added). Thus, the *Watson* court pointed to additional evidence other than the photo array and in court identification (i.e. the unique clothing articles that tied the defendant to the crime) in denying the defendant’s insufficiency claim. *See also State v. DeJesus*, 712 P.2d 246, 247 (Utah 1985) (the Utah Supreme Court held that there was sufficient evidence to support the defendant’s conviction of aggravated robbery where *in*

addition to the eyewitness testimony, defendant's palm print and thumb print were found at the scene of the robbery.)

By contrast, in *United States v. Bonner*, 648 F.3d 209 (4th Cir. 2011), the court held that there was insufficient evidence to support defendant's conviction for interference with commerce through robbery. In *Bonner*, two men robbed a North Carolina fast food restaurant. *Id.* at 211. During the incident, the two men were armed and were wearing baseball hats, hoodies, and pantyhose over their faces. *Id.* A victim inside the store could only identify the men as being "African-American male" *Id.* After the robbers left, police stopped an SUV that matched the description of a vehicle that had been seen at the restaurant. *Id.* at 212. Inside the vehicle were the defendant's wallet, three cellphones, marijuana, and ammunition. *Id.* at 212. The cell phone records showed that five calls were made in fast succession around the same time that the robbers left the restaurant. *Id.* at 212. After reviewing video footage of the crime, police officers found a baseball hat near the restaurant that matched a hat worn by one of the robbers. *Id.* At trial, a DNA analysis pointed out that DNA found in the hat was consistent with the defendant's DNA. *Id.*

In *U.S. v. Bonner*, the defendant argued that all of the prosecution's evidence was insufficient to support his conviction of the robbery charge because "neither the presence of his wallet (which contained his driver's license) in the SUV nor the New York Yankees baseball hat with his DNA [were] sufficient to identify him as having been present at the scene of the robbery." 735 F.Supp.2d 405, 410 (M.D.N.C 2010) *aff'd* .648 F.3d 209 (4th Cir. 2011). In addition, the defendant pointed out that the phone calls made

from the cell phones found in the vehicle had “innocent and useful purposes” and had nothing to do with criminal activity. *Id.* at 410. The defendant pointed out that the prosecution impermissibly “stack[ed] inference upon inference in its effort to identify him as one of the robbers.” *Id.* at 410.

The *Bonner* court agreed with the defendant that the prosecution’s evidence was insufficient to support his convictions. In doing so, the court held that “the DNA demonstrates that a hat previously worn- perhaps predominately- by [the defendant] was present, not that [defendant] was the person wearing it during the robbery.” *Id.* at 411. In addition, “no eyewitness identified the robber the [prosecution] claims was [defendant] in any respect, by facial feature, height, or any other feature, other than that he was African-American male.” *Id.* at 411. The court also noted that the phone call evidence did not “demonstrate that [defendant] was present at the time of the robbery.” *Id.* at 412. The court held that while circumstantial evidence can often provide sufficient evidence to convict a defendant, the “evidence supporting identity” in this matter failed to “rise to the level that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of [the defendant’s] guilt beyond a reasonable doubt.” *Id.* at 413.

A person commits first degree aggravated burglary “if in attempting, committing, or fleeing from a burglary the actor or another participant in the crime: (a) causes bodily injury to any other person who is not a participant in the crime; or (b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or (c) possesses or attempts to use any explosive or dangerous weapon.” Utah Code §76-6-203, R.253.

In *State v. Martinez*, 2002 UT App 126, ¶¶44-47, 47 P.3d 115, this Court held that there was sufficient evidence to convict the defendant of aggravated burglary. In *Martinez*, two men entered a residence without permission and shot one of the inhabitants. *Id.* at ¶2. An eyewitness identified the defendant as the driver of the getaway car. *Id.* at ¶5. And, while the defendant was held in jail during the pendency of the case, he confessed to another inmate that he had participated in the crime. *Id.* at ¶9. Defendant argued against the reliability of the eyewitness identification because the witness “was focused on her children’s safety, her observation lasted only a few seconds, and the presentation of the photo spread [by the officer] was suggestive.” *Id.* at ¶20. In addition, the defendant argued that the problems related to the eyewitness identification highlighted the insufficiency of the evidence to support his conviction for murder and aggravated robbery as “there was no reliable or conclusive evidence to support a finding that he acted as a party to the offense.” *Id.* at ¶42. This Court, however, held that the evidence was sufficient to sustain the defendant’s convictions because the defendant confessed to the crime to a fellow jail inmate, defendant’s car clearly matched the car seen at the crime scene, and the eyewitness commented on the “unique eyes” of the perpetrator which matched defendant’s eyes. *Id.* at ¶43. Thus, in *Martinez*, this Court pointed to additional reliable evidence other than only the eyewitness identification evidence to deny the defendant’s insufficiency claim.

The marshaled evidence supporting Mr. Craft's aggravated robbery and aggravated burglary convictions, in the light most favorable to the verdict, is the following.⁸

1. Davis testified that while the three uninvited men were in his house on March 12, 2013, he was able to see that one of the men had "darker skin and [the other] one... white." R.397-398,401,416,424. In addition, at one point, the "white one" removed his mask. R.401,412. Davis was able to see the man without his mask in his "peripheral vision" while he was face down on the carpet in a "sacrificial position." R.412-413, 400-01.
2. Torres testified that approximately seven to eight hours after the incident, Davis met with Torres and was presented with a sequential photo line-up of six photos. R.434-35,531,544,572. Davis pointed to a photo of Mr. Craft and stated that he "looked familiar." R.418,545-56. In response, Torres asked Davis if the man in the photo was the same man that stood next to Davis's bed during the robbery incident. R.546. Davis responded "yes." R.546.
3. At the pre-trial interview between Davis and Torres, Davis said that the man who removed his mask at his house was "male, white with reddish-brown hair and [had] a goatee." R.544,572.
4. Using a GPS system, police officers were able to track the iPhone taken from Davis to a trailer park near Harrison Avenue, between Main Street and West Temple. R.407-08,488,450-51. When police officers arrived at the trailer park, two men ran in the direction of trailer 14 after seeing the police officers. R.482-83, 488. Mr. Craft was among the seven individuals who were located inside trailer number 14. R.529-30,555-556,608,613,621. *See also* State's Exhibits 37-42, photos depicting the seven individuals found in the trailer. A photo of Mr. Craft is State's Ex. 41. R. 556.
5. Officers obtained a search warrant to search a silver PT Cruiser that was located next to trailer 14. R.453,458. In the PT Cruiser, officers found marijuana, a gun holster, a mask, an I-pad, a flashlight, a set of keys, video games, and a jacket inside the vehicle. R.453,458-59,461-62,547,612.
6. During the pendency of the case, a phone call was made from the jail and computer information showed that the phone call came from Mr. Craft. R.534-39. This phone call was recorded by the jail, and in this phone call a male voice told a female "I guess my homeboys—my homeboys are a little crazy man. Fucking I

⁸ *See* Utah R. App. P. 24 (a)(9); *State v. Nielsen*, 2014 UT 10, ¶¶40-44, 326 P.3d 645.

told ‘em to leave all the electronics, ‘don’t-don’t touch nothing like that.’ ‘Leave it.’ R.534-39. *See also* State’s Ex. 23. Torres also testified at trial that during this same phone call, the female stated, “you messed up, what were you thinking?” to which the male responded, “I’m probably going to do a nickle.” R.538.

7. At trial, Davis pointed to and identified Mr. Craft after the prosecutor asked him if the white man who took off his mask during the March 2013 incident was in the courtroom. R.401-02.

Even when looking at the evidence in the light most favorable to the verdict, the prosecution presented insufficient evidence that Mr. Craft was one of the three men in Davis and Kirby’s house on March 12, 2013. In this matter, the prosecution impermissibly “stack[ed] inference upon inference in its effort to identify [Mr. Craft] as one of the robbers.” *Bonner*, 735 F.Supp.2d at 410; *see also State v. Cristobal*, 2010 UT App 228, ¶7, 238 P.3d 1096. Because the convictions were based only on speculation and remote possibilities of guilt, the convictions should be overturned. *See State v. Shumway*, 2002 UT 124, ¶18, 63 P.3d 94.

Like in *Bonner*, the evidence in this matter failed to show that Mr. Craft was present at the scene of the robbery. *Bonner*, 648 F.3d at 210. Mr. Craft was not in possession of the stolen items and none of Mr. Craft’s fingerprints nor DNA evidence was found on any of the items that were taken from Davis’s residence or on any of the items that were found in the PT Cruiser. R.476,465,548, 551. *Cf. DeJesus*, 712 P.2d at 246 (defendant’s palm print and thumb print were found at the scene of the robbery.). In addition, none of Mr. Craft’s personal items were found in the PT Cruiser. R.453-62. There was simply no evidence to connect Mr. Craft to the PT Cruiser as the vehicle didn’t belong to him but belonged to Desmond Redkettle. R.547. At best, the evidence

only showed that Mr. Craft was one of seven individuals found in trailer 14 and this evidence falls extremely short of proving that Mr. Craft was present at the crime scene. R.529-531; *see also Bonner*, 648 F.3d at 210.

In closing arguments, the State emphasized that Mr. Craft was the only individual in trailer 14 who matched the description given by Davis. R.609-10,621-622. This statement, however, was incorrect. First, Davis identified the intruder who took of his face as “male, white, with reddish-brown hair and a goatee.” R. 572. While Mr. Craft had a goatee, he did not have reddish-brown hair, but had a mostly shaved head with very little dark hair. *See State’s Ex. 41*. Second, there was another white male found in the trailer who did have reddish-brown hair. *See State’s Ex. 42*. This person was Dustin Kilpack. R. 529.

The eyewitness testimony was also not sufficient to place Mr. Craft at the crime scene. For reasons discussed *supra*, the eyewitness testimony was unreliable because it clearly failed to meet the factors outlined in *Ramirez*. 817 P.2d at 780. *See also supra*, Part IA. Davis’s ability to view the robbers was significantly hindered and the identifications he made of Mr. Craft were the product of suggestion. *See supra*, Part IA. In addition, the credibility of the eyewitness was suspect because Davis not only received immunity for his testimony which prevented him from facing drug charges, but he also lied about the marijuana that he had in his house. R.393,409,418. Davis testified that he had only “an eighth of marijuana” for personal use and denied being involved in drug distribution, yet a police search of his house uncovered much more than an eighth of an ounce of marijuana, as well as scales, pipes and bongs—all items “consistent with drug

distribution.” R.393 409,417-418 549-550. Thus, Davis had every reason to pick out Mr. Craft in order to prevent himself from facing criminal charges.

Unlike in *Watson* and *Martinez*, there was no other reliable independent evidence in addition to the unreliable eyewitness identifications that placed Mr. Craft at the crime scene. *See State v. Watson*, 684 P.2d 39 (Utah 1984); *see also State v. Martinez*, 2002 UT App 126. There were no unique clothing articles that tied Mr. Craft to the robbery. *See Watson*, at 40 (the unique dark cowboy hat and leather jacket tied the defendant to the crime scene). Likewise, there were not any unique facial characteristics that tied Mr. Craft to the Crime Scene. *See Martinez*, at ¶4 (the eyewitness noted the “unique eyes” of the perpetrator which matched defendant’s eyes).

In addition, unlike the facts in *Martinez*, there was no independent confession given by Mr. Craft to the crime. *Martinez*, at ¶9. The evidence of the phone call made from the jail did not constitute a confession by Mr. Craft. R.537-39. *See also* State’s Ex. 23. Even in assuming that Mr. Craft was the man talking in the phone call, none of the ambiguous statements contained in the call support the view that Mr. Craft admitted to being present at the crime scene. The statement, “I’m probably going to do a nickle” showed at most that Mr. Craft believed he would likely be incarcerated. R.538. This, however, is a far cry short of confessing to a crime. That is, believing that jail or prison time is imminent is, at best, Mr. Craft expressing his concern and anxiety that he may not prevail at trial. Simply being arrested for the felony charges could lead Mr. Craft to express his frustration that incarceration was an inevitable outcome. A proper reading of

this call is that Mr. Craft was reaching out for support because he was facing felony charges and fearing long-term incarceration. *See Bonner*, 735 F.Supp.2d at 409, 411-412.

In addition, the statement “I guess my homeboys... I told ‘em to leave all the electronics, ‘don’t -don’t touch nothing like that” did not place Mr. Craft at the crime scene. *See State’s Ex. 23*. That is, this ambiguous statement lacks any contextual information about who, what, when, or why it is being uttered. To infer that this statement means that Mr. Craft was admitting that on March 12, 2013 he was present at Davis and Kirby’s residence is only based on “speculative possibilities of guilt.” *State v. Shumway*, 2002 UT 124, ¶18; *see also State v. Cristobal*, 2010 UT App 228, ¶7. Just because the topic of electronics is being discussed in the jail phone call does not mean that this discussion is about the electronics taken from Davis and Kirby, and to think otherwise is an example of extreme speculation. *Shumway* at ¶18.

The admission of the improper co-defendant hearsay statement was also not sufficient to support the jury’s verdict. That is, this statement was inherently unreliable because of the self-serving interests of the co-defendants. *See infra*, Part II.

Ultimately, because there was no reliable eyewitness identification in this matter and no reliable independent evidence to place Mr. Craft at the crime scene, there was insufficient evidence to support the verdict. The jury thus took an impermissible “speculative leap” with the evidentiary gaps to convict Mr. Craft. *Shumway*, at ¶15.

This issue is preserved based upon defense counsel’s directed verdict motion. R.558. But to the extent the Court believes it is not, it should review the issue for plain error. *See State v. Mohamed*, 2012 UT App 183, ¶3, 282 P.3d 1066. “When challenging


the sufficiency of the evidence under the plain error doctrine, ‘a defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitted the case to the jury.’” *Id.* (quoting *State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346).

For reasons mentioned *supra*, the evidence was insufficient to support Mr. Craft’s convictions. The prosecution presented insufficient that Mr. Craft was one of the three uninvited men that entered Davis and Kirby’s residence on March 12, 2013. *See Holgate*, 2000 UT 74, ¶17. Therefore, the insufficiency of the evidence was so obvious and fundamental that the trial court erred in submitting the aggravated robbery and aggravated burglary charges to the jury. *Id.*

CONCLUSION

Based on the foregoing, Mr. Craft respectfully asks this Court to reverse and remand with an order of dismissal because the evidence was insufficient. Alternatively, Mr. Craft asks this Court to reverse and remand for a new trial because of the improperly admitted evidence regarding the unreliable eyewitness identifications and the improper co-defendant hearsay statement.

SUBMITTED this 2nd day of March, 2016.



TERESA L. WELCH
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, TERESA L. WELCH, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 2nd day of March, 2016.



TERESA L. WELCH

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 13,250 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.



TERESA L. WELCH

DELIVERED this 2 day of March, 2016.



Tab A

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
 :
vs. : Case No: 131902555 FS
JUSTIN PAUL CRAFT, : Judge: PAUL B PARKER
Defendant. : Date: August 24, 2015
Custody: Salt Lake County Jail

PRESENT

Clerk: shantec
Prosecutor: COOLEY, BRADFORD D
Defendant
Defendant's Attorney(s): BOWN, CHRISTOPHER G

DEFENDANT INFORMATION

Date of birth: January 11, 1990
Sheriff Office#: 311469
Audio
Tape Number: S34-10.41 Tape Count: 10.52

CHARGES

1. AGGRAVATED BURGLARY - 1st Degree Felony
- Disposition: 06/17/2015 Guilty
2. AGGRAVATED ROBBERY - 1st Degree Felony
- Disposition: 06/17/2015 Guilty

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED BURGLARY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than ten years and which may be life in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED ROBBERY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than ten years and which may be life in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

To run concurrent.

ALSO KNOWN AS (AKA) NOTE

JUSTIN CRAFT
LOUIE

Restitution Amount: \$2250.00 Plus Interest
Pay in behalf of: KIRBY

Restitution Amount: \$2000.00
Pay in behalf of: VICTIM

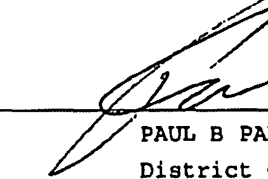
PROBATION CONDITIONS

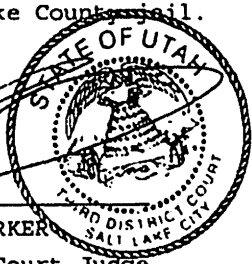
Defendant has a right to file a notice of appeal within 30 days of sentencing.

CUSTODY

The defendant is present in the custody of the Salt Lake County Jail.

Date: 8/25/15


PAUL B PARKER
District Court Judge



Tab B

U.C.A. 1953 § 76-6-203

§ 76-6-203. Aggravated burglary

(1) A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary the actor or another participant in the crime:

(a) causes bodily injury to any person who is not a participant in the crime;

(b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or

(c) possesses or attempts to use any explosive or dangerous weapon.

(2) Aggravated burglary is a first degree felony.

(3) As used in this section, "dangerous weapon" has the same definition as under Section 76-1-601.

Credits

Laws 1973, c. 196, § 76-6-203; Laws 1988, c. 174, § 1; Laws 1989, c. 170, § 6.

Notes of Decisions (54)

U.C.A. 1953 § 76-6-203, UT ST § 76-6-203
Current through 2015 First Special Session

End of Document

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U.C.A. 1953 § 76-6-302 (2012)

§ 76-6-302. Aggravated robbery

- (1) A person commits aggravated robbery if in the course of committing robbery, he:
 - (a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;
 - (b) causes serious bodily injury upon another; or
 - (c) takes or attempts to take an operable motor vehicle.
- (2) Aggravated robbery is a first degree felony.
- (3) For the purposes of this part, an act shall be considered to be “in the course of committing a robbery” if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

Credits

Laws 1973, c. 196, § 76-6-302; Laws 1975, c. 51, § 1; Laws 1989, c. 170, § 7; Laws 1994, c. 271, § 1; Laws 2003, c. 62, § 1, eff. May 5, 2003.

U.S. Const. amend VI

Amendment VI

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