

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**

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THE STATE OF UTAH,  
*Plaintiff/Appellee*

v.

JUSTIN PAUL CRAFT,  
*Defendant/Appellant.*

Appellant is incarcerated

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**REPLY BRIEF OF APPELLANT**

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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.

---

Jennifer Williams (15942)  
Assistant Attorney General  
Sean D. Reyes (7969)  
Utah Attorney General  
160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

*Attorneys for Plaintiff/Appellee*

Teresa L. Welch (9554)  
Salt Lake Legal Defender Assoc.  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111  
twelch@sllda.com  
(801) 532-5444

*Attorney for Defendant/Appellant*

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160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

*Attorneys for Plaintiff/Appellee*

Teresa L. Welch (9554)  
Salt Lake Legal Defender Assoc.  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111  
twelch@sllda.com  
(801) 532-5444

*Attorney for Defendant/Appellant*

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**INTRODUCTION**

Craft's opening brief argues that his trial counsel was ineffective for not objecting to the admission of two unreliable and suggestive witness identifications made of him by the victim of a robbery and burglary (a pretrial out of court photo identification and an in-court identification). In addition, Craft's trial counsel provided ineffective assistance by failing to object to the improper admission of an incriminating hearsay statement made by the codefendants that placed Craft at the crime scene. Craft argues that these two instances of deficient performance are individually and cumulatively prejudicial. Lastly, Craft's opening brief argues that there was insufficient evidence to convict him of aggravated robbery and aggravated burglary where the only evidence of these crimes was two

unreliable eyewitness identifications of Craft, an improperly admitted codefendant hearsay statement, and an ambiguous jail phone call.

In response, the State contends that Craft has not proved deficient performance or prejudice in either of Craft's ineffective assistance of counsel claims, that cumulative error does not exist, and that Craft did not preserve his insufficiency of the evidence claim, nevertheless, the evidence was sufficient to support Craft's convictions. For the reasons set forth in the opening brief and in this reply brief, the State is incorrect. *See Utah R. App. P. 24 (c)* ("Reply briefs shall be limited to answering any new matter set forth in the opposing brief.").

#### ARGUMENT

**I. Craft's convictions should be reversed because of the ineffective assistance of counsel that he received and because the evidence was insufficient to support his convictions of aggravated robbery and aggravated burglary.**

Craft's aggravated robbery and aggravated burglary convictions should be reversed because of the ineffective assistance of counsel he received and because the evidence was insufficient to support his convictions. Contrary to the State's arguments, (1) Trial counsel's failure to object to the admissibility of the unreliable and suggestive eyewitness identifications was objectively unreasonable and not a strategic decision; (2) Trial counsel's failure to object to the introduction of the hearsay statement made by the codefendants that placed Craft at the crime scene was objectively unreasonable and not a strategic decision; (3) Craft's insufficiency argument was preserved, properly briefed, and correct in



pointing out that there was insufficient evidence to support Craft's aggravated robbery and aggravated burglary convictions. *See* Appellee's Br. 19-53.

- A. Trial Counsel's failure to challenge the admissibility of the unreliable and suggestive eyewitness identifications was objectively unreasonable and not a strategic decision.

Trial counsel's deficient performance prejudiced Craft's defense when he failed to object to the unreliable and suggestive eyewitness identifications made by Davis as violating Craft's due process rights under Utah Const. art. I, §7. Applying the pertinent factors outlined in *State v. Long*, the pre-trial identification of Craft did not pass constitutional muster where Davis was pistol whipped during the incident and had only a limited view of his assailant, and where a police officer suggested that Craft was the man in Davis' house during the robbery prior to Davis saying so. *See* 721 P.2d 483, 488 (Utah 1986); *State v. Lujan*, 2015 UT App 199, ¶19, 357 P.3d 20, *cert. granted*, 364 P.3d 48 (Utah 2015); Utah Const. art I, §7; *see also* Appellant's Br. 19-31. Because the initial identification was constitutionally unreliable, it follows that the subsequent in court identification by Davis of Craft was also unreliable because it was tainted by this initial problematic identification. *See* Appellant's Br. 22, 30.

Trial counsel's decision to call Dr. Dodd to testify about the various problems relating to eyewitness identifications in lieu of objecting to the admission of the constitutionally problematic eyewitness identifications was not sound trial strategy and was objectively unreasonable. *See State v. Litherland*, 2000 UT 76, ¶19, 12 P.3d 92. Furthermore, it was not sound strategy for trial

counsel to give the jury a *Long* instruction that addressed the various issues that can affect the accuracy of any eyewitness identification in lieu of objecting to the admission of the constitutionally problematic eyewitness identification in the first place. R. 245, 591, 581-82, 584, 590-92; *see also Long*, 721 P.2d at 487-95. While trial counsel is not required to move for the suppression of eyewitness identifications in every case, it is objectively unreasonable to not seek suppression where numerous factors clearly indicate the constitutional unreliability of any given eyewitness identification. *See State v. Ramirez*, 817 P.2d 774, 778-81 (Utah 1991); *State v. Lopez*, 886 P.2d 1105, 1110-11 (Utah 1994); *Cf. State v. Mecham*, 2000 UT App 247, ¶¶13- 16, 9 P.3d 777 (where this Court determined that trial counsel had a sound strategy in not seeking to suppress the eyewitness identifications because the identifications did not have the type of constitutional problems as seen in *Ramirez*, 817 P.2d at 778-81 or *Lopez*, 886 P.2d at 1110-11).

In other words, no reasonable attorney would allow the jury to hear about constitutionally unreliable eyewitness identifications, like those that occurred in this case, only to attack their reliability at trial. *See id.* That is, because of the profound impact and influence that eyewitness identifications have on the jury, it is imperative to exclude unconstitutional eyewitness identifications altogether rather than seek to lessen their prejudicial impact on the jury. *See State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991) (pointing out the “great weight [that] jurors are likely to give eyewitness testimony.”) (internal quotations and citations

omitted); *see also State v. Clopten*, 2009 UT 84, ¶15, 223 P.3d 1103 (stating that “juries seemed to be swayed the most by the confidence of an eyewitness.”). Simply put, it is impossible to sufficiently ‘unring the bell’ of the prejudicial impact of an unconstitutional identification by trying to attack it after the jury has witnessed it. Thus, contrary to the State’s claims, it was not reasonable trial strategy for Craft’s counsel to not object to the introduction of the constitutionally unreliable eyewitness identifications because of the special importance that jurors place on this type of evidence. *See Appellee’s Br. 22-33*

In addition, contrary to the State’s argument, the record in this case supports that the eyewitness identifications did not pass constitutional muster and that trial counsel performed deficiently in not objecting to them. *See Appellee’s Br. 23; see also Utah R. App. P. 23B; State v. Lee*, 2014 UT App 4, ¶9, 318 P.3d 1164 (“A [rule 23B] remand is not necessary if the facts underlying the ineffectiveness claim are contained in the existing record.”). Here, the record clearly shows that 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. R. 400-01, 405, 412-17. During the few minutes when one of the men had removed his mask, Davis was face down on the carpet in a “sacrificial position[,]” so he could only see the maskless man in his “peripheral vision.” R. 400-01,412-15. He was also in a continued heightened level of stress as he was held at gunpoint and was hit and pistol whipped, leaving his “whole face [] bloody.” R. 395, 398-99, 400-01, 412-14, 429. Davis’s attention was also

distracted by his concern for his mother and the fact that there were three, not just one, uninvited men in his house. R.401, 404, 415-416, 429.

In addition, the length of time between the incident and the initial identification of Craft, disputed as being as little as seven up to forty-eight hours, underscores the unreliability of the identification. R.421,434-35,531,544; *Ramirez*, 817 P.2d at 783; *See Appellant's Br. 26*. And, Detective Torres failed to follow a number of safe-guard procedures for ensuring that any eyewitness identification made by Davis would be constitutionally reliable. *See Appellant's Br. 14*. Detective Torres also impermissibly suggested that Davis choose Craft's photo when Torres asked Davis if Craft was the man that he saw in his house during the burglary after Davis said that Craft "looked familiar." R. 546. Thus, because the record is clear that the eyewitness identifications did not pass constitutional muster, and the record also shows that at no time did trial counsel object to these identifications, the State is mistaken in arguing that Craft cannot prove trial counsel's deficient performance on this record. *See Appellee's Br. 23*.

The State is also mistaken in arguing that trial counsel's deficient performance did not prejudice his defense. *See Appellee's Br. 33*. That is, apart from the problematic eyewitness identifications, there was a dearth of evidence to support that Craft was one of the three men involved in the robbery and burglary at Davis and Kirby's residence R. 394. Neither 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 Craft at the scene of the crime. Thus, had the problematic identifications been objected to and excluded from trial, there was a reasonable probability that the jury would have acquitted Craft.<sup>1</sup>

B. Trial Counsel's failure to object to the introduction of the hearsay statement made by the codefendants that placed Craft at the crime scene was objectively unreasonable and not a strategic decision.

The State is mistaken in arguing that trial counsel's performance was not prejudicially deficient when counsel failed to object and ask for a mistrial after Detective Torres introduced a nontestifying co-defendant hearsay statement that placed Craft at the scene of the crime, thus depriving Craft of his Sixth Amendment right to confront his accusers. *See Crawford v. Washington*, 541 U.S. 36, 42 (2004); *see also* R. 551-52 (where Detective Torres responds to the prosecutor's questions about how the pictures for the photo identification were chosen by saying, "As far as the other two defendants saying *he was there.*") (emphasis added); *see also* Appellee's Br.23. Furthermore, because the

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<sup>1</sup> The State is correct in pointing out that this Court applies the reasonable likelihood prejudice standard in the context of ineffective assistance of counsel claims. *See* Appellee's Br. 21; *see also Strickland v. Washington*, 466 U.S. 668, 689 (1984). Craft has demonstrated that, in applying this standard, his trial counsel's deficient performance prejudiced his defense. *See* Appellant's Br. 31-32, 35-37. Furthermore, the gravity of trial counsel's deficient performance is highlighted by the fact that had trial counsel properly objected to the admission of the eyewitness identifications and introduction of the improper hearsay statement, the trial court's admission of these would be reviewed under the harmless beyond a reasonable doubt prejudice standard. *See State v. Lujan*, 2015 UT App 199, ¶16; *Crawford v. Washington*, 541 U.S. 36, 42 (2004); *see also* Appellant's Br. 30-32, 35-37.

codefendant hearsay statement was both improper and inflammatory, trial counsel's failures to object to the statement and move for a mistrial were objectively deficient and not sound trial strategy. *See State v. Larrabee*, 2013 UT 70, ¶26, 321 P.3d 1136; *State v. King*, 2012 UT App 203, ¶14, 283 P.3d 980.<sup>2</sup>

The State argues that Craft cannot establish deficient performance because trial counsel's decision to not object to the statement and to not move for a mistrial was a strategic determination to not draw unwarranted attention to the statement. *See* Appellee's Br. 40. The State also argues that trial counsel did not move for a mistrial because he made a strategic decision that the trial court would have likely not granted the motion. *Id.* at 42. However, the State is mistaken because it is not a strategic decision to not object to a hearsay statement when it is as inflammatory and improper as the statement at issue in this case. *See State v. Larrabee*, 2013 UT 70, ¶28 (stating that "given the improper and inflammatory nature of the prosecutor's remarks, it was not reasonable for defense counsel to stand silent."). In other words, no reasonable attorney would fail to object to the incriminating hearsay statement made by the codefendants where the defendant is precluded from his constitutional right to cross-examine the statement, and the statement places the defendant at the crime scene, but the

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<sup>2</sup> Contrary to the State's argument, a rule 23B remand was not necessary to decide Craft's ineffective of assistance of counsel claim as the record is clear that Detective Torres introduced the improper co-defendant hearsay statement and that defense counsel did not object to the statement. Furthermore, trial counsel's failure to object and ask for a mistrial was objectively unreasonable and not sound strategy. *See* Appellee's Br.39; *see also* Utah R. App. P. 23B; *State v. Lee*, 2014 UT App 4, ¶9, 318 P.3d 1164.

physical evidence in the case does not. *See* U.S. Const. amend. VI. *See also Crawford*, 541 U.S. at 42.

Furthermore, had defense counsel objected to the inflammatory and improper co-defendant hearsay statement and moved for a mistrial, the trial judge would have likely granted trial counsel's motion. Even though the prosecutor did not draw attention to the statement after it was offered by Detective Torres, the single utterance of the statement was extremely damaging and not innocuous because it unreliably placed Craft at the crime scene and Craft was not able to cross-examine this statement at trial. *Cf. State v. Duran*, 2011 UT App 254, ¶34, 262 P.3d 468 (In the context of a prosecutor giving improper remarks at trial, "a mistrial is not required where an improper statement is not intentionally elicited, is made in passing, and is *relatively innocuous* in light of all the testimony presented.") (emphasis added) (internal citations and quotations omitted).

There is also a reasonable probability that the jury would have acquitted Craft if the improper codefendant statement had not been introduced at trial. *See State v. Greuber*, 2007 UT 50, ¶9, 165 P.3d 1185. That is, apart from the improper, inflammatory, and unreliable hearsay statement, there was no reliable evidence that placed Craft at the crime scene. *See* Appellant's Br. 31, 36. Moreover, even if the two instances of deficient performance identified *supra* are not individually prejudicial, they are cumulatively prejudicial. *See* Appellant's Br. 37-38.

- C. Trial Counsel's insufficiency argument was preserved, properly briefed, and correct in pointing out that there was insufficient evidence to support the convictions in this case.

Contrary to the State's claim, trial counsel preserved the insufficiency of the evidence claim that the evidence did not support Craft's convictions for aggravated robbery and aggravated burglary. *See* Appellee's Br. 45; R. 558. Here, trial counsel made a timely directed verdict motion at the close of the State's evidence, and the trial judge's response to counsel reflects an understanding that counsel objected to the sufficiency of the evidence when he responded with "Mr. Davis testified and identified [Craft] as the person being there. That is *enough* [evidence] to take it to the jury, to allow reasonable minds to consider whether or not to find him guilty" R. 558 (emphasis added); *see also State v. Seale*, 853 P.2d 862, 874 (Utah 1993) (stating that "[a]lthough [trial counsel's] objection was vague, the judge clearly understood it when he ruled that the statement was admissible... [and] trial counsel [can] forego explaining his or her grounds for objection if the specific ground is apparent from the context, which it obviously must have been.") (internal quotations and citations omitted).

But in the event that this Court decides that counsel did not preserve the insufficiency of the evidence claim, this Court can reach this issue under the plain error doctrine, an argument sufficiently briefed in Craft's opening brief. *See State v. Mohamed*, 2012 UT App 183, ¶3, 282 P.3d 1066. *See also* Appellant's Br. 38-48. That is, in applying *State v. Watson*, 684 P.2d 39, 41 (Utah 1984), *United States v. Bonner*, 648 F.3d 209, 214-216 (4<sup>th</sup> Cir.), *State v. Martinez*, 2002 UT

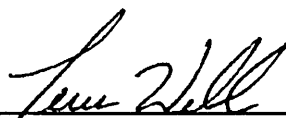


App 126, ¶¶44-47, 47 P.3d 115, and *State v. DeJesus*, 712 P.2d 246, 247 (Utah 1985), there was insufficient evidence to support Craft's convictions for aggravated robbery and aggravated burglary where there was no reliable evidence to place Craft at the crime scene. *See* Appellant's Br. 46-47. Here, Craft was not in possession of stolen items and none of his fingerprints nor DNA evidence was found at the crime scene. *Id. see also* R.476,465,548, 551. In addition, the well-established and abundant case law on this issue should have made the insufficiency in this case obvious and fundamental to the trial court. *See State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346); *see also* Appellant's Br. 38-48. Thus, contrary to the State's claim, a plain error analysis shows that there was insufficient evidence to support Craft's convictions for aggravated robbery and aggravated burglary, that the error should have been obvious to the trial court, and that Craft was prejudiced by the error because he now has two first degree felony convictions where the evidence failed to sufficiently place him at the crime scene.

CONCLUSION

For the reasons given above and in the opening brief, Craft respectfully asks this Court to reverse and remand with an order of dismissal because the evidence was insufficient. Alternatively, 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 codefendant hearsay statement.

SUBMITTED this 30<sup>th</sup> day of June, 2016.

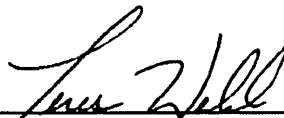


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TERESA L. WELCH  
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains less than 7,000 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 Georgia 13 point.



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TERESA L. WELCH

**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 30<sup>th</sup> day of June, 2016.

  
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TERESA L. WELCH

DELIVERED this 30 day of June, 2016.

  
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