

2014

**State of Utah, Plaintiff/Appellee, v. Levi Gene King, Defendant/
Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	
Plaintiff / Appellee,)	Case No. 20130223-CA
)	
v.)	
)	
LEVI GENE KING,)	
)	
Defendant / Appellant.)	

AMENDED BRIEF OF APPELLANT

Appeal from the Minutes - Change of Plea – Sentence, Judgment, Commitment entered
on January 18, 2013, in the Second District Court, Davis County, the Honorable Thomas
L. Kay, presiding

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ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Utah Court of Appeals is conferred with jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78A-4-103(2)(e).

STATEMENT OF RULE 23B MOTION FILING

Defendant filed a Rule 23B Motion with the supporting Affidavits of Levi Gene King, and Dr. David H. Dodd with this Amended Brief of Appellant. The Motion and Amended Brief of Appellant, support and supplement each other for purposes of factual statements, legal authorities, and arguments.

STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. Whether trial counsel deprived Defendant of his constitutional right to the effective assistance of counsel. “To prevail, a defendant must show, first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel’s performance prejudiced the defendant.” *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); *see also State v. Hay*, 859 P.2d 1, 5 (Utah 1993); *accord State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App. 1995). The appellate court reviews a claim of ineffective assistance of counsel raised for the first time on appeal as a question of law. *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162; *see also State v. Maestas*, 1999 UT 32, ¶ 20, 984 P.2d 376 (citing *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998)).

Preservation of Issue Citation or Statement of Grounds for Review: Issues involving claims of ineffective assistance of counsel constitute an exception to the preservation rule and therefore may be raised for the first time on appeal.

2. Whether the trial court deprived Defendant of his right to a fair and impartial trial by having him handcuffed during the jury trial with a uniformed officer sitting directly behind him.

Standard of Review: This issue presents a question of law that is reviewed for correctness. See *State v. Udy*, 2012 UT App 244, ¶ 11, 286 P.3d 345; *Chen v. Stewart*, 2004 UT 82, ¶ 25, 100 P.3d 1177 (“Constitutional issues, including questions regarding due process, are questions of law that we review for correctness.”) (citing *In re K.M.*, 965 P.2d 576, 578 (Utah Ct. App. 1998) (citing *State v. Holland*, 921 P.2d 430, 433 (Utah 1996) (“[T]he ultimate question of whether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness.”)).

Preservation of Issue Citation or Statement of Grounds for Review: Defendant arguably preserved this issue by objection at R. 93:65-67. This issue is also raised by way of plain error. This Court will reverse for plain error, which requires a showing that “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful” *State v. Parker*, 2000 UT 51, ¶ 6, 4 P.3d 778 (quoting *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993)).

3. Whether the cumulative effect of the errors resulting from the ineffective assistance of counsel and other errors merits reversal. “[T]he cumulative error doctrine . . . requires [the appellate court] to apply the standard of review applicable to each underlying claim of error”, which is correction of error in this case. *Radman v. Flanders Corp.*, 2007 UT App 351, ¶ 4, 172 P.3d 668, *cert. denied*, 186 P.3d 957 (2008). After assessing the claims, the appellate court will reverse “under the cumulative error doctrine only if the cumulative effect of the several errors undermines . . . confidence that a fair trial was had.” *State v. Killpack*, 2008 UT 49, ¶ 54, 191 P.3d 17 (internal quotation marks omitted).

Preservation of Issue Citation or Statement of Grounds for Review: Issues involving claims of ineffective assistance of counsel constitute an exception to the preservation rule and therefore may be raised for the first time on appeal.

DETERMINATIVE AUTHORITY

The constitutional provisions, statutes, ordinances, rules, regulations, or case law whose interpretation is determinative, are set out verbatim, with the appropriate citation, in the body and arguments of the instant Amended Brief of Appellant.

STATEMENT OF THE CASE

This case involves claims of ineffective assistance of counsel presented both by way of a Rule 23B Motion filed with the instant Brief and demonstrated by the record on appeal.

These claims involve critical failures of trial counsel to render effective assistance of counsel, which resulted in extreme prejudice to Defendant.

Defendant was initially charged with Theft, a second-degree felony, in violation of Utah Code Ann. § 76-6-604 (Count 1), and Failure to Stop at the Command of Law Officer, a class A misdemeanor, in violation of Utah Code Ann. § 76-8-305.5 (Count 2). After a preliminary hearing on September 7, 2012, Defendant was bound over for trial.

Defendant appeared for arraignment on September 20, 2012, pleading not guilty to both charges. A jury trial was set for December 10, 2012, during a pretrial conference on October 18, 2012. On November 5, 2012, the State filed an Amended Information, charging Defendant with Theft, a second-degree felony, in violation of Utah Code Ann. § 76-6-404 (Count 1), Theft, a third-degree felony, in violation of Utah Code Ann. § 76-6-404 (Count 2), and Failure to Stop at the Command of Law Officer, a class A misdemeanor, in violation of Utah Code Ann. § 76-8-305.5 (Count 3).

The parties appeared for the jury trial on December 10, 2012. The State called eight witnesses during its case in chief. Defendant was the sole defense witness at trial.

After closing arguments, the jury – upon deliberating – found Defendant guilty as charged. The trial court sentenced Defendant as follows: to an indeterminate term of one to fifteen years in the Utah State Prison on the second-degree felony Theft; to an indeterminate term of zero to five years in the Utah State Prison for the third-degree felony Theft; and one year in jail for Failure to Stop, a class A misdemeanor.

The trial court signed the Minutes - Change of Plea - Sentence, Judgment, Commitment on January 18, 2013. Defendant timely appealed.

STATEMENT OF FACTS

A. *Factual Background*

On August 1, 2012, Defendant left his house at approximately 8:00 a.m., intending to apply for a job at various businesses until the local library opened at 10:00 a.m. (R. 93:202:12-16). Shortly after leaving his house, Defendant ran into an acquaintance by the name of Kyle (R. 93:202:21-22). Kyle – who was sitting in a black truck and appeared somewhat sick – asked Defendant if he wanted to buy an iPod (R. 93:203:1-4). Kyle offered to sell the iPod to Defendant for thirty dollars (R. 93:203:4-5). Defendant hesitantly decided to buy the iPod (R. 93:203-04).

While talking with Kyle, Defendant began to casually smoke some marijuana that he had (R. 93:204:18-20). Kyle, who initially appeared skittish, began looking around like he was paranoid and then jumped out of the truck, running behind the truck and jumping over a fence (R. 93:204:18-23). Defendant then saw a cop driving by as he backed up two or three steps (R. 93:204-05). When the cop – who was in a car – turned around, Defendant also “took off running.” (R. 93:205:5-7). Defendant continued to frantically run even though the officer told him to stop (R. 93:205:16-24).

Various police officers took chase after Defendant. Eventually, the police apprehended and arrested Defendant (R. 93:206:14-18). The police then took one of the

victims and an alleged eyewitness, Jill Hatch, to the location down the block where Defendant had been apprehended, removed him from the police cruiser, and had her identify Defendant (R. 93:93-94).

B. *Proceedings*

Defendant was initially charged with Theft, a second-degree felony, in violation of Utah Code Ann. § 76-6-404 (Count 1), and Failure to Stop at the Command of Law Officer, a class A misdemeanor, in violation of Utah Code Ann. § 76-8-305.5 (Count 2) (R. 1-2).¹ Defendant appeared for a preliminary hearing on September 7, 2012 (R. 16-17). Upon conclusion, the trial court found “that the State has presented sufficient evidence to support a reasonable belief that the defendant committed the charged crimes in this case.” (R. 92:47-48).² As a result, the court bound Defendant over for trial (R. 92:48:4-6).

Defendant appeared for arraignment on September 20, 2012, pleading not guilty to both charges (R. 91:2-3). At a pretrial conference on October 18, 2012, a jury trial was set for December 10, 2012 (R. 91:3 (10/18/2012 Hearing); R. 20).

On November 5, 2012, the State filed an Amended Information, charging Defendant with Theft, a second-degree felony, in violation of Utah Code Ann. § 76-6-404 (Count 1), Theft, a third-degree felony, in violation of Utah Code Ann. § 76-6-404 (Count 2), and

¹See Information (R. 1-2 - filed August 3, 2012), a true and correct copy of which is attached to this Amended Brief as Addendum A.

²See Transcript of Preliminary Hearing (R. 92 - September 7, 2012), a true and correct copy of which is attached to this Amended Brief as Addendum B.

Failure to Stop at the Command of Law Officer, a class A misdemeanor, in violation of Utah Code Ann. § 76-8-305.5 (Count 3) (R. 25-26).³ At the final pretrial conference on November 29, 2012, the court, in addition to other matters, confirmed the jury trial date as previously scheduled (R. 91:2-5 (11/29/2012 Hearing)).

The parties appeared for the jury trial on December 10, 2012 (R. 54-56). The State called eight witnesses during its case in chief: Bradley Hatch, the alleged victim, who had his truck stolen; Jill Hatch, the wife of Bradley Hatch; John Ottesen of the Layton Police Department; Sean Lewis of the Layton Police Department; Russell Godfrey of the Layton Police Department; Daniel Jewel of the Layton Police Department; Mitchell Pilkington, Crime Scene Investigation Supervisor for the Layton Police Department; and Nels Huso (R. 93). After the State rested, defense counsel called one witness, the Defendant (*See* R. 93:201:22).

Bradley Hatch, testified that he went to work in his black truck on the morning of August 1, 2012, and after carrying supplies from his truck to his place of business, he inadvertently left the keys to the truck in the console (R. 93:72-73). Shortly thereafter, his wife, Jill, arrived at the business and excitedly told him that somebody took his truck (R. 93:73-74).

³*See* Amended Information (R. 25-26 - filed November 5, 2012), a true and correct copy of which is attached to this Amended Brief as Addendum C.

Jill Hatch testified that on her way to work, she saw her husband's truck coming towards her and she came to stop and rolled down her window – claiming to have had a clear view of the person driving her husband's truck (R. 93:86-88). Later, after apprehending Defendant, Police took her to a location down the block where Defendant had been apprehended and – while in police custody – had her identify him (R. 93:93-94). She identified Defendant, who she claimed to have been wearing the same shirt and had the same hair, as the person driving her husband's truck (R. 93:94:5-14). In addition, she identified various items were missing from the truck, including her iPod (R. 93:91-92).

Detective John Ottesen testified that shortly after receiving a dispatched attempt to locate, he said he observed the missing truck, then making a u-turn to follow it (93:105-06). The truck, according to Detective Ottesen, increased in speed upon being followed (93:107:4-5), and, as a result, he lost visual contact of the truck on the curves of the street (R. 93:107:16-17). He relocated it about three to four blocks away, where it was parked behind a small commercial building (93:107:18-24). Detective Ottesen identified the driver as a male with short dark hair with a white tee shirt like that of Defendant (109:7-11). As Detective Ottesen approached the truck, the driver exited and ran even though Officer Ottesen told him to stop (R. 93:111-12). Nevertheless, the individual continued over the fence (*see id.*).

Officers, Sean Lewis, Russell Godfrey, and Daniel Jewel testified about the eventual apprehension and arrest of Defendant (R. 93:137:13; R. 93:154:19; and R. 93:161:20). In

addition, Mitchell Pilkington testified about the fingerprinting procedure utilized in this case (R. 93:180). Mr. Pilkington testified that none of the fingerprints obtained matched those of Defendant (93:184:15-17). Finally, Nels Huso testified that Defendant – in the course of the chase – desperately hailed him and asked for a ride (R. 93:194:11-13).

After the State rested, the Defendant testified (R. 93:201:22). He admitted running from the police, but testified that he ran because he was scared due to his possession and use of marijuana (R. 93:205:17-24). He also testified that he attempted to locate Kyle prior to trial through an investigator (R. 93:216:14-24).

After closing arguments, the jury – upon deliberating – found Defendant guilty on all charges (R. 93:247:13-17).⁴ At sentencing, the trial court sentenced Defendant as follows: to an indeterminate term of one to fifteen years in the Utah State Prison on the second-degree felony Theft; to an indeterminate term of zero to five years in the Utah State Prison for the third-degree felony Theft; and one year in jail for Failure to Stop, a class A misdemeanor (R. 64-65; *see also* R. 91:1-11 (01/17/2013 Sentencing Hearing)). The court ran the sentences concurrent and gave Defendant credit for time served (R. 64-65).

⁴According to the record, the jury deliberated approximately 33 minutes before returning its guilty verdict (R. 55).

The trial court signed the Minutes - Change of Plea⁵ - Sentence, Judgment, Commitment on January 18, 2013.⁶ Defendant filed a timely Notice of Appeal on February 14, 2013 (R. 35-37).

SUMMARY OF ARGUMENTS

1. Trial counsel deprived Defendant of his constitutional right to the effective assistance of counsel. More specifically, trial counsel deprived Defendant of the right to effective assistance of counsel by failing to utilize an expert witness to testify about the deficiencies and pitfalls of eyewitness identifications. In this case, trial counsel presented no expert witness for the defense, no cautionary jury instructions on the “vagaries of eyewitness identification,” and meager cross-examination on the *Long* or *Clopton* issues. Even if trial counsel had performed marvelously on cross-examination and had submitted a cautionary jury instruction, the absence of an expert witness alone constituted ineffective assistance of counsel. Counsel performed deficiently and prejudicially in not obtaining an expert witness to assist the trier of fact and to educate the jury about the pitfalls inherent in seeing, retaining, and recalling an event full of distractions and pitfalls.

⁵The title of the Sentence, Judgment, Commitment mistakenly identified this matter as a change of plea.

⁶See Minutes – Change of Plea – Sentence, Judgment, Commitment (R. 64-65), a true and correct copy of which is attached to this Amended Brief as Addendum D.

Because one or more of the established factors affecting the accuracy of the observed events were present and in multiple categories – an eyewitness expert would have met rule 702's requirement to “assist the trier of fact.” According to the reasons set forth in detail in *Clopten*, counsel performed deficiently and prejudicially in not obtaining an expert witness to assist the trier of fact and to educate the jury about the pitfalls inherent in seeing, retaining, and recalling an event full of distractions and suggestive pitfalls.

Case law guards against the shortcomings of cross-examination and cautionary instructions – both of which were minimal or absent in this case. Absent a *Long* instruction, counsel should have acted to counter the obvious deficiencies of the eyewitness identification. Counsel was ineffective in not obtaining such expert testimony for this purpose. The circumstances existing in Defendant’s jury trial are essentially the same as those under which the testimony of an eyewitness is most helpful to a jury. As a result, there is a reasonable likelihood that had an eyewitness expert been utilized in the instant case, the jury would have questioned the accuracy of the eyewitness identifications more rigorously and would not have convicted Defendant.

Trial counsel also deprived Defendant of his right to the effective assistance of counsel by failing to request a cautionary *Long* instruction inasmuch as eyewitness identification was a central and critical issue in the case. Trial counsel’s failure prejudiced Defendant by precluding the jury from considering critical information and instruction

concerning essentially the sole eyewitness identification of Defendant by Ms. Hatch as well as that of Officer Ottesen.

The record on appeal demonstrates that trial counsel rendered deficient performance by failing to request such a cautionary jury instruction. *See also* Argument I.C. Trial counsel did not object to the proposed jury instructions even though they did not include a *Long* instruction, which was critical to the jury finding Defendant guilty as charged.

Because of this deficiency, trial counsel failed to provide the jury with critical instruction with which to analyze essentially the sole eyewitness identification of Ms. Hatch and that of Officer Ottesen. Consequently, the jury based its finding of the convictions on incomplete instructions deemed critical to the jury's deliberations by the Utah Supreme Court in *Long* and its progeny. Had trial counsel requested a *Long* instruction, the jury would have accurately analyzed the inconsistencies and pitfalls in the eyewitness identifications provided prior to and at trial, which, in turn, would have led the jury to determine that the alleged crimes had not been committed by Defendant.

Consequently, trial counsel did not act as reasonably competent counsel, did not protect Defendant's rights to due process, and did not zealously represent Defendant's interests during trial. The prejudice that resulted from trial counsel's failures amounted to a denial of Defendant's right to a fair trial. Because of trial counsel's failure, the jury was precluded from accurately analyzing the testimony and evidence presented at trial. Trial counsel's failure prejudiced Defendant by precluding the jury from considering critical

information and instruction concerning the eyewitness identification of Defendant by Ms. Hatch and that of Officer Ottesen.

Remand pursuant to Utah Rule of Appellate Procedure 23B is necessary to enter findings of fact not appearing in the record on appeal that demonstrate the numerous failures by trial counsel set forth in the Rule 23B Motion and this Brief of Appellant.

2. The trial court deprived Defendant of his right to a fair and impartial trial by having him handcuffed during the jury trial with a uniformed officer sitting directly behind him. Defendant appeared for a jury trial on two counts of theft and failing to stop at the command of a law enforcement officer – which did not include any crimes of violence. The trial court erred in having Defendant appear at trial by jury wearing handcuffs with a uniformed and armed officer sitting directly behind him. Defendant’s trial counsel objected, bringing the matter to the court’s attention and providing the court with an opportunity to correct the matter. The prosecution agreed – at least partially – that the matter had been handled inappropriately. Nevertheless, the trial court neglected to fully address the prejudicial circumstances under which the jury trial had begun – making no finding that Defendant constituted a security risk and should be restrained in some manner. Moreover, the trial court never offered Defendant some alternative physical restraint or security that could be hidden from the jury’s view in some fashion.

This issue is reviewable for plain error. The trial court’s behavior was erroneous inasmuch as it did not affirmatively afford or address the prejudicial circumstances under

which Defendant was required to go to trial. This error was obvious because Defendant's right to a fair and impartial trial and the court's duty to affirmatively afford him this right under the circumstances were well settled at the time of trial. Moreover, Defendant's right to due process under these circumstances, including the right to a presumption of innocence, was well settled at the time of trial.

The error was harmful or prejudicial. By failing to inquire as to the prejudicial circumstances, the trial court committed obvious reversible error – mandating reversal according to Utah law. But for the trial court's deprivation of Defendant's right to a fair and impartial trial and due process, there is a reasonable probability that the outcome of the trial would have been different.

The failure to provide Defendant with the fundamental constitutional right to a fair and impartial trial constitutes a structural error that is not subject to the harmless error analysis. A structural error is a defect that affects the framework within which the trial proceeds, rather than simply an error in the trial process itself. Inasmuch as the failure to provide a defendant with the right to a fair and impartial trial affects the very framework of the trial itself, prejudice or harm is presumed.

By failing to timely request that the trial court affirmatively inquire and address the prejudicial circumstances under which he was being required to go to trial, trial counsel rendered ineffective assistance of counsel. This failure fell below an objective standard of reasonable professional judgment, which is demonstrated by existing Utah case law and the

underlying factual circumstances of this case. But for counsel's unprofessional failure to timely request that the trial court inquire and address Defendant's handcuffs and the uniformed, armed officer sitting directly behind him, there is a reasonable probability the result at trial would have been different.

3. The cumulative effect of the errors resulting from the ineffective assistance of trial counsel and other errors merits reversal. Because the aggregate of the errors resulting from the ineffective assistance of trial counsel undermine confidence that Defendant received a fair trial, reversal is warranted.

ARGUMENTS

I. TRIAL COUNSEL DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. *Ineffective Assistance of Counsel Principles*

The United States Supreme Court, in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), established the two-prong test for determining when a defendant's Sixth Amendment⁷ right to effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct. at 1064. "To prevail, a defendant must show, first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance

⁷See U.S. Const. amend. VI, which states, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence."

prejudiced the defendant.” *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); *see also State v. Montoya*, 2004 UT 5, ¶ 23, 84 P.3d 1183; *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998); *accord State v. Templin*, 805 P.2d 182, 186 (Utah 1990); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986); *State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App. 1995).

In order to satisfy the first prong of the test, a defendant must “‘identify the acts or omissions’ which, under the circumstances, ‘show that counsel’s representation fell below an objective standard of reasonableness.’” *Templin*, 805 P.2d at 186 (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted); *see also Chacon*, 962 P.2d at 50 (quoting *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah), *cert. denied*, 513 U.S. 966, 115 S.Ct. 431 (1994))). A defendant “must overcome the strong presumption that trial counsel rendered adequate assistance, by persuading the court that there is no conceivable tactical basis for counsel’s actions.” *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162 (emphasis omitted) (citations and internal quotation marks omitted); *see also State v. Gunter*, 2013 UT App 140, ¶ 30, 304 P.3d 866;⁸ *accord State v. Bullock*, 791 P.2d 155, 159-60 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3270 (1990). To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support “a reasonable probability that, but for counsel’s unprofessional errors, the result

⁸“The court ‘give[s] trial counsel wide latitude in making tactical decisions and will not question such decisions unless there is no reasonable basis supporting them.’” *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162; *accord State v. Gunter*, 2013 UT App 140, ¶ 30, 304 P.3d 866.

of the proceedings would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Templin*, 805 P.2d at 187.

An ineffective assistance of counsel claim may not be considered on direct appeal unless the record on appeal is adequate and there is new counsel on appeal. *See State v. Humphries*, 818 P.2d 1027, 1029 (Utah 1991); *State v. Garrett*, 849 P.2d 578, 580 (Utah Ct. App.), *cert. denied*, 860 P.2d 943 (Utah 1993); *State v. Alvarado*, 845 P.2d 966, 970 (Utah Ct. App. 1993); *but see State v. Litherland*, 2000 UT 76, ¶ 16, 12 P.3d 92. Both conditions apply to the failure of trial counsel to utilize an expert witness to testify concerning the deficiencies and pitfalls of eyewitness identification. Moreover, these conditions arguably apply to the failure of trial counsel to request a cautionary *Long* instruction inasmuch as the issue of eyewitness identification had become a central issue in the case. *See also* Arguments I.C. and I.D. below.

B. *The Constitutional Right to Present a Complete Defense*

A criminal defendant has several federal constitutional rights to present a complete defense to the criminal charges lodged against him or her. *See Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146-47 (1985) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or the Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’ We break no new ground in

observing that an essential component of procedural fairness is an opportunity to be heard.” (citations omitted)).

Similar rights exist under the Utah Constitution. For example, an essential element of due process provided by article I, section 7, of the Utah Constitution is the “fair opportunity to submit evidence.” *See Christiansen v. Harris*, 109 Utah 1, 8, 163 P.2d 314, 317 (1945). “[T]he defendant’s right to present all competent evidence in his defense is a right guaranteed by the due process clause of our State Constitution, Art. I, Sec. 7” *State v. Harding*, 635 P.2d 33, 34 (Utah 1981). Article I, section 12, of the Utah Constitution, provides numerous trial rights, stating as follows:

In criminal prosecutions the accused shall have *the right to appear and defend in person and by counsel*, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, *to have compulsory process to compel the attendance of witnesses in his own behalf*, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases.

(emphasis added); *see also* Utah Code Ann. § 77-1-6.

In *State v. Templin*, 805 P.2d 182 (Utah 1990), our supreme court determined that trial counsel’s failure to investigate potential defense witnesses constitutes clearly deficient performance and “cannot be considered a tactical decision.” *Id.* at 188-89. The Court determined further that an appellate court cannot discern the exact effect the missing testimony would have on credibility. *Id.*

“Critical to the attorney-client relationship and the integrity of judicial proceedings is an attorney’s duty to represent the interests of a client with zeal and loyalty.” *State v. Holland*, 876 P.2d 357, 359 (Utah 1994). In fact, “[t]he duty of loyalty is so essential to the proper functioning of the judicial system that its faithful discharge is mandated not only by the Rules of Professional Conduct, but also, in criminal cases, by the Sixth Amendment right of a criminal defendant to the effective assistance of counsel.” *Id.* (citing *United States v. Cronin*, 466 U.S. 648, 656-57, 104 S.Ct. 2039, 2045-46 (1984); *Von Moltke v. Gillies*, 332 U.S. 708, 725-26, 68 S.Ct. 316, 324 (1948) (plurality opinion)). Trial counsel’s faithful discharge of this duty “is a vital factor both in uncovering and making clear to a court the truth on which a just decision depends and in protecting the rights of persons charged with a crime.” *Id.* “In almost all cases, defendants are wholly dependent on the dedication of their attorneys to protect their interests and to ensure their fair treatment under the law.” *Id.*

C. Trial Counsel Rendered Ineffective Assistance of Counsel by Failing to Utilize an Expert Witness to Testify About the Difficiencies and Pitfalls of Eyewitness Identifications.

Over twenty-five years ago – the Utah Supreme Court recognized that “the vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification.” *State v. Long*, 721 P.2d 483, 491 (Utah 1986) (quoting *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926 (1967)). In fact, “[d]ecades of study, both before and particularly after *Long*, have established that

eyewitnesses are prone to identifying the wrong person as the perpetrator of a crime, particularly when certain factors are present.” *State v. Clopten*, 2009 UT 84, ¶ 15, 223 P.3d

1103. According to the Court,

accuracy is significantly affected by factors such as the amount of time the culprit was in view, lighting conditions, use of a disguise, distinctiveness of the culprit’s appearance, and the presence of a weapon or other distractions. Moreover, *there is little doubt that juries are generally unaware of these deficiencies in human perception and memory and thus give great weight to eyewitness identifications*. Indeed, juries seemed to be swayed the most by the confidence of an eyewitness, even though such confidence correlates only weakly with accuracy. That the empirical data is conclusive on these matters is not disputed by either party in this case and has not been questioned by this court in the decisions that followed *Long*.

Id., 223 P.3d 1103 (emphasis added) (citing *State v. Hubbard*, 2002 UT 45, ¶ 16, 48 P.3d 953 (noting the “inherent deficiencies” in eyewitness testimony)); *State v. Butterfield*, 2001 UT 59, ¶ 42, 27 P.3d 1133 (recognizing “the vagaries of eyewitness identification”) (footnotes omitted)).

In *Clopten*, the primary issue was “whether expert testimony is generally necessary to adequately educate a jury regarding these inherent deficiencies.” *Clopten*, 2009 UT 84 at ¶ 16, 223 P.3d 1103. The Court answered that question unequivocally – that it is. *Id.*, 223 P.3d 1103; *see also State v. Guard*, 2013 UT App 270, ¶¶ 17-19, 316 P.3d 444 (applying *Clopten* notwithstanding retroactivity concern). In so doing, the Court specifically noted that “[i]n the absence of expert testimony, a defendant is left with two

tools – cross-examination and cautionary instructions – with which to convey the possibility of mistaken identification to the jury. Both of these tools suffer from serious shortcomings when it comes to addressing the merits of eyewitness identifications.” *Clopten*, 2009 UT 84 at ¶ 16, 223 P.3d 1103 (footnote omitted). “Because of this overreliance on questionable eyewitnesses, juries will often benefit from assistance as they sort reliable testimony from unreliable testimony.” *See id.* at ¶ 17, 223 P.3d 1103.

In this case, Defendant’s trial counsel presented no expert witness for the defense, no cautionary jury instructions on the “vagaries of eyewitness identification,” and meager cross-examination on the *Long* or *Clopten* issues. Even if trial counsel had performed marvelously on cross-examination and had submitted a cautionary jury instruction, the absence of an expert witness alone constituted ineffective assistance of counsel.

While *Long* and its progeny “have established that eyewitnesses are prone to identifying the wrong person as the perpetrator of a crime, particularly when certain factors are present[,]” *id.* at ¶ 15, 223 P.3d 1103, the underlying rationale for requiring an expert witness is the need “to explain how certain factors relevant to the identification in question could have produced a mistake.” *Id.* at ¶ 19, 223 P.3d 1103. In other words, when a witness points a finger at the defendant and says – “He is the one.” – a myriad of factors are involved in the end result, which constitutes the eyewitness identification. The critical importance of an expert witness stems from the expert’s ability to explain how and why

“certain factors relevant to the identification in question could have produced a mistake.”

Id. at ¶ 19, 223 P.3d 1103.

Such [expert] testimony performs two beneficial functions. First, it teaches jurors about certain factors – such as “weapon focus” and the weak correlation between confidence and accuracy – that have a strong but counterintuitive impact on the reliability of an eyewitness. In other words, the testimony enables jurors to avoid certain common pitfalls, such as believing that a witness’s statement of certainty is a reliable indicator of accuracy. Second, it assists jurors by quantifying what most people already know. An expert may discuss, for example, the degree to which accuracy is affected by a disguise or a long lapse between the crime and the identification. Importantly, expert testimony does not unfairly favor the defendant by making the jury skeptical of all eyewitnesses. In fact, when a witness sees the perpetrator under favorable conditions, expert testimony actually makes jurors more likely to convict. When expert testimony is used correctly, the end result is a jury that is better able to reach a just decision.

Id. at ¶ 20, 223 P.3d 1103 (footnotes omitted).

The *Clopton* Court relied heavily on *State v. Long*, which highlighted the difficulties inherent in the eyewitness identification process from a storage and perception perspective by recognizing that

[a] far less obvious limitation of great importance arises from the fact that the human brain cannot receive and store all the stimuli simultaneously presented to it. This forces people to be selective in what they perceive of any given event. To accomplish this selective perception successfully, over time each person develops unconscious strategies for determining what elements of an event are important enough to be selected out for perception. The rest of the stimuli created by the event are ignored by the brain.

Long, 721 P.2d at 489 (citation omitted).

Moreover, the Court in *Clopten* held that “in cases where eyewitnesses are identifying a stranger and where one or more established factors affecting accuracy are present, the testimony of an eyewitness expert will meet rule 702's requirement to ‘assist the trier of fact.’” *Clopten*, 2009 UT 84 at ¶ 32, 223 P.3d 1103; *see also* Utah R. Evid. 702.

The Court elaborated upon the established factors in the following footnote:

An illustrative but not exhaustive list of such factors can be broken down into several categories. The first category pertains to the eyewitness and included factors such as uncorrected visual defects, fatigue, injury, intoxication, presence of a bias, an exceptional mental condition such as an intellectual disability or extremely low intelligence, age (if the eyewitness is either a young child or elderly), and the race of the eyewitness relative to the race of the suspect (cross-racial identification). The second category relates to the event witnessed and includes the effects of stress or fright, limited visibility, distance, distractions, the presence of a weapon (weapon focus), disguises, the distinctiveness of the suspect's appearance, the amount of attention given to the event by the eyewitness, and whether the eyewitness was aware at the time that a crime was occurring. The third category pertains to the identification itself. This category includes such factors as the length of time between observation and identification, any instances in which the eyewitness failed to identify the suspect or gave an inconsistent description, the value of lineups compared to showups, the value of photo identifications compared to in-person identifications, and any exposure of the eyewitness to influences such as news reports or interaction with other witnesses. It also includes potentially suggestive police conduct, such as the instructions given the eyewitness by police, the composition of the lineup, the way in which the lineup was carried out, and the behaviors of the person conducting the lineup.

Clopten, 2009 UT 84 at ¶ 32 n.22, 223 P.3d 1103.

In the case at bar, the State relied almost exclusively on the eyewitness identification of Jill Hatch – a stranger to Defendant. Under the circumstances of the brief encounter driving in the opposite direction of the truck, it is questionable whether Ms. Hatch had sufficient time to adequately view and encode the face of the perpetrator for identification purposes (*see* R. 93:86-88). Ms. Hatch’s initial description of the perpetrator was simply that of a male driver with short dark hair in contrast to describing him as wearing a white T-shirt after viewing him at the showup. Additionally, the vehicle driven by Ms. Hatch at the time was approximately two feet lower than the truck, making it more difficult to view the perpetrator (*see* R. 93:88:9-13). Further, the perpetrator never turned his face toward Ms. Hatch while driving by her in the opposite direction (*see* R. 93:99:19-21). As a result, Ms. Hatch never obtained a complete frontal view of the perpetrator’s face.

The most critical element of the eyewitness identification in this case is the police showup. As the report of Dr. David H. Dodd indicates,⁹ showups are inherently suggestive and are to be avoided unless circumstances require otherwise. There neither is nor was an indication of any such circumstances in this case. The exposure of Ms. Hatch to this suggestive police conduct significantly undermines her eyewitness identification of Defendant (R. 93:93-94). This case – consistent with the edict set forth in *Clopten* –

⁹The Report of Dr. David H. Dodd is attached to his Affidavit in support of the Rule 23B Motion filed contemporaneously with this Amended Brief.

demonstrates that the handling of eyewitness identification evidence is as important as other forms of evidence, such as DNA evidence, especially in light of the rather significant influence that eyewitnesses have over juries. Ms. Hatch's questionable eyewitness identification is especially troublesome in light of fact that none of the many fingerprints obtained by the police from the scene belonged to Defendant (*see* R. 93:183-84).

Officer Ottesen also identified Defendant as the perpetrator, initially, after Defendant was in custody. Later – at the preliminary hearing and at trial – he identified Defendant as the driver of the vehicle (R. 92:41-42; R. 93:110:3-10). During the officer's first encounter, when he saw the truck drive by, there was little opportunity to see the perpetrator (R. 93:109-10). Likewise, there was little opportunity to see the perpetrator when the officer approached the truck and the perpetrator exited. In the reports, Officer Ottesen, consistent with the broadcast description to which he responded, describes the perpetrator as a white male with short dark hair and wearing a white shirt, which was later reported as a white T-shirt (R. 93:111:15-20). Officer Ottesen did not provide any other description such as eye color, facial hair or not, shape of face, shape of nose, etc. Then, when Defendant was subsequently in custody in another officer's car, Officer Ottesen made an identification, which also constituted a showup, connecting that identification to the previous description (R. 93:114-15). As a result, Officer Ottesen's identification is limited in the same ways as those provided by Ms. Hatch.

Because “one or more established factors affecting accuracy [were] present, the testimony of an eyewitness expert [would have met] rule 702's requirement to ‘assist the trier of fact.’” *Clopten*, 2009 UT 84 at ¶ 32 n.22, 223 P.3d 1103; *see also* Utah R. Evid. 702. The factors affecting Ms. Hatch – the eyewitness almost exclusively relied upon by the State in this case – fell into the second, and third categories discussed in *Clopten*.¹⁰ Further, because eyewitness identification was and is directly at issue, an expert at trial would have been able to educate the jury on the inconsistencies of Ms. Hatch’s testimony in remembering what she saw, the inconsistencies between stories conveyed then and there at the scene versus later in court, potentially suggestive police conduct, as well as various other matters all critical to the jury’s decision making process. An expert witness should have been used to testify about the multiple factors in both the second and third categories including “the effects of stress or fright, limited visibility, distance, distractions, the presence of a weapon (weapon focus), the distinctiveness of the suspect’s appearance, the amount of attention given to the event by the eyewitness, the length of time between observation and identification, any instances in which the eyewitness failed to identify the suspect or gave an inconsistent description, the value of lineups compared to

¹⁰Elements contained within the first category may apply as well, but were arguably not established due to the lack of investigation by trial counsel. *State v. Lenkart*, 2011 UT 27, ¶ 28, 262 P.3d 1 (citation omitted) (“one of criminal defense counsel’s most fundamental obligations is to investigate the underlying facts of a case. This duty is not optional; it is indispensable”); *id.* (“failing to investigate because counsel does not think it will help does not constitute a strategic decision, but rather an abdication of advocacy”); *accord Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

showups, the value of photo identifications compared to in-person identifications, and any exposure of the eyewitness to influences such as news reports or interaction with other witnesses.” *Clopten*, 2009 UT 84 at ¶ 32 n.22, 223, P.3d 1103.¹¹

Inasmuch as one or more of the established factors affecting the accuracy of the observed events were present and in multiple categories – an eyewitness expert would have met rule 702's requirement to “assist the trier of fact.” *Id.*; *see also* Utah R. Evid. 702. For the reasons set forth in detail in *Clopten*, counsel performed deficiently and prejudicially in not obtaining an expert witness to assist the trier of fact and to educate the jury about the pitfalls inherent in seeing, retaining, and recalling an event full of distractions and suggestive pitfalls.

Case law guards against the shortcomings of cross-examination and cautionary instructions – both of which were minimal or absent in the instant case. *Clopten*, 2009 UT 84 at ¶ 16, 223, P.3d 1103. With no *Long* instruction requested or utilized, counsel should have acted to counter the obvious deficiencies of the eyewitness identification. Counsel was ineffective in not obtaining such expert testimony for this purpose. *See id.* at ¶ 33, 223 P.3d

¹¹Admittedly, it is possible that the prosecution and the defense may both benefit in some respects from the testimony of an expert witness on the established factors. “Importantly, expert testimony does not unfairly favor the defendant by making the jury skeptical of all eyewitnesses.” *Id.* at ¶ 19. The fact that each party may be able to benefit from the expert witness does not diminish the court’s holding and requirement “that, in cases where eyewitnesses are identifying a stranger and where one or more established factors affecting accuracy are present, the testimony of an eyewitness expert will meet rule 702's requirement to “assist the trier of fact.” *State v. Clopten*, 2009 UT 84, ¶ 32, 223 P.2d 1103; Utah R. Evid. 702.

1103 (“We expect, however, that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony.”). In short, the circumstances existing in Defendant’s jury trial are essentially the same as those under which the testimony of an eyewitness is most helpful to a jury. *See and cf. id.* at ¶ 47, 223 P.3d 1103. Consequently, there is a reasonable likelihood that had an eyewitness expert been utilized in the instant case, the jury would have questioned the accuracy of the sole eyewitness more rigorously and would not have convicted Defendant.

D. *Trial Counsel Deprived Defendant of the Right to Effective Assistance of Counsel by Failing to Request a Long Instruction Because Eyewitness Identification was a Central Issue in the Case.*

“[T]he vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification.” *State v. Long*, 721 P.2d 483, 491 (Utah 1986) (quoting *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926 (1967)). In *Long*, the Utah Supreme Court highlighted the difficulties inherent in the eyewitness identification process from a storage and perception perspective by recognizing that

[a] far less obvious limitation of great importance arises from the fact that the human brain cannot receive and store all the stimuli simultaneously presented to it. This forces people to be selective in what they perceive of any given event. To accomplish this selective perception successfully, over time each person develops unconscious strategies for determining what elements of an event are important enough to be selected out for perception. The rest of the stimuli created by the event are ignored by the brain.

Id. at 489 (citation omitted). As a result, the Court held that trial courts shall give a cautionary jury instruction concerning the accuracy of eyewitness identifications “whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense.” *Id.* at 492.

The record on appeal demonstrates that trial counsel rendered deficient performance by failing to request such a cautionary jury instruction. *See also* Argument I.C. above. Trial counsel did not object to the proposed jury instructions even though they did not include a *Long* instruction, which was critical to the jury finding Defendant guilty as charged (*see* R. 93:222:6-8; *see* R. 34-53, Jury Instructions).

Because of this deficiency, trial counsel failed to provide the jury with critical instruction with which to analyze essentially the sole eyewitness identification of Ms. Hatch. The jury – as a result – based its finding of the convictions on incomplete instructions deemed critical to the jury’s deliberations by the Utah Supreme Court in *Long* and its progeny. Had trial counsel requested a *Long* instruction, the jury would have accurately analyzed the inconsistencies in the testimony of Ms. Hatch provided prior to and at trial, which, in turn, would have led the jury to determine that the alleged crimes had not been committed by Defendant.

Consequently, trial counsel did not act as reasonably competent counsel, did not protect Defendant’s rights to due process, and did not zealously represent Defendant’s interests during trial. The prejudice that resulted from trial counsel’s failures amounted to

a denial of Defendant's right to a fair trial. Because of trial counsel's failure, the jury was precluded from accurately analyzing the testimony and evidence presented at trial. Trial counsel's failure prejudiced Defendant by precluding the jury from considering critical information and instruction concerning the eyewitness identification of Defendant by Ms. Hatch and that of Officer Ottesen.

II. THE TRIAL COURT DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL BY HAVING HIM HANDCUFFED DURING THE JURY TRIAL WITH A UNIFORMED OFFICER SITTING DIRECTLY BEHIND HIM.

Under Utah law, "[a] principle ingredient of due process is that every criminal defendant is entitled to a fair and impartial trial." *See State v. Mitchell*, 824 P.2d 469, 473 (Utah Ct. App. 1991) (quoting *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1973), *cert. denied*, *Kennedy v. Gray*, 416 U.S. 959, 94 S.Ct. 1976 (1974)). A criminal defendant's right to a fair trial is a fundamental liberty interest guaranteed by the Fourteenth Amendment to the United States Constitution. *See Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 1692 (1976). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Id.* From this necessarily follows the principle that a criminal defendant is generally entitled to the "physical indicia of innocence." *See Mitchell*, 824 P.2d at 473 (quoting *Kennedy*, 487 F.2d at 104). This indicia of innocence most often refers to the right of a criminal defendant to

be tried in front of a jury in the “garb of innocence,” rather than in prison clothing. *Id.* (quoting *Kennedy*, 487 F.2d at 105).

“The prejudicial effect that flows from a defendant’s appearing before a jury in identifiable prison garb is not measurable, and it is so potentially prejudicial as to create a substantial risk of fundamental unfairness in a criminal trial.” *Chess v. Smith*, 617 P.2d 341, 344 (Utah 1980).

The rule requiring that a defendant be tried in the “garb of innocence” has generally been extended to include “a defendant’s right to be tried without being shackled, chained, bound, handcuffed, gagged, or otherwise physically restrained.” *Mitchell*, 824 P.2d at 473. Numerous cases – as cited by this Court in *Mitchell* – support the premise that this right is an essential component of a fair and impartial trial. *See id.* (string citation omitted) (citing Sheldon R. Shapiro, Annotation, *Propriety and Prejudicial Effect of Gagging, Shackling, or Otherwise Physically Restraining Accused During Course of State Criminal Trial*, 90 A.L.R.3d 17 (1979)).

In *Mitchell*, this Court recognized that “[w]hile compelling an accused to wear jail clothing furthers no essential state policy, compelling an accused to be physically restrained furthers the essential state policy of providing security in the courtroom. For these reasons, court’s have recognized that the right to be tried without physical restraints is not unqualified.” *See id.* (quoting *United States v. Hack*, 782 F.2d 862, 867 (10th Cir. 1986), *cert. denied*, *Owens v. United States*, 476 U.S. 1184, 106 S.Ct. 2921 (1986)). “An accused

may be physically restrained if needed to prevent an escape, resort to violence, or disruption of the trial.” *See id.* (citing *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057 (1970); *Kennedy v. Cardwell*, 487 F.2d 101 (6th Cir. 1973); and *People v. Kimball*, 5 Cal.2d 608, 55 P.2d 483 (1936)); *but see & cf. People v. Hall*, 157 Cal.App.3d 538, 223 Cal.Rptr. 267, 269-70 (1984) (determining that trial court did not abuse its discretion in requiring defendant to wear leg chains throughout trial where defendant had previously escaped from custody and where crimes charged were crimes of violence).

In *Mitchell*, the defendant had appeared before the trial court for the retrial of a crime of violence, during which a firearm had been utilized. *See Mitchell*, 824 P.2d at 474. The trial court had been made aware that the defendant had fled the state after shooting the victim. *See id.* Apparently, between his first and second trials, the defendant had been confined in an out-of-state penitentiary and had escaped from that facility by helicopter. *See id.* Upon the defendant’s return to Utah, he had been found with an 18-inch “shank” – otherwise known as a homemade knife – within his first week in a Utah jail. *Id.* After examining the factual circumstances, this Court concluded that the trial court did not abuse its discretion in ordering the defendant to wear some type of physical restraint during trial. *See id.* In support - this Court recognized that the trial court had found the defendant to be a security risk and should be restrained in some manner. *Id.* The Court also noted that the trial court had offered the defendant a leg brace to provide a degree of physical restraint and security, but which could be hidden from the jury’s view under the defendant’s pants. *See*

id. However, the defendant “chose the more obtrusive and visible shackles, apparently having concluded they would be physically more comfortable.” *Id.*

After jury selection and opening argument in the instant case, the following exchange occurred:

DEFENSE COUNSEL: Your Honor, then the issue that I need to bring up before the jury is we have an armed deputy in uniform sitting behind my client. My concern is in trial, is anytime there’s Court security they are dressed in plainclothes. My concern is it is prejudicing my client. I didn’t realize he was there in uniform.

My understanding in every trial I’ve ever had with the defendant, that if there’s going to be Court security, they’re dressed in plainclothes. If he’s going to sit near my client, I’m requesting that he either be in plainclothes or they have another officer come in because to have an armed deputy sitting directly behind my client I think prejudices the case.

THE COURT: Okay, what’s the –

PROSECUTOR: That’s typically the procedure, your Honor. I’ve had trials where they came from the prison and they’re always plainclothes. I think, though, the fact that his uniform matches the bailiff, I think if he can just be introduced as one of the two bailiffs that will be assisting with the trial today, and we could have him sit elsewhere. I don’t have a problem with that.

DEFENSE COUNSEL: If he wants to sit in the back of the Court. My concern is deputies should understand during jury trials protocol it should be filed – or followed; and to have him sitting directly behind my client I think prejudices him. So if he wants to sit in the back of the Court, that’s fine, but I don’t think sitting behind my client is appropriate.

THE COURT: Well, why don't we just do this. If he can sit a little farther back, and then we just don't say anything. I don't want to draw undue attention to it.

PROSECUTOR: Okay.

THE COURT: So is there any –

DEFENSE COUNSEL: My client's got handcuffs on. I just – I would assume that the Court security would know that, and I wanted that on the record because I didn't notice that until I got up to do an opening and looked back –

THE COURT: All right.

PROSECUTOR: We typically have two bailiffs in a courtroom during a trial. So that's why I think that's – I mean, I don't want to unnecessarily draw attention, but I think if there is a problem, I think I can clarify the whole thing just saying we have two bailiffs that work on trials, and these are the two bailiffs that work on trials, and these are the two bailiffs, and introduce them.

DEFENSE COUNSEL: I think that just draws more attention to the fact that he's been sitting right there.

PROSECUTOR: Okay.

THE COURT: Well, I think if it just be not directly behind him, I think we'll be fine.

PROSECUTOR: Sure. Thank you, your Honor.

THE COURT: Okay, then –

COURT CLERK: It's actually our policy to have two bailiffs when we have a jury.

THE COURT: Okay, the question is –

DEFENSE COUNSEL: That's fine, but you then have clothes.

THE COURT: – yeah, the question is being right behind being –

COURT CLERK: Okay.

THE COURT: Yeah. So, okay, anything else?

PROSECUTOR: No, your Honor.

(R. 93:64-67).¹²

In this case, Defendant appeared before the trial court for a jury trial on two counts of theft and failing to stop at the command of a law enforcement officer – which did not include any crimes of violence. The trial court erred in having Defendant appear at trial before a jury wearing handcuffs with a uniformed and armed officer sitting directly behind him. Defendant's trial counsel objected, bringing the matter to the court's attention and providing the court with an opportunity to correct the matter. Notwithstanding trial counsel's somewhat belated objection, the prosecution agreed – at least partially – that the matter had been handled inappropriately. Nevertheless, the trial court neglected to fully address the prejudicial circumstances under which the jury trial had begun – making no finding that Defendant constituted a security risk and should be restrained in some manner.

¹²A true and correct copy of the exchange between counsel and the trial court concerning the uniformed, armed guard sitting directly behind Defendant and Defendant wearing handcuffs during the trial is attached to this Amended Brief as Addendum E.

Moreover, the trial court never offered Defendant some alternative physical restraint or security that could be hidden from the jury's view in some fashion.

This issue is reviewable for plain error. Plain error requires a showing that “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful” *State v. Parker*, 2000 UT 51, ¶ 6, 4 P.3d 778 (quoting *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993)).

The trial court's behavior was erroneous inasmuch as it did not affirmatively afford or address the prejudicial circumstances under which Defendant was required to go to trial. The underlying basis for this error is specifically contained in the arguments above. This error was obvious because Defendant's right to a fair and impartial trial and the court's duty to affirmatively afford him this right under the aforementioned circumstances were well settled at the time of trial. *See, e.g., State v. Mitchell*, 824 P.2d 469, 473 (Utah Ct. App. 1991) (citation omitted); *see also Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 1692 (1976) (determining that a criminal defendant's right to a fair trial is a fundamental liberty interest guaranteed by the Fourteenth Amendment to the United States Constitution). Moreover, Defendant's right to due process under these circumstances, including the right to a presumption of innocence, was well settled at the time of trial. *See, e.g., State v. Mitchell*, 824 P.2d 469, 473 (Utah Ct. App. 1991) (quoting *Kennedy v. Cardwell*, 487 F.2d

101, 104 (6th Cir. 1973), *cert. denied*, *Kennedy v. Gray*, 416 U.S. 959, 94 S.Ct. 1976 (1974)).

Finally, the error was harmful or prejudicial. By failing to inquire as to the prejudicial circumstances, the trial court committed obvious reversible error – mandating reversal. *See State v. Bennett*, 2000 UT 34, ¶ 3, 999 P.2d 1. But for the trial court’s deprivation of Defendant’s right to a fair and impartial trial and due process, there is a reasonable probability that the outcome of the trial would have been different. *See State v. Montoya*, 2004 UT 5, ¶ 23, 84 P.3d 1183.

The failure to provide Defendant with the fundamental constitutional right to a fair and impartial trial constitutes a structural error that is not subject to the harmless error analysis. A structural error is a “defect [that] affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *See Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265 (1991); *see also State v. Cruz*, 2005 UT 45, ¶ 17, 122 P.3d 543. Because the failure to provide a defendant with the right to a fair and impartial trial affects the very framework of the trial itself, prejudice or harm is presumed. *See State v. Arguelles*, 2003 UT 1, ¶ 94, n.23, 63 P.3d 731.

By failing to timely request that the trial court affirmatively inquire and address the prejudicial circumstances under which he was being required to go to trial, trial counsel rendered ineffective assistance of counsel. This failure fell below an objective standard of

reasonable professional judgment. This is demonstrated by existing Utah case law discussed at length above and the underlying factual circumstances of this case. *See also* Argument I.A. and I.B.

But for counsel's unprofessional failure to timely request that the trial court inquire and address Defendant's handcuffs and the uniformed, armed officer sitting directly behind him, there is a reasonable probability the result at trial would have been different. Had the trial court been alerted of its obligation, there is a reasonable probability that the outcome of the trial would have been different.

III. THE CUMULATIVE EFFECT OF THE ERRORS RESULTING FROM THE INEFFECTIVE ASSISTANCE OF COUNSEL AND OTHER ERRORS SPECIFICALLY SET FORTH ABOVE MERITS REVERSAL.

The cumulative effect of the numerous deficiencies and ineffective assistance of counsel, namely, the failure to utilize an expert witness to testify about the deficiencies and pitfalls of eyewitness identifications and the failure to request a *Long* instruction when eyewitness identification was a central issue in the case in addition to other errors, prejudiced Defendant. These numerous critical errors undermine confidence that a fair trial was provided Defendant. "Under the cumulative error doctrine," this Court may reverse "if the cumulative effect of . . . several errors undermines . . . confidence . . . that a fair trial was had." *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993); *accord State v. Perea*, 2013 UT 68,

¶ 99, 322 P.3d 624 (stating cumulative error doctrine is “used when a single error may not constitute grounds for reversal, but many errors, when taken collectively, nonetheless undermine confidence in the fairness of a trial”). “In assessing a claim of cumulative error,” this Court “consider[s] all the identified errors.” *Dunn*, 850 P.2d at 1229. This Court is “more willing to reverse when a conviction is based on comparatively thin evidence.” *State v. King*, 2010 UT App 396, ¶ 35, 248 P.3d 984. But for the numerous deficiencies and ineffective assistance of trial counsel both prior to and during trial in addition to other critical errors, the evidence presented at trial did not implicate Defendant as the man who allegedly committed second-degree felony theft. As a result, the State’s case was based on the erroneous and incomplete evidence – not to mention unconstitutionally suggestive identification evidence involving the State’s eyewitnesses. The aggregate of these errors “undermine . . . confidence that [King] received a fair trial,” providing the basis for this Court to reverse his convictions. *See id.* at ¶ 38, 248 P.3d 984.

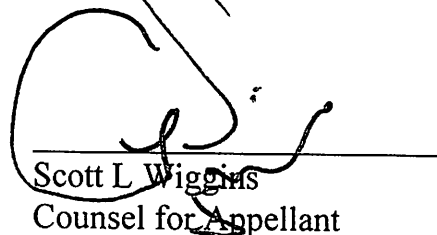
CONCLUSION

Based on the foregoing, Defendant respectfully requests that this Court reverse his convictions and vacate the illegal sentence, remanding this case for further proceedings

consistent with the Court's decision. Defendant further requests that the Court grant any further relief it deems appropriate under the circumstances of this case.

RESPECTFULLY SUBMITTED this 27th day of October, 2014.

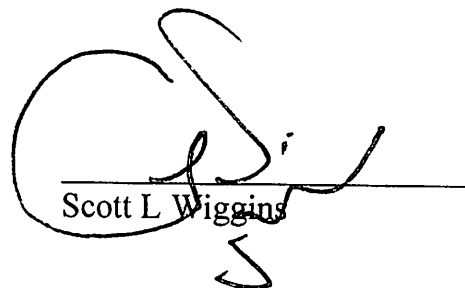
ARNOLD & WIGGINS, P.C.



Scott L Wiggins
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned, Scott L Wiggins, hereby certifies, pursuant to Utah Rule of Appellate Procedure 24(f)(1)(C), that the Amended Brief of Appellant complies with the applicable type-volume limitation set forth in Utah Rule of Appellate Procedure 24(f)(1)(A) by containing 10,200 words.



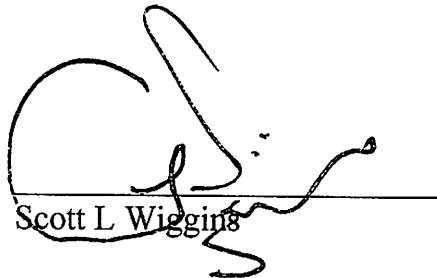
Scott L Wiggins

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copies of the foregoing **AMENDED BRIEF OF APPELLANT** to the following on this 30 day of October, 2014:

Ryan D. Tenney
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Counsel for the State of Utah

The undersigned also certifies that he included a digital copy of the Amended Brief of Appellant.



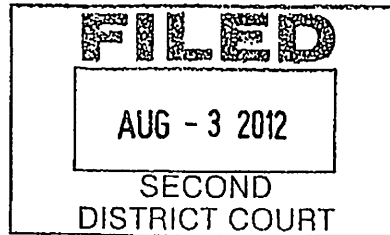
Scott L. Wiggins

ADDENDA

- Addendum A: Information (R. 1-2 - filed August 3, 2012)
Addendum B: Transcript of Preliminary Hearing (R. 92 - September 7, 2012)
Addendum C: Amended Information (R. 25-26 - filed November 5, 2012)
Addendum D: Minutes – Change of Plea – Sentence, Judgment, Commitment
(R. 64-65)
Addendum E: Transcript of exchange between counsel and the trial court (R.
93:64-67)

Tab A

TROY S. RAWLINGS, #6969
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

THE STATE OF UTAH
Plaintiff,

vs.

LEVI GENE KING
DOB: 11/29/1988,
Defendant.

Bail:

INFORMATION

Case No.
OTN

121701223

The undersigned prosecutor states on information and belief that the defendant, either directly or as a party, at County of Davis, State of Utah, committed the crimes of:

COUNT 1

THEFT, 76-6-404 UCA, Second Degree Felony, as follows: That on or about August 01, 2012 at the place aforesaid the defendant did obtain or exercise unauthorized control over the property of another person with a purpose to deprive the person thereof, and (i) the value of the property or services was or exceeded \$5,000, or (ii) the property stolen is a firearm or an operable motor vehicle.

COUNT 2

FAIL TO STOP AT COMMAND OF LAW OFFICER, 76-8-305.5 UCA, Class A Misdemeanor, as follows: That on or about August 01, 2012 at the place aforesaid the defendant did flee from or otherwise attempt to elude a law enforcement officer (a) after the officer issued a verbal or visual command to stop; (b) for the purpose of avoiding arrest; or (c) by any means other than a violation of Utah Code Section 41-6a-210.

This Information is based on evidence obtained from witness D Jewel.

PROBABLE CAUSE STATEMENT: The undersigned prosecutor is a Deputy Davis County Attorney and has received information from the investigating officer, Daniel Jewel of the Layton Police Department, and the information herein is based upon such personal observations and investigation of said officer.

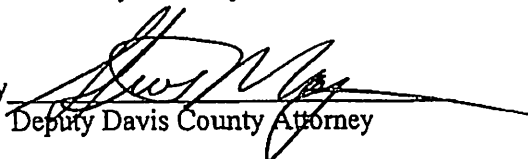
1. On August 1, 2012, the victim reported that his vehicle had just been stolen. Officers located the vehicle, and observed the defendant driving it.

2. When the officers attempted to take defendant into custody, he fled from them on foot.

Authorized August 3, 2012
for presentment and filing:

TROY S. RAWLINGS
Davis County Attorney

By


Deputy Davis County Attorney

Tab B

IN THE SECOND JUDICIAL DISTRICT COURT-FARMINGTON
OF DAVIS COUNTY, STATE OF UTAH

FILED

MAR 10 2013

SECOND
DISTRICT COURT

ORIGINAL

STATE OF UTAH,

Plaintiff,

vs.

LEVI GENE KING,

Defendant.

Case No. 121701223 FS

Preliminary Hearing
Electronically Recorded on
September 7, 2012

BEFORE: THE HONORABLE DAVID CONNORS
Second District Court Judge

APPEARANCES

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Transcribed by: Wendy Haws, CCT

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FILED

UTAH APPELLATE COURTS

APR 23 2013

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P R O C E E D I N G S

(Electronically recorded on September 7, 2012)

THE COURT: Okay, we're here on the preliminary hearing.

Is this the --

MS. GEORGE: Mr. King, your Honor.

THE COURT: -- King matter? Okay, it's No. 35 on the calendar, State of Utah vs. Levi Gene King, case 121701223.

This is the time set for the preliminary hearing. Just appearances for the record.

MS. GEORGE: Julie George, your Honor, on behalf of Mr. King who is present here in Court.

MR. NIELSON: Jason Nielson for the State, your Honor.

THE COURT: All right, are we planning to go ahead, then, with the hearing today?

MR. NIELSON: Yes.

THE COURT: Okay, either party wish to make a brief opening statement?

MR. NIELSON: The State would waive opening, your Honor.

THE COURT: Okay, Ms. George?

MS. GEORGE: As well, your Honor.

THE COURT: Okay, is the State ready to proceed?

MR. NIELSON: We are, your Honor.

THE COURT: Okay, you may call your first witness.

MR. NIELSON: State calls Brad Hatch.

1 THE COURT: All right, Mr. Hatch, if you'll come and
2 pause near the podium there, and we'll have you raise your
3 right arm and be sworn in.

4 COURT CLERK: Raise your right hand, please. You do
5 solemnly swear that the testimony you are about to give in the
6 case now before the Court will be the truth, the whole truth
7 and nothing but the truth, so help you God?

8 THE WITNESS: I do.

9 THE COURT: All right, please have a seat on the
10 witness stand.

11 You may proceed.

12 MR. NIELSON: Thank you very much, your Honor.

13 BRAD HATCH,

14 having been first duly sworn,

15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. NIELSON:

18 Q. Could you please state your name and spell your first
19 and last name for us, please.

20 A. Charles Bradley Hatch.

21 Q. Why don't you just spell your last name for us.

22 A. H-a-t-c-h.

23 Q. Thank you very much. Mr. Hatch, where do you live,
24 which county?

25 A. Davis County, Layton.

1 Q. Okay, and where do you work?

2 A. I'm self-employed with my wife.

3 Q. Okay, and where is your place of employment, what
4 city?

5 A. It's in Layton.

6 Q. Did you go to work on August 1st of this year?

7 A. Yes.

8 Q. How did you get there?

9 A. I drove my truck.

10 Q. What type of truck do you own?

11 A. It's a 2004 Ford black short bed, 350.

12 Q. Is that the vehicle you --

13 A. Yes, the one I go to work in every day, yeah.

14 Q. -- commonly drive to work? Okay, and do you happen to
15 know what the license plate is on that truck?

16 A. Not offhand.

17 Q. Okay, and what time did you arrive at work that day?

18 A. It was roughly 6:45.

19 Q. Okay, and where did you park your vehicle before going
20 into work?

21 A. That was a.m. I always park it in the rear of the
22 business that we own.

23 Q. Okay, and what happened that morning after you parked
24 your truck and went into work?

25 A. I normally go there every morning, a couple of hours

1 before the girls get there to start work, to do some cleaning
2 and whatnot. Just parked the truck and got out. Had some
3 supplies. I always take supplies with me just about every
4 morning into the back door, and then I go about my business.

5 Q. Did anything happen that was noteworthy to you during
6 that morning after you arrived at work and did what you just
7 described?

8 A. No, everything was -- everything was normal, just a
9 normal day.

10 Q. Okay, and did anything change during that day to make
11 it not normal for you?

12 A. Yeah.

13 Q. Specifically what was that?

14 A. I was up front in the business, and my wife came
15 around the corner in her car, frantic. I opened the door for
16 her and she said, "Who's in your truck?"

17 Q. I'm going to interrupt you. I'm not going to be able
18 to have you tell us what other people told you, okay?

19 A. Okay.

20 Q. So I'm just going to ask you what you saw, all right?
21 Does that make sense?

22 A. Okay.

23 Q. Okay, so you saw your wife?

24 A. Uh-huh.

25 Q. Did you speak with her? Not telling me what she said,

1 but did you speak with her?

2 A. Yeah.

3 Q. After you spoke with her, could you see your truck?

4 A. No.

5 Q. Okay, and what did you do when you couldn't see your
6 truck?

7 A. I got in my wife's car and went to look for it.

8 Q. Okay, and how long did that take; how long were you
9 doing that for?

10 A. Oh, probably 20 minutes.

11 Q. Okay, and where did you go to look for your truck?

12 A. I went the direction my wife told me it went, and I
13 went east instead of west. I wish I'd have gone west, but I
14 didn't.

15 Q. Okay, and east in Layton?

16 A. Layton, right.

17 Q. Okay, and what did you do -- were you able to find the
18 truck during those 20 minutes that you were driving around?

19 A. No, I didn't.

20 Q. What did you do after that?

21 A. I got a phone call from -- actually I called 911 while
22 I was in the car.

23 Q. Okay.

24 A. Reported my truck had been stolen. Then I looked for
25 it, and with no luck. Got a phone call from my wife said they

1 found my truck.

2 Q. Okay, and where did you go after you received word
3 that someone had found your truck?

4 A. I went back to work, picked up my wife --

5 Q. Okay.

6 A. -- and to the location where I was told to go -- or
7 she was told to go.

8 Q. Which location did you go to?

9 A. I can't remember the exact address, but it was down on
10 Gordon -- close to Gordon Avenue, just east of the Red Lobster
11 area.

12 Q. Is that still in Layton City?

13 A. In Layton.

14 Q. About how far is that or how long did it take you to
15 get there from your place of employment?

16 A. Oh, probably 12, 13 minutes, right in that area.

17 Q. Okay, so from the time you started looking for your
18 truck until the time that you went to that location about how
19 much time passed?

20 A. I'm sorry, what was that?

21 Q. So from the time that you first noticed your truck
22 wasn't there until the time that you went to this location that
23 we just talked about, how much time passed between those two
24 points in time?

25 A. I would say roughly 45 minutes.

1 Q. All right, and what did you -- what did you see when
2 you arrived at that location?

3 A. Several cop cars and that was it. Just several cop
4 cars.

5 Q. Okay, did you ever see your truck again?

6 A. Yeah.

7 Q. Okay, when was that?

8 A. Oh, 15, 20 minutes after I made a statement.

9 Q. Okay, and where was the truck located when you saw
10 it next?

11 A. Over by some business complex just off Gordon. I
12 don't know the exact address.

13 Q. How close was it to the location where you saw the
14 multiple police cars?

15 A. It was just around the corner maybe two blocks.

16 Q. Okay, did that end your interaction with the police on
17 that day?

18 A. No.

19 Q. What else did you do?

20 A. They took me to the truck and they had it all finger-
21 printed. It was parked in backwards into there, and I proceeded
22 to look for my keys, because I didn't have any keys.

23 Q. Could you locate your keys?

24 A. No.

25 Q. Have you ever seen your keys since?

1 A. No.

2 Q. Okay, were there any other items in your truck, other
3 than your keys?

4 A. At the time I didn't notice anything missing. It
5 looked fine.

6 Q. Okay, and did you find anything missing at a later
7 point in time?

8 A. Yeah, I got back to work and noticed the I-Pod was
9 missing.

10 Q. Okay, and whose I-Pod was that?

11 A. That was mine and my wife's.

12 Q. Okay, and do you remember whether that I-Pod was in
13 the truck, or did it just go missing?

14 A. Yeah, it's always in the same spot.

15 Q. Okay, and did you ever see that I-Pod again?

16 A. I did. It was probably two hours later. An officer
17 brought it to my house.

18 Q. Okay, and did you ever speak with the police about who
19 had your truck?

20 A. They showed my wife and I the gentleman when he got
21 out of the police unit.

22 Q. Okay, did they take you to that location?

23 A. Yeah.

24 Q. They showed you an individual?

25 A. Yes.

1 Q. Is that individual in the courtroom today?

2 A. Yes.

3 Q. Okay, and could you identify that person, please.

4 A. This gentleman right here.

5 MR. NIELSON: Okay. Your Honor, if the record could
6 reflect he's pointed at the defendant, Levi King.

7 THE COURT: The record will so reflect.

8 MR. NIELSON: Thank you, your Honor.

9 Q. BY MR. NIELSON: This might seem like an obvious
10 question, but did you give any per -- anybody permission that
11 day to use your I-Pod or your truck?

12 A. No.

13 MR. NIELSON: Okay, that's all the questions I have for
14 this witness, your Honor.

15 THE COURT: Okay, thank you. Cross examination?

16 MS. GEORGE: Just a few questions, your Honor.

17 CROSS EXAMINATION

18 BY MS. GEORGE:

19 Q. Mr. Hatch, you indicated that you arrived at the salon
20 on -- let's see the particular date here, I apologize. I've
21 got your handwritten statement. What date was it that the
22 truck was taken?

23 A. August 1st.

24 Q. August 1st. Okay, so you arrived at the salon, and it
25 was in the morning?

1 A. Yes, I am.

2 Q. What time was that again?

3 A. About 6:45 a.m.

4 Q. Okay, and you entered through the back of the salon;
5 is that right?

6 A. No.

7 Q. Okay, where did you go in?

8 A. I went through the front door.

9 Q. Okay, and your wife, where does she park when she
10 comes to the salon?

11 A. In the front of the building.

12 Q. Okay, and at the time that you entered the salon were
13 you taking items with you from your truck into the salon?

14 A. No, I actually go open the door, go through the salon,
15 turn lights on, I come back out to get stuff from my truck and
16 put into the salon.

17 Q. Okay, and at the time that you entered the salon did
18 you lock your truck?

19 A. No.

20 Q. How long were you inside the salon before you were
21 notified that your truck was missing?

22 A. Probably 45 minutes. I was in and out of the back
23 taking supplies out of my truck, and just failed to lock it
24 that day.

25 Q. Okay, so -- and to go over this, so you drive up to

1 the salon, the truck is unlocked, you go into the salon to turn
2 the lights on; is that right?

3 A. Yeah, around the front, come back, get stuff out of
4 the truck take it in.

5 Q. So were you coming and going from the salon in and out
6 of your truck?

7 A. Yes.

8 Q. Okay, how many times do you think you exited the
9 salon, went to your truck to retrieve something and went back
10 in?

11 A. Probably two or three times.

12 Q. Okay, over how long of a period of time?

13 A. About 45 minutes.

14 Q. Was there anyone else out there during the two or
15 three times that you went back out to the truck?

16 A. No.

17 Q. The keys during this time period, were they in the
18 ignition?

19 A. They were in my cup holder.

20 Q. You indicated that you believed your I-Pod was
21 missing; is that right?

22 A. Yes.

23 Q. Were you ever shown an I-Pod from law enforcement to
24 identify as the one that --

25 A. They made me identify it before they showed it to me.

1 Q. Okay, and how did you identify it; from the genre of
2 music that was on it, from the color --

3 A. From the color and the -- whatever the diagram is on
4 the back of the I-Pod.

5 Q. Okay, and so you were able to identify the one that
6 law enforcement had?

7 A. Yeah.

8 Q. I apologize, sir, what else did you believe was taken
9 from the truck?

10 A. For -- I know my keys are missing. I don't know when
11 the I-Pod -- there was money from the console that was missing,
12 but I don't know how much it was.

13 Q. Okay, could you estimate for us? I mean, was it a
14 large amount of money, small?

15 A. No, small amount.

16 Q. Okay, and the keys, was it just -- were there just the
17 keys for the truck on there or were there a number of keys?

18 A. Keys to a (inaudible) cover.

19 Q. Okay, so probably two, three keys on there?

20 A. Yeah, two keys and an I-Pod -- or an I-Pad.

21 Q. Pardon?

22 A. A key pad.

23 Q. Oh, okay.

24 A. The remote key pad.

25 Q. The little key like a key fob kind of thing?

1 A. Uh-huh.

2 Q. Okay, and that went to the truck; is that right?

3 A. Uh-huh.

4 Q. The keys were not located but the I-Pod was, correct?

5 A. Correct.

6 Q. You were notified that the car was missing when your
7 wife had approached you that morning, correct?

8 A. That's right.

9 Q. At the time that you were called to the scene where
10 your truck was located, did you see anyone in custody there?
11 I mean, did the officers have someone that they had detained?

12 A. They did. When I arrived there they did.

13 Q. You weren't able to identify anyone because you hadn't
14 seen anyone around your truck?

15 A. Exactly.

16 Q. Okay. Was there any damage to the truck?

17 A. Not that I could tell.

18 MS. GEORGE: Okay, no further questions. Thank you,
19 Mr. Hatch.

20 THE WITNESS: Yep.

21 THE COURT: Redirect?

22 MR. NIELSON: No, your Honor. Thank you.

23 THE COURT: All right, you may step down.

24 THE WITNESS: Thank you.

25 THE COURT: Other witnesses?

1 MR. NIELSON: The State calls Jill Hatch, your Honor.

2 THE COURT: All right, Ms. Hatch, if you'll pause at
3 the podium, raise your right arm, we'll have you sworn in.

4 COURT CLERK: You do solemnly swear that the testimony
5 you are about to give in the case now before the Court will be
6 the truth, the whole truth and nothing but the truth, so help
7 you God?

8 THE WITNESS: I do.

9 THE COURT: All right, come on forward, have a seat in
10 the witness stand. There should be a pitcher of water and some
11 cups if you need a drink.

12 THE WITNESS: Okay.

13 THE COURT: You may proceed.

14 MR. NIELSON: Thank you, your Honor.

15 JILL HATCH,

16 having been first duly sworn,

17 testified as follows:

18 DIRECT EXAMINATION

19 BY MR. NIELSON:

20 Q. Could you please state your name for us.

21 A. My name is Jill Hatch.

22 Q. Okay, do you spell your last name the same way your
23 husband does?

24 A. Uh-huh.

25 Q. Okay, thank you. Ms. Hatch, do you also live in

1 Layton?

2 A. Yes, I do.

3 Q. All right, and do you also work in Layton?

4 A. Yes, I do.

5 Q. Did you work on August 1st 2012?

6 A. I did.

7 Q. What type of vehicle do you drive?

8 A. An Escalade.

9 Q. Okay, and was that the vehicle -- did you use that
10 vehicle on that day?

11 A. I did.

12 Q. What time did you go to work that day?

13 A. About 7:30.

14 Q. Okay, and was that before or after your husband had
15 left for work?

16 A. It was after.

17 Q. What did you observe as you were on your way to work
18 that day?

19 A. I was on my way and his truck was coming towards me at
20 kind of a little side street that I passed him; but I thought
21 it was him so I came to almost a complete stop.

22 Q. Just to clarify, for purposes of the record when you
23 say "his truck" and "him," who are you referring to, Ms. Hatch?

24 A. The gentleman that took the truck, I guess, because I
25 didn't recognize the person in the truck. So I almost came to

1 a stop and had my window rolled down, and he didn't stop. He
2 just kept going. Then I was kind of confused. So I --

3 Q. Let me interrupt you, Ms. Hatch.

4 A. Okay, yeah.

5 Q. The truck that you saw, who did you believe that truck
6 belonged to?

7 A. To my husband.

8 Q. Okay, just when we say "his" or "him" --

9 A. Yeah.

10 Q. -- it's not 100 percent clear, so I'm just asking --

11 A. Okay, yeah.

12 Q. -- to clarify a couple of things, okay?

13 A. Yeah.

14 Q. Thank you. Whose truck -- was this truck that you
15 believed to be your husband's, is that the truck that you were
16 talking about just now?

17 A. Yes, uh-huh.

18 Q. You saw it?

19 A. Yeah.

20 Q. Then you came up to a stop?

21 A. I stopped and rolled down my window to talk to them,
22 and it wasn't him, and he just went by; but it was my husband's
23 truck.

24 Q. How did you know it was your husband's truck?

25 A. He has some identifiable mud flaps on the back, and

1 when I stopped, I looked in the rearview mirror because I was
2 confused, and I knew it was his truck because of the mud flaps
3 on the truck.

4 Q. Could you see the person that was driving the truck?

5 A. Uh-huh.

6 Q. What did that person look like?

7 A. He had short dark hair, short dark hair (inaudible).

8 Q. About how old was this person?

9 A. Mid 20's, maybe.

10 Q. Do you see that person in the courtroom today?

11 A. I do.

12 Q. Where is that person?

13 A. Here.

14 MR. NIELSON: Okay. Your Honor, if the record could
15 reflect she's identified the defendant, Levi King.

16 THE COURT: The record will so reflect.

17 MR. NIELSON: Thank you, your Honor.

18 Q. BY MR. NIELSON: So you're surprised when you see this
19 truck that you thought was your husband's?

20 A. Yeah.

21 Q. Where did you go from there?

22 A. I went to the salon and I ran in the front door and
23 said to them, "Where is your truck? Did you let somebody drive
24 your truck?"

25 Q. Could you see the truck at that location?

1 A. No, it was gone. So, yeah, and he's like, "What are
2 you talking about?" I said, "There's somebody in your truck.
3 Somebody just must have stole your truck."

4 Q. What did you do after you told your husband that?

5 A. So I called 911, too. I also called the police, and
6 he left. My husband left.

7 Q. When is the next time you saw your husband?

8 A. He came back -- back to my work, and then we left
9 together, because he took my car. So we left together in my
10 car to go to the location the police told us to go to.

11 Q. You accompanied your husband to that location?

12 A. Yes, uh-huh.

13 Q. At any point in time did the police ask you to make an
14 identification of the driver of the vehicle?

15 A. They did.

16 Q. Did they have a person in custody?

17 A. They did.

18 Q. Who was that person?

19 A. It was that gentleman right there.

20 MR. NIELSON: Okay, your Honor, again, if the record
21 could reflect she's identified the defendant.

22 THE COURT: The record will so reflect.

23 Q. BY MR. NIELSON: So the person that was driving the
24 truck initially, was that the same person that the police
25 showed you that they had in custody?

1 A. Uh-huh.

2 Q. Did you have any personal belongings in the truck?

3 A. Me and my husband, we had -- well, an I-Pod that was
4 in there.

5 Q. Did you ever recover that I-Pod?

6 A. Yes.

7 Q. When was that?

8 A. The police brought it back to us that day.

9 Q. Could you describe that I-Pod for us?

10 A. Yeah, it had a white with kind of black and red flower
11 skin on it, a skin on the front and the back.

12 Q. Okay, and when you saw it, how certain were you that
13 it was the I-Pod that you believed was missing?

14 A. I was exactly certain.

15 Q. Have you used that I-Pod since?

16 A. Yes.

17 Q. Okay, did it have the same information that it had
18 previously?

19 A. Uh-huh, yep.

20 MS. NIELSON: That's all the questions I have for this
21 witness, your Honor.

22 THE COURT: All right, thank you. Cross examination.

23 CROSS EXAMINATION

24 BY MS. GEORGE:

25 Q. Just a few questions, Ms. Hatch. The truck, then,

1 that you identified as your husband's, you said that it had
2 some unique identifiers; is that correct?

3 A. Uh-huh, yeah.

4 Q. Those were mud flaps; is that correct?

5 A. Uh-huh.

6 Q. Could you describe for the Court on our record what
7 type of mud flaps your husband has on his truck?

8 A. Yeah, they're on like a bar that's kind of a gold
9 colored bar, and they're called "Rock Dogs" or something like
10 that, but they're big. They hook on so that the rocks won't
11 hit the trailer when we pull it.

12 Q. Okay, and so they're just a black, a plain black mud
13 flap?

14 A. Uh-huh.

15 Q. But they're hooked onto a bar that drops off the
16 truck?

17 A. Yeah.

18 Q. Okay, and you indicated that the individual that you
19 saw in the truck was Mr. King here; is that correct?

20 A. Uh-huh.

21 Q. You can identify him how?

22 A. He just -- well, he had short hair, and it's him.
23 Then when we went to identify him, that's who the police had.

24 Q. In your witness statement you indicated that he had
25 dark shaved hair.

1 A. Yeah.

2 Q. So is that in your opinion what this gentleman has
3 here?

4 A. His hair is longer than it was.

5 Q. Okay, but the same color?

6 A. Uh-huh.

7 Q. Okay, and did -- were the windows rolled up or rolled
8 down in the truck?

9 A. I'm not sure.

10 Q. Okay, and the windows on your husband's truck, they
11 have a darker tint; do they not?

12 A. I don't think they do. I don't.

13 Q. Is it the standard tint that came with the truck?

14 A. Yeah, uh-huh.

15 Q. That model of truck -- in looking up that model of
16 truck, is that a standard tint that you know of on that? I
17 guess what I'm saying --

18 A. I think, yeah, it's a standard tint.

19 Q. It's the way it came from the factory; is that right?

20 A. Yeah.

21 Q. Is the driver's side window darker than the back
22 window or lighter than the back window of the truck?

23 A. I don't -- I don't think -- I think it's lighter.

24 Q. Okay.

25 A. Yeah.

1 Q. You don't remember whether the windows were rolled up
2 or rolled down?

3 A. I think it was down.

4 Q. Okay, when you slowed down to talk to the person
5 driving the truck, did the truck slow down?

6 A. No.

7 Q. What was the -- if you can, estimate the speed. How
8 fast do you think you were driving into the parking lot?

9 A. Not very fast.

10 Q. How fast do you think the truck was driving out of the
11 parking lot?

12 A. Not very fast, yeah. Maybe ten miles an hour.

13 Q. Okay.

14 A. Not very fast.

15 Q. You indicated that an I-Pod was missing. Do you know
16 of anything else that was missing in the truck?

17 A. Just some -- we had some money in there, but it wasn't
18 very much.

19 Q. Okay, so a little bit of money and the I-Pod, and
20 those are the only things you know of?

21 A. And the keys.

22 Q. Okay, were there any papers missing from the truck?

23 A. Not that we know of.

24 Q. Wallet missing from the truck?

25 A. No.

1 Q. Was there anything in tinfoil or anything like that in
2 the truck?

3 A. Not that we know of.

4 MS. GEORGE: No further questions. Thank you very
5 much, Ms. Hatch.

6 THE WITNESS: Uh-huh.

7 THE COURT: All right, any redirect?

8 MR. NIELSON: No, thank you, your Honor.

9 THE COURT: You may step down.

10 MR. NIELSON: The State calls Officer Jewel, your
11 Honor.

12 THE COURT: Okay, Officer, if you'll -- on your way up
13 if you'll pause and raise your right arm, we'll have you sworn
14 in.

15 COURT CLERK: You do solemnly swear that the testimony
16 you are about to give in the case now before the Court will be
17 the truth, the whole truth and nothing but the truth, so help
18 you God?

19 THE WITNESS: I do.

20 THE COURT: All right, please have a seat on the witness
21 stand. There's a pitcher with some cups there if you need to
22 get a drink of water.

23 You may proceed, Mr. Nielson.

24 MR. NIELSON: Thank you, your Honor. I left a witness
25 statement on the table. I'm sorry, your Honor.

1 THE COURT: It's okay.

2 DANIEL JEWEL,

3 having been first duly sworn,

4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. NIELSON:

7 Q. Would you please state your name for us.

8 A. Daniel Jewel.

9 Q. Could you spell your last name for us.

10 A. J-e-w-e-l.

11 Q. Thank you, and are you currently employed?

12 A. I am.

13 Q. With what agency?

14 A. Layton Police Department.

15 Q. How long have you been a police officer?

16 A. Since June of this year.

17 Q. Okay, Officer Jewel, what's your current assignment
18 with Layton PD?

19 A. Patrol division.

20 Q. Have you been on patrol the whole time since you
21 started?

22 A. Yes. Well, I start -- I worked in evidence for a
23 month, but --

24 Q. Okay, and were you on duty on August 1st, 2012?

25 A. I was.

1 Q. Specifically were you on duty that morning?

2 A. Yes.

3 Q. What did you do that morning? What were you doing
4 prior to about 7 o'clock, I'm sorry?

5 A. I was -- I was with my FTO. We were currently on
6 northbound Main Street. I received the call.

7 Q. Okay, and what type of dispatch did you receive?

8 A. A vehicle theft.

9 Q. Where was the location of the vehicle theft that you
10 were dispatched to?

11 A. It was 1320 East Highway 193.

12 Q. Okay, and did you respond to that location?

13 A. I did not.

14 Q. Okay, what did you do after you received the dispatch?

15 A. I headed north on Hill Field Road.

16 Q. What information did you receive related to the stolen
17 vehicle?

18 A. Once I became the initial officer I heard -- I heard
19 over radio traffic that Officer Ottesen spotted the alleged
20 vehicle that was taken.

21 Q. Specifically what type of vehicle were you looking
22 for?

23 A. It was a black Ford F-350.

24 Q. Was there a license plate indicated on the ATL?

25 A. There was, Zulu 62 1 Golf Fox.

1 Q. For us lay people that don't know all the call signs--

2 A. Z621GF.

3 Q. Thank you very much, Officer. Were you able to locate
4 that vehicle?

5 A. It was located.

6 Q. Where was it located?

7 A. Officer Ottesen located the vehicle about 1090 North
8 75 West.

9 Q. Did you respond to that location as well?

10 A. I did not.

11 Q. What did you do after you learned that the vehicle had
12 been spotted?

13 A. I went to a Printer Securities at the intersection of
14 1050 North 2250 West.

15 Q. Okay, what did you observe when you arrived at that
16 location?

17 A. I had my -- I turned my emergency lights on. I was
18 in a position where I could see north and east facing in case
19 -- because we were told that (inaudible) Security Printers.
20 We wanted to make sure that he didn't get out of that area.

21 Q. Okay, and --

22 A. He was on foot at that point.

23 Q. Okay, so you received information. Was that from
24 other police officers?

25 A. Yes, through radio traffic.

1 Q. So you received information that someone was on foot.
2 Specifically who was the individual that was on foot, based on
3 the information that you received from other police officers?

4 A. We -- Officer Ottesen stated through radio traffic
5 that it was a male in a white tee shirt, blue jeans, matching
6 the description of what we heard originally through dispatch.

7 Q. Were you able to locate an individual that matched
8 that description?

9 A. Yes.

10 Q. Where was that that you located that individual?

11 A. I didn't locate that individual until we were on about
12 1225 North. I saw that individual running westbound from
13 another officer.

14 Q. Was there anyone else that you could see that was
15 running?

16 A. Another officer.

17 Q. Okay, and who -- which officer was that?

18 A. Officer Lewis.

19 Q. Who was in front of this running?

20 A. The individual, Levi King.

21 MR. NIELSON: Okay, and your Honor, if the record could
22 reflect he just pointed towards the defendant.

23 THE COURT: The record will so reflect.

24 Q. BY MR. NIELSON: Mr. King, was he -- what type of
25 clothing was he wearing when you saw him?

1 A. He was wearing a white tee shirt with blue jeans.

2 Q. Was that consistent with the description you received
3 over dispatch?

4 A. It was consistent with the description given from the
5 first officer.

6 Q. Okay, and what happened during this -- while both of
7 them were running?

8 A. I saw them. I turned westbound onto 425 North. I put
9 my vehicle in park, exited my vehicle, and I -- Levi King was
10 on the ground fighting with Officer Lewis, and I proceeded to
11 gain control of Mr. King's arms -- his left arm.

12 Q. What did you do after you grabbed his left arm?

13 A. Put it into a hold, just a holding position so we
14 could get him to where we could handcuff him.

15 Q. Okay, were you able to take him into custody?

16 A. We did, we took him into custody.

17 Q. Okay, what did you do after you placed him into
18 custody?

19 A. I searched his person incident to arrest.

20 Q. Did you locate any items on his person that were
21 reported from -- reportedly from the truck?

22 A. At the time I didn't -- we didn't -- we didn't know
23 they were from the truck, but in his pocket he had a tinfoil --
24 he had tinfoil wrapped up as (inaudible) marijuana with some
25 residue. He also had an I-Pod.

1 Q. Could you describe that I-Pad for us, please.

2 A. Oh, the I-Pod was white in color with red and black,
3 some sort of print picture on it. It had a scan and it was
4 like old style classic bigger I-Pod.

5 Q. What did you do with that property after you recovered
6 it from his person?

7 A. We didn't know it belonged to anyone else, so we
8 assumed it was his. It was booked into Davis County when I
9 released him to them.

10 Q. Did you ever see that property again?

11 A. I did.

12 Q. How did you go about obtaining that property?

13 A. I obtained a search warrant through Judge -- Judge
14 Morris, because I called Mr. and Mrs. Hatch and asked if they
15 were missing anything else from the vehicle, and they stated
16 they were missing an I-Pod. I asked them to describe it to me.
17 It matched the description of the I-Pod that I saw. We took
18 Mr. King into custody, and then that's when I went to get the
19 search warrant. So I --

20 Q. Were you successful in obtaining a search warrant?

21 A. I was.

22 Q. Where did you go after obtaining the search warrant?

23 A. We went to the booking area at Davis County Jail, gave
24 the search warrant to the deputies on duty, and the deputies on
25 duty searched Mr. King's belongings that were booked.

1 Q. Were they able to locate the I-Pod?

2 A. They were able to book the I-Pod -- or they found the
3 I-Pod. They were unable to find a key. That was also part of
4 the search warrant.

5 Q. What did you do with the I-Pod after you obtained it?

6 A. I returned it to Mr. Hatch.

7 Q. Did you ask them whether they could identify the item?

8 A. I did. I asked if he could give me another description
9 of the I-Pod. It matched the same description as his wife gave
10 him -- or gave me. Then I returned the I-Pod to them.

11 Q. Okay, Officer Jewel, are you the person that took Mr.
12 King to the jail?

13 A. Yes.

14 MR. NIELSON: Okay, your Honor, if I could approach,
15 please.

16 THE COURT: Yes, you may.

17 Q. BY MR. NIELSON: I'm just going to draw your attention
18 just to the photograph and to the name there. What is that
19 document, Officer Jewel, that I've just handed to you?

20 A. It's a Davis County Sheriff's Office book and inform-
21 ation.

22 Q. Okay, and is that the booking sheet that you obtained
23 when you booked Mr. King into jail?

24 A. I didn't receive a booking.

25 Q. Okay, let me just draw your attention to the photo-

1 graph.

2 A. Okay.

3 Q. Is that photograph consistent with Mr. King's
4 appearance at the time you booked him into the jail?

5 A. Yes, it is.

6 Q. Okay, your Honor, I'd move just for the admission
7 of just the booking photograph and name as State's Exhibit 1.

8 THE COURT: Any objection?

9 MS. GEORGE: No.

10 THE COURT: All right, it will be received for that.

11 (Exhibit No. 1 received into evidence)

12 MR. NIELSON: Thank you very much, your Honor. If I
13 could approach and I'll give that to the clerk.

14 THE COURT: That's fine.

15 MR. NIELSON: That's all the questions I have for this
16 witness, your Honor.

17 THE COURT: All right, thank you. Cross examination?

18 MS. GEORGE: Yes, your Honor.

19 CROSS EXAMINATION

20 BY MS. GEORGE:

21 Q. Officer, at the time that you were investigating this
22 incident, were you aware that fingerprints -- the truck was
23 dusted for fingerprints?

24 A. I was.

25 Q. Those prints, from what I understand, there were

1 several latent prints taken from the truck; is that correct?

2 A. Yes.

3 Q. Clearly from the booking sheet that you've just
4 identified there, Mr. King was booked into jail, correct?

5 A. Yes.

6 Q. At the time someone's booked into jail are there
7 fingerprints taken?

8 A. I'm not familiar with the process. I believe there is
9 a fingerprinting process.

10 Q. So you worked in the evidence room; is that right?

11 A. Yes.

12 Q. At the time you worked there are you familiar with
13 whether part of identifying individuals involved taking a look
14 at scars, tattoos, marks, height, weight, that kind of thing?

15 A. When I worked the evidence room I was -- I just booked
16 evidence.

17 Q. Just evidence?

18 A. I didn't deal with the fingerprinting process at all.

19 Q. Okay, and so you are not aware of whether Mr. King's
20 fingerprints were taken or not?

21 A. Oh, they were. I -- CSI was called to the scene to
22 lift prints.

23 Q. Okay, and isn't it true that none of the prints taken
24 from the truck match Mr. King?

25 A. According to the CSI's the Court, that's what it

1 stated.

2 Q. The I-Pod, was it dusted for fingerprints?

3 A. It was not.

4 Q. That I-Pod isn't here today, correct? In fact, it
5 was returned?

6 A. No, the I-Pod was returned to Mr. and Mrs. Hatch.

7 Q. So one of the key pieces of evidence linking Mr. King
8 to this crime is the fact that the I-Pod was apparently in the
9 truck owned by the Hatches or moved from the truck by the
10 suspect and then recovered afterwards, but that I-Pod wasn't
11 seized and no prints were taken from it; is that right?

12 A. Yes, that's correct.

13 Q. Did you identify Mr. King in the truck? Meaning you
14 personally observed him in the truck?

15 A. I did not personally observe him in the truck.

16 Q. When was the first time that you personally observed
17 Mr. King?

18 A. When I saw him running from another officer.

19 Q. Okay, so you didn't see him exiting the truck; you
20 just saw him running, correct?

21 A. I did not see him exit the truck.

22 Q. At the time you saw Mr. King running was an officer
23 actually engaged in pursuit or standing stationary?

24 A. Officers were engaged in foot pursuit.

25 Q. Okay, and they were running down a sidewalk or across

1 a yard?

2 A. Down the -- they were running westbound on 1225 North
3 on the road.

4 Q. Okay, you did assist the other officers in arresting
5 Mr. King; is that right?

6 A. I did.

7 Q. Did you search Mr. King pursuant to his arrest?

8 A. I did.

9 Q. Okay, and it indicates in here that a wallet was
10 found; is that right?

11 A. (No verbal response).

12 Q. I'm looking at page 8.

13 A. Yeah, there was a wallet. It had \$15 and a lot of
14 loose paperwork.

15 Q. Was there any identification in the wallet?

16 A. I don't remember if there was any identification in
17 the wallet.

18 Q. Was that wallet seized as part of the evidence in this
19 case?

20 A. No, the wallet was booked into -- with his belongings.

21 Q. Okay, and the paperwork, would that have been booked
22 in as well?

23 A. Yes, it was -- the paperwork was phone numbers.

24 Q. Okay, and in the report as well, Officer, it indicates
25 that shoes were taken from Mr. King. Did you take those shoes

1 from Mr. King?

2 A. I did.

3 Q. Where are the shoes now?

4 A. The Layton City evidence room.

5 Q. Okay, and also it indicates that photographs were
6 taken of shoe prints; is that correct?

7 A. That is correct.

8 Q. Did you take those photographs personally?

9 A. No, I did not.

10 Q. Okay, do you know where the photographs were taken of?
11 Meaning what the photograph was -- obviously a shoe print, but
12 where it was located?

13 A. The address or the areas it was located?

14 Q. The areas.

15 A. I was shown pictures by another officer.

16 Q. Okay.

17 A. There was a footprint that was in a muddy dirt area.

18 Q. Where was that muddy dirt area; was it near where
19 Mr. King was stopped and arrested?

20 A. No.

21 Q. Okay.

22 A. It was -- it was along the route that he was evading
23 officers.

24 Q. Okay, so along the route you think he traveled,
25 correct?

1 A. Yes.

2 MR. GEORGE: Okay, thank you. No further questions.

3 THE COURT: Any redirect?

4 MR. NIELSON: No thank you.

5 THE COURT: You may step down. Any further witnesses?

6 MR. NIELSON: One, your Honor.

7 THE COURT: Okay.

8 MR. NIELSON: Officer Otteson from Layton PD.

9 THE COURT: Okay. All right, Officer, if you'll pause
10 at the podium, raise your right arm.

11 COURT CLERK: You do solemnly swear that the testimony
12 you are about to give in the case now before the Court will be
13 the truth, the whole truth and nothing but the truth, so help
14 you God?

15 THE WITNESS: Yes.

16 THE COURT: All right, please have a seat on the witness
17 stand.

18 JOHN OTTESEN,

19 having been first duly sworn,

20 testified as follows:

21 DIRECT EXAMINATION

22 BY MR. NIELSON:

23 Q. Could you please state your name and spell your last
24 name for us.

25 A. John Ottesen. Ottesen, O-t-t-e-s-e-n.

1 Q. Are you currently employed as a patrol officer for
2 Layton PD?

3 A. I'm not a patrol officer. I'm the community resource
4 officer, but yes, I am employed with Layton City Police Depart-
5 ment.

6 Q. Okay, and what do your duties primarily consist of as
7 the community resource officer?

8 A. Generally I'm in charge of the crime free program,
9 which is a program designated for multi-housing in the City.
10 Also kind of the public relations officer, do public events,
11 presentations for the public. Also responsible for residential
12 training for neighborhood watch program in the city as well.

13 Q. So that's a lot of responsibilities. Do you ever
14 spend time patrolling in Layton?

15 A. I do. I do. Previous to my responsibilities as the
16 community resource officer I was a patrol officer.

17 Q. How long have you -- what's your total experience in
18 law enforcement? How many years, Officer Ottesen?

19 A. A little over four-and-a-half years, about five years.

20 Q. Were you on duty on -- in the morning of August 1st of
21 2012?

22 A. I was.

23 Q. Did you receive a dispatch related to a stolen
24 vehicle?

25 A. There was an attempt to locate, which is an ATL from

1 our dispatch, indicating that they had received information of
2 a possible stolen vehicle. I was out driving in my patrol car
3 in the city when that ATL came out.

4 Q. What was the vehicle that was placed on the ATL?

5 A. They mentioned that it was a black Ford F-350 extended
6 cab truck.

7 Q. Was there any description of the driver of the vehicle?

8 A. They indicated that it was a white male with short dark
9 hair.

10 Q. Approximately what part of Layton were you in when you
11 received this ATL information?

12 A. I was approximately 1325 North Fort Lane, which is 400
13 West.

14 Q. What did you observe as you were at that location?

15 A. I came up to a stop sign, and as I was there at the
16 stop sign I noticed a black Ford truck turn in front of me to
17 head westbound on 1325 North.

18 Q. Was that truck consistent with the information you had
19 received with the attempt to locate?

20 A. Yes.

21 Q. So what did you do after you made that observation of
22 the truck?

23 A. I was looking at the call screen on my laptop and
24 computer to try to get some more information. Sometimes they
25 type additional information in the notes on the call screen,

1 but while I was doing that, you know, I had stopped, made a
2 U-turn to -- in an attempt to catch up to the vehicle.

3 Q. Were you able to catch up to the vehicle?

4 A. I was not.

5 Q. Did you see that vehicle again?

6 A. I did.

7 Q. Where was that vehicle when you saw it the next time?

8 A. Approximately Gordon and 75 West. Gordon Avenue is
9 about 1000 North.

10 Q. About how far is that from the original location where
11 you saw the truck?

12 A. I would say probably about maybe five or six blocks.

13 Q. Was there anyone inside the vehicle when you saw it
14 the second time?

15 A. Yes.

16 Q. Were you able to see that identi -- that individual
17 clearly?

18 A. Yes.

19 Q. Was there anything obstructing your vision between you
20 and the person in the vehicle?

21 A. No.

22 Q. Is the individual that you saw in the truck present in
23 the courtroom today?

24 A. Yes, he is.

25 Q. Could you identify him, please.

1 A. Yeah, I could. It's Mr. King, sitting at the defense
2 table.

3 MR. NIELSON: Okay, thank you very much. Since he
4 stated his name, your Honor, I want to ask the Court to place
5 that on the record.

6 Q. BY MR. NIELSON: What did you do after you saw Mr. King
7 and the truck that was the subject of the ATL?

8 A. Well, I pulled into the small parking lot where the
9 vehicle had -- was backed in into a parking stall. As I pulled
10 around, Mr. King jumped out of the vehicle and ran towards a
11 fence of a residential home that was just north of the parking
12 lot, jumped that fence and ran through the backyard of that
13 residence.

14 Q. What did you do after you made -- after you saw him
15 doing that?

16 A. I pursued after him. I went and jumped to the fence.
17 By the time I got to the fence and jumped at least it was about
18 approximately six feet in height, I jumped to the fence and
19 hollered out to him, identifying myself and telling him to
20 stop.

21 Q. Did he have any reaction when you yelled at him to
22 stop?

23 A. He did not.

24 Q. What did he do after you yelled at him to stop?

25 A. He then jumped over on the other side of the fence,

1 which was approximately, oh, 30 feet away from me, and I lost
2 visual at that time.

3 Q. How far apart were you from Mr. King when you commanded
4 him to stop?

5 A. Oh, it was probably about 30 feet.

6 Q. How loud was your command?

7 A. It was fairly loud. It was more than just a normal
8 conversation. It was a yell.

9 Q. Do you have any hearing problems, Officer Ottesen?

10 A. Minor.

11 Q. Okay, would you have been able to hear from 30 feet
12 away, as loud as you were yelling?

13 A. Yes.

14 Q. Okay, and you said you lost site of him. Did you see
15 him again that day?

16 A. I did.

17 Q. Where did you see him?

18 A. I can't remember the exact coordinates, but it was on
19 14 -- 1425 North, just east of the Layton Hills Mall area.

20 Q. Who did you receive that information from?

21 A. Other officers. Officer Jewel and Officer Lewis.

22 Q. Did you respond to that location?

23 A. I did.

24 Q. What did you observe when you arrived at that location?

25 A. I observed several officers in the area and talking to

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Officer Jewel he informed me that they had a suspect matching the description that I had given out to dispatch as I was in pursuit of the individual. I did notice there was an individual sitting in the back seat of Officer Jewel's patrol vehicle.

Q. Did you get a good look at that individual?

A. I did.

Q. Was that individual the same person that you'd been --

A. It was.

Q. -- that you commanded to stop?

A. It was, yes.

Q. Who was that person?

A. Mr. King.

Q. Okay, that's all the questions I have for this witness, your Honor.

THE COURT: Okay, cross examination?

MS. GEORGE: Just a few questions.

CROSS EXAMINATION

BY MS. GEORGE:

Q. Officer, at the time that this occurred and you observed the truck, what type of car were you in?

A. I was in my patrol vehicle.

Q. How was that marked as a patrol car? I mean, does it have, you know, "Police" on the side of it?

A. It has the Layton City logo on the side of it, with a

1 white bar on top, which would be indicative to our other patrol
2 cars in our city.

3 Q. Okay, and at the time that you turned around to follow
4 the truck, did you activate your lights?

5 A. I did not.

6 Q. Okay, at the time that you exited your patrol car and
7 approached the suspect, what type of clothing were you in; were
8 you in a uniform?

9 A. I was. I was wearing my patrol uniform that day.

10 Q. Could you describe for the record what that looks
11 like?

12 A. Sure. It's blue, blue in color with patches, shoulder
13 patches on both shoulders, indicating the agency and the city
14 that we work for, along with a shield on the left side of my
15 shirt here.

16 Q. At the time that you indicated to this individual to
17 stop, did you have a weapon drawn?

18 A. I did not.

19 Q. When the individual did not respond to your request
20 what did you do?

21 A. I pursued after the individual and jumped over the
22 first fence there.

23 Q. How high of a fence was that?

24 A. Approximately six feet.

25 Q. The individual that you were chasing, did he also jump

1 over the fence?

2 A. Yes, uh-huh.

3 Q. Okay, you were not the one that actually stopped the
4 suspect. That was another officer; is that right?

5 A. Correct.

6 Q. Okay, and when you approached the stop you identified
7 the individual on the ground as the same person that had exited
8 the truck?

9 A. He was not on the ground, no.

10 Q. Or where he was in --

11 A. He was in the back of a patrol car at that point.

12 Q. Okay, in custody at that point --

13 A. Yes, uh-huh.

14 Q. -- but he was the same person you saw exit the truck?

15 A. That is correct.

16 Q. Identifying his clothing again, it would be identified
17 as what?

18 A. A white shirt, blue jeans. I did notice he was --
19 previous to making that contact, he was wearing black shoes,
20 and a hole I believe it was in his right knee of the jeans.

21 Q. Okay, and that was prior to being apprehended; is that
22 right?

23 A. Yes, ma'am.

24 Q. After apprehension were his shoes removed?

25 A. I don't believe so.

1 Q. Okay, and while you were pursuing the suspect did you
2 see him throwing or dispensing of any items?

3 A. I did not.

4 Q. Did you or any other officer go back along that route
5 to look for the keys that the Hatch family had indicated had
6 been taken from their car?

7 A. I did. Around where the truck was located I looked
8 around that area. I did go in the back yard of the residence
9 where the suspect had run through, and checked that area, and
10 was unable to locate any keys.

11 MS. GEORGE: Thank you. No further questions, Officer.

12 THE COURT: All right, any -- any redirect?

13 MR. NIELSON: No, your Honor, thank you.

14 THE COURT: You may step down.

15 THE WITNESS: Thank you, your Honor.

16 MR. NIELSON: That concludes the State's presentation,
17 your Honor.

18 THE COURT: All right, does the defense wish to call
19 any witnesses?

20 MS. GEORGE: No witnesses, your Honor. We'd submit it
21 on the evidence presented.

22 THE COURT: All right, any argument?

23 MR. NIELSON: I think it's pretty straightforward, your
24 Honor. We'd submit it.

25 THE COURT: Okay, based on the testimony that's been

1 here in the courtroom today I find that the State has presented
2 sufficient evidence to support a reasonable belief that the
3 defendant committed the charged crimes in this case. So I do
4 believe that the defendant -- well, I find that the defendant
5 will be bound over, and we'll have him arraigned, then, before
6 Judge --

7 COURT CLERK: It's Judge Kay, your Honor.

8 THE COURT: -- Kay. That's Thursday afternoon at 1 p.m.
9 Do we have a -- do you have a date you're requesting, Counsel?

10 MS. GEORGE: Any date, your Honor, is fine.

11 MR. NIELSON: We don't have Court this Thursday.

12 THE COURT: Yeah, so --

13 COURT CLERK: How about September 20?

14 MR. NIELSON: That's fine with the State.

15 THE COURT: All right, Thursday, September 20th at
16 1 p.m. before Judge Kay.

17 MS. GEORGE: That's not the -- judicial conference is
18 what, the week --

19 MR. NIELSON: This week.

20 THE COURT: Is next week.

21 MR. NIELSON: Next week, the 13th --

22 MS. GEORGE: Okay.

23 MR. NIELSON: -- is the day we go.

24 THE COURT: Right, next week is judicial conference.
25 That's why we're not --

1 MS. GEORGE: Just wanted to make sure we --

2 THE COURT: doing it the 13th.

3 MS. GEORGE: -- set it on a date he's there.

4 THE COURT: Yeah.

5 MR. NIELSON: Your Honor, if I could with -- I actually
6 brought it back to the desk, but if I could withdraw State's
7 Exhibit 1.

8 THE COURT: Yeah, any objection, Ms. George, to with-
9 drawing the State's exhibit?

10 MS. GEORGE: No, your Honor.

11 THE COURT: All right, the exhibit may be withdrawn.

12 MR. NIELSON: Thank you very much, your Honor.

13 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Wendy Haws, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her court reporter's license, appropriately authorized under Utah statutes.

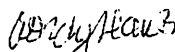
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

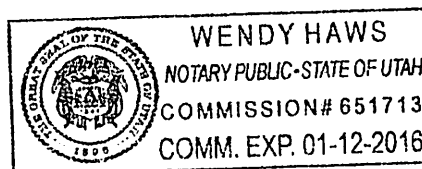
That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 15th day of March 2013.

My commission expires:
January 12, 2016



Wendy Haws, CCT
NOTARY PUBLIC
Residing in Utah County



Signed: 
Beverly Lowe, CCR/CCT

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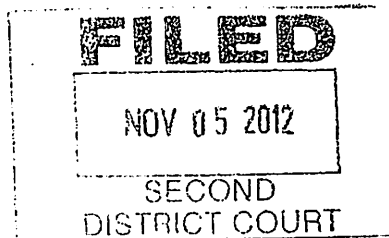
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Tab C

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

THE STATE OF UTAH
Plaintiff,

vs.
LEVI GENE KING
DOB: 11/29/1988,
Defendant.

AMENDED
INFORMATION

Case No. 121701223

The undersigned prosecutor states on information and belief that the defendant, either directly or as a party, at County of Davis, State of Utah, committed the crimes of:

COUNT 1

THEFT, 76-6-404 UCA, Second Degree Felony, as follows: That on or about August 01, 2012 at the place aforesaid, the defendant did obtain or exercise unauthorized control over the property of another person with a purpose to deprive the person thereof, and

(i) the value of the property or services was or exceeded \$5,000 or

(ii) the property stolen is a firearm or an operable motor vehicle;

COUNT 2

THEFT, 76-6-404 UCA, Third Degree Felony, as follows: That on or about August 01, 2012 at the place aforesaid, the defendant did obtain or exercise unauthorized control over the property of another person with a purpose to deprive the person thereof, and the defendant had been twice before convicted of any of the following offenses, if each prior offense was committed within 10 years of the date of the current conviction or the date of the offense

upon which the current conviction is based:

- (i) theft, any robbery, or any burglary with intent to commit theft;
- (ii) any offense under Title 76, Chapter 6, Part 5, Fraud; or
- (iii) any attempt to commit any of the aforementioned offenses..

COUNT 3

FAIL TO STOP AT COMMAND OF LAW OFFICER, 76-8-305.5 UCA, Class

A Misdemeanor, as follows: That on or about August 01, 2012 at the place aforesaid, the defendant did flee from or otherwise attempt to elude a law enforcement officer

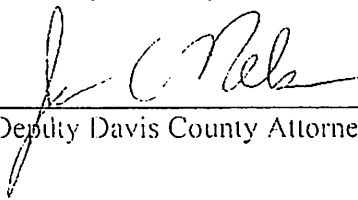
- (a) after the officer issued a verbal or visual command to stop;
- (b) for the purpose of avoiding arrest; or
- (c) by any means other than a violation of Utah Code Section 41-6a-210.

This information is based on evidence obtained from witness Daniel Jewel.

Authorized October 22, 2012
for presentment and filing:

TROY S. RAWLINGS
Davis County Attorney

By


Deputy Davis County Attorney

Tab D

2nd District - Farmington
DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	CHANGE OF PLEA
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 121701223 FS
LEVI GENE KING,	:	Judge: THOMAS L KAY
Defendant.	:	Date: January 17, 2013
Custody: Bail	:	

PRESENT

Clerk: vickil
Prosecutor: NELSON, JASON C
Defendant
Defendant's Attorney(s): GEORGE, JULIE

DEFENDANT INFORMATION

Date of birth: November 29, 1988
Audio
Tape Number: F3 011713 Tape Count: 114

CHARGES

1. THEFT - 2nd Degree Felony
Plea: Guilty - Disposition: 12/10/2012 Guilty
2. THEFT (amended) - 3rd Degree Felony
Plea: Guilty - Disposition: 12/10/2012 Guilty
3. FAIL TO STOP AT COMMAND OF LAW ENFORCEME - Class A Misdemeanor
Plea: Guilty - Disposition: 12/10/2012 Guilty

SENTENCE PRISON

Based on the defendant's conviction of THEFT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of THEFT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the DAVIS 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

Concurrent service.

SENTENCE RECOMMENDATION NOTE

Credit for time served. Drug treatment. Court finds Mr. King as Indigent.

SENTENCE JAIL

Based on the defendant's conviction of FAIL TO STOP AT COMMAND OF LAW ENFORCEME a Class A Misdemeanor, the defendant is sentenced to a term of 1 year(s)

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

Class A may be served concurrent at the Utah State Prison

SENTENCE TRUST

The defendant is to pay the following:

Attorney Fees: Amount: \$500.00 Plus Interest

Pay in behalf of: PUBLIC DEFENDER FEE DAVIS COUNTY TREASURER

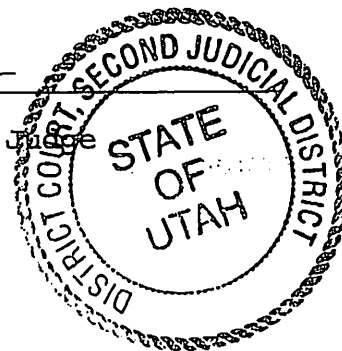
The amount of Attorney Fees is to be determined by Board of Pardons.

Date:

January 18, 2013

Thomas L Kay
THOMAS L KAY

District Court Judge



Tab E

IN THE SECOND JUDICIAL DISTRICT COURT-FARMINGTON
OF DAVIS COUNTY, STATE OF UTAH

-1-
FILED
MAR 21 2013
SECOND
DISTRICT COURT

STATE OF UTAH,
Plaintiff,
vs.
LEVI GENE KING,
Defendant.

ORIGINAL

Case No. 121701223 FS

Jury Trial
Electronically Recorded on
December 10, 2012

BEFORE: THE HONORABLE THOMAS L. KAY
Second District Court Judge

APPEARANCES

For the State:

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Transcribed by: Wendy Haws, CCT

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Provo, Utah 84606
Telephone: (801) 377-2444

FILED

UTAH APPELLATE COURTS

APR 23 2013

20130223-CA

1 MR. NIELSON: Are we going to -- are we going to mess
2 up the Court?

3 THE COURT: I think what we need to do, if you can lift
4 up the wires.

5 MS. GEORGE: Okay.

6 THE COURT: Well, okay, just tilt it backwards. You
7 see where that -- you just can't run it over those -- see where
8 it's connected in?

9 MR. NIELSON: Oh, yeah.

10 THE COURT: Yeah, if you rub it over, you'll just -- it
11 won't be picking up the microphone. So how do you want to --

12 MR. NIELSON: (Inaudible), Julie?

13 MS. GEORGE: I just wanted to twist it so we're not
14 standing at a weird angle.

15 THE COURT: Okay.

16 MR. NIELSON: Oh, straight.

17 MS. GEORGE: Your Honor, then the issue that I need to
18 bring up before the jury is we have an armed deputy in uniform
19 sitting behind my client. My concern is in trial, is anytime
20 there's Court security they are dressed in plainclothes. My
21 concern is it is prejudicing my client. I didn't realize he
22 was there in uniform.

23 My understanding in every trial I've ever had with the
24 defendant, that if there's going to be Court security, they're
25 dressed in plainclothes. If he's going to sit near my client,

1 I'm requesting that he either be in plainclothes or they have
2 another officer come in because to have an armed deputy sitting
3 directly behind my client I think prejudices the case.

4 THE COURT: Okay, what's the --

5 MR. NIELSON: That's typically the procedure, your
6 Honor. I've had trials where they came from the prison and
7 they're always plainclothes. I think, though, the fact that
8 his uniform matches the bailiff, I think if he can just be
9 introduced as one of the two bailiffs that will be assisting
10 with the trial today, and we could have him sit elsewhere. I
11 don't have a problem with that.

12 MS. GEORGE: If he wants to sit in the back of the
13 Court. My concern is deputies should understand during jury
14 trials protocol it should be filed -- or followed; and to have
15 him sitting directly behind my client I think prejudices him.
16 So if he wants to sit in the back of the Court, that's fine,
17 but I don't think sitting behind my client is appropriate.

18 THE COURT: Well, why don't we just do this. If he can
19 sit a little farther back, and then we just don't say anything.
20 I don't want to draw undue attention to it.

21 MR. NEILSON: Okay.

22 THE COURT: So is there any --

23 MS. GEORGE: My client's got handcuffs on. I just --
24 I would assume that the Court security would know that, and I
25 wanted that on the record because I didn't notice that until I

1 got up to do an opening and looked back --

2 THE COURT: Okay.

3 MS. GEORGE: -- and sort of saw him sort of sitting
4 right behind Mr. King.

5 THE COURT: All right.

6 MR. NIELSON: We typically have two bailiffs in a
7 courtroom during a trial. So that's why I think that's -- I
8 mean, I don't want to unnecessarily draw attention, but I think
9 if there is a problem, I think I can clarify the whole thing
10 just saying we have two bailiffs that work on trials, and these
11 are the two bailiffs, and introduce them.

12 MS. GEORGE: I think that just draws more attention to
13 the fact that he's been sitting right there.

14 MR. NIELSON: Okay.

15 THE COURT: Well, I think if it just be not directly
16 behind him, I think we'll be fine.

17 MR. NIELSON: Sure. Thank you, your Honor.

18 THE COURT: Okay, then --

19 COURT CLERK: It's actually our policy to have two
20 bailiffs when we have a jury.

21 THE COURT: Okay, the question is --

22 MS. GEORGE: That's fine, but you then have clothes.

23 THE COURT: -- yeah, the question is being right behind
24 being --

25 COURT CLERK: Okay.

1 THE COURT: Yeah. So, okay, anything else?

2 MR. NIELSON: No, your Honor.

3 THE COURT: All right, then we'll be just a couple of
4 minutes.

5 (Recess taken)

6 COURT BAILIFF: You may be seated.

7 THE COURT: Okay, do you want to bring the jury in,
8 then.

9 (Jury enters the courtroom)

10 THE COURT: Okay, you may be seated. The record will
11 reflect that the jury and the Counsel and the parties are
12 present. So if the State wishes to call the first witness.

13 MR. NIELSON: Your Honor, the State calls Brad Hatch.

14 THE COURT: Okay, if you'll come forward and be sworn.

15 COURT CLERK: Will you raise your right hand. Do you
16 solemnly swear the testimony you are about to give in this case
17 now before the Court will be the truth, the whole truth and
18 nothing but the truth, so help you God?

19 THE WITNESS: Yes.

20 COURT CLERK: Thank you.

21 THE COURT: Okay, if you'll just take the witness chair
22 here, please.

23 BRADLEY HATCH,

24 having been first duly sworn,

25 testified as follows: