

2015

State of Utah, Plaintiff and Appellee, v. Abisai Martinez-Castellanos, Defendant and Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

v.

ABISAI MARTINEZ-CASTELLANOS,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

An Appeal from a Judgment and Criminal Convictions for Two Counts of Possession of Controlled Substances (Third Degree Felonies), Possession of Drug Paraphernalia (a Class B Misdemeanor), and Driving with a Controlled Substance in the Body (a Class B Misdemeanor), Entered in the Fourth Judicial District Court, Juab County, the Honorable James Brady Presiding (District Court Case No. 101600146)

Mr. Martinez-Castellanos is not incarcerated.

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UTAH APPELLATE COURTS

AUG 12 2015

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Introduction

Defendant Abisai Martinez-Castellanos has raised three issues on appeal. The first issue involves counsel's failure to object when the district court engaged in jury voir dire proceedings in Martinez-Castellanos's absence, and the second and third issues relate to a traffic stop. Martinez-Castellanos has relied on the ineffective-assistance-of-counsel doctrine for the issues, as counsel's conduct fell below an objective standard of reasonableness and was prejudicial.

The State makes several arguments in response. For the first issue, the State asserts that Martinez-Castellanos is challenging counsel's decisions about individual jurors, and that Martinez-Castellanos must comply with *State v. King*, 2008 UT 54, 190 P.3d 1283, and *State v. Litherland*, 2000 UT 76, 12 P.3d 92. But Martinez-Castellanos has challenged counsel's failure to object to his absence during a critical stage of trial, and *King* and *Litherland* do not address that issue. The State also asserts that case law is unsettled as to whether defendant is entitled to be present for voir dire, but the State misstates the law. Utah law supports Martinez-Castellanos's presence. Moreover, the State argues that Martinez-Castellanos has applied an incorrect prejudice analysis and it relies on speculative facts. But Martinez-Castellanos has relied on stipulated evidence and has applied the proper prejudice analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). Because counsel failed to object to Martinez-Castellanos's absence in jury selection, this court may remand the case for a new trial.

The second and third issues involve Trooper Sheets' extended traffic stop and Martinez-Castellanos's right to counsel in a post-trial hearing to challenge Sheets' actions. Martinez-Castellanos has combined his response to the State's arguments. In short, because Martinez-Castellanos was not represented by counsel in post-trial proceedings, the court did not address the extended traffic stop. Instead, the State makes its own factual assessment about the extended stop, thereby usurping the function of the district court. Because the district court should assess the evidence and make findings, this court should remand the case to that court for further proceedings on the extended traffic-stop issue.

Argument

1. Martinez-Castellanos had the right to be present at jury voir dire

Counsel was ineffective at trial when he failed to object to Martinez-Castellanos's absence during a critical stage of the trial, *i.e.*, jury voir dire. (Op.Br. 14-37.) While the State acknowledges that Martinez-Castellanos was absent, it urges this court to affirm the judgment. Specifically, the State maintains that the supreme court's analysis in *State v. Litherland* applies to determine if counsel acted below an objective standard of reasonableness; it asserts that "controlling law" did not entitle Martinez-Castellanos to be present for jury voir dire; it argues that the record supports a presumption that Martinez-Castellanos waived his right to be present; and it maintains that Martinez-Castellanos relied on an incorrect prejudice analysis. (Resp.Br. 15-48.)

The State's arguments are misguided for several reasons.

First, *Litherland* does not govern the reasonableness question here, as the court in *Litherland* did not address the defendant's right to be present for voir dire. Second, Utah courts have recognized a defendant's right to be present at trial, including the right to be present during voir dire when prospective jurors are asked about experiences and biases. Third, the record shows that Martinez-Castellanos did not waive his right to be present during voir dire and counsel failed to involve him for no discernible or strategic reason. And fourth, because the issue focuses on Martinez-Castellanos's right to be present, he has applied the correct prejudice analysis and has demonstrated prejudice here.

Martinez-Castellanos has addressed each point below.

1.1 *Litherland* does not govern the reasonableness question here, as the court in *Litherland* did not address the defendant's right to be present for voir dire

In addressing whether counsel's acts were objectively unreasonable, the State relies on *Litherland*. (Resp.Br. 18-20,31-44.) Under *Litherland*, the court ruled that trial counsel is entitled to a presumption that her decision not to remove a juror from the panel is strategic; and if a defendant challenges counsel's decision under the ineffective-assistance-of-counsel doctrine, defendant must rebut the presumption. 2000 UT 76, ¶¶20-25.

Notably, the court in *Litherland* did not address a defendant's right to be present for a critical stage of the trial. *Id.* Likewise, Utah courts have not required

an appellant to apply the *Litherland* analysis to a claim that counsel failed to object to defendant's absence in voir dire.¹ *State v. Hubbard*, 2002 UT 45, 48 P.3d 953; *State v. Glenny*, 656 P.2d 990 (Utah 1982); *State v. Aikers*, 51 P.2d 1052 (Utah 1935); *State v. Hodge*, 2008 UT App 409, 196 P.3d 124; *State v. Zamora*, 2005 UT App 196U, 2005 WL 977585 (citing *Litherland* for a different purpose). Instead, courts consider whether the defendant had a right to be present for the proceedings and also the circumstances around counsel's failure to protect that right. See *Comm. v. Williams*, 9 A.3d 613, 617-18 (Pa. 2010).

In this case, counsel failed to object when the court conducted jury voir dire outside Martinez-Castellanos's presence. (Resp.Br. 16.) Moreover, the supreme court has ruled that a defendant has the right to be present at all stages of trial. *Hubbard*, 2002 UT 45, ¶33; see also Utah Code § 77-1-6(1)(a); Utah R. Crim. P. 17(a); Utah Const. art. I, § 12; *State v. Wagstaff*, 772 P.2d 987, 989-90 (Utah Ct. App. 1989). The supreme court has noted that jury selection is an important stage that "arguably has a reasonably substantial relation to the fullness of a defendant's opportunity to defend against a charge," and also, "a defendant's right to a fair and just hearing could be thwarted by his or her absence." *Hubbard*, 2002 UT 45, ¶33 n.7. Because the issue on appeal focuses on counsel's failure to

¹ Martinez-Castellanos has discussed the impaneled jurors under the *Litherland* standard in his opening brief to demonstrate that reluctant and biased jurors were seated, and to show that jurors revealed information in voir dire that would have been important to him and his case. (Op.Br. 26-33.)

object when the district court conducted in-chambers voir dire in Martinez-Castellanos's absence, this court should assess whether the defendant had a right to be present for those proceedings. According to the law, he did. Moreover, counsel's failure to object was objectively unreasonable.

1.2 Controlling law supports a defendant's right to be present at trial, including the right to be present during voir dire when prospective jurors are asked about experiences and biases

According to the State, controlling law does not support that Martinez-Castellanos had a right to be present during in-chambers jury voir dire. (Resp.Br. 44-45.) The State's argument is mistaken for several reasons.

First, the State asserts that *Hopt v. Utah Territory*, 110 U.S. 574 (1884), is dictum and does not support a defendant's right to be present during jury voir dire. In support of that assertion, the State cites *Snyder v. Massachusetts*, 291 U.S. 97 (1934). (Resp.Br. 46.) The State's analysis is overstated.

The *Hopt* Court relied on Utah law and constitutional law to rule that a defendant is entitled to be present during jury voir dire. 110 U.S. at 578-79. The holding in *Hopt* did not support that defendant may waive that right. The United States Supreme Court has since ruled that "[t]he broad dicta in *Hopt* ... that a trial *can never continue* in the defendant's absence have been expressly rejected." *Illinois v. Allen*, 397 U.S. 337, 342 (1970) (emphasis added); *Snyder*, 291 U.S. at 118 n.2. That is, the Court has clarified that a defendant may waive the right to be present by consent or misconduct, and once the right is waived, the district court

may continue with the trial in the defendant's absence.² *Snyder*, 291 U.S. at 106.

Notably, the Court in *Snyder* did not overrule the defendant's right to be present during voir dire proceedings. It ruled that a defendant is entitled to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." 291 U.S. at 105-06. And it reaffirmed the defendant's presence "at the examination of jurors," for it will be within the defendant's power "to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." *Id.* In *Snyder*, the Court considered whether jurors could view the scene in defendant's absence. *Id.* at 108. It recognized that such a practice was embedded in centuries' old case law. *Id.* at 111-12. Also, because defendant would not be allowed to ask or answer questions at the view, and because the prosecution summarized the proceedings and the "defendant and his counsel gave assent by acquiescence," the Court ruled defendant was not entitled to attend the view. *Id.* at 118.

Second, *Snyder* does not diminish the right to be present for purposes of this case, nor does it diminish the relevance of *Hopt*. When *Hopt* was decided in 1884, Utah law entitled a defendant to be "personally present at the trial." 110 U.S. at 576 (quoting early version of the Utah Criminal Code). That law was relevant to the Court's holding. *Id.* Utah law in effect today is the same: a

² The right may be waived if the defendant consents, but only if the consent is voluntary, knowing, and intelligent. *Wagstaff*, 772 P.2d at 989-90; see also *State v. Anderson*, 929 P.2d 1107, 1110-11 (Utah 1996).

defendant has the right to be “personally present at the trial.” Utah R. Crim. P. 17 (a); *see* Utah Code § 77-1-6(1)(a) (defendant is entitled to “appear in person”); Utah Const. art. I, sec. 12 (“the accused shall have the right to appear and defend in person and by counsel”); *State v. Houtz*, 714 P.2d 677, 678 (Utah 1986) (“A defendant charged with a crime is entitled to be present at all stages of trial”). The State makes no reference to those authorities.

The Utah Supreme Court recently ruled that when a phrase is transplanted from another legal source, the phrase brings with it the “old soil.” *Barneck v. UDOT*, 2015 UT 50, ¶16, -- P.3d --. For purposes of this case, the phrase “personally present at the trial” carries with it the right under Utah law to be present at the voir dire proceedings. *Hopt*, 110 U.S. at 576. The United States Supreme Court’s interpretation of that phrase in 1884 and Utah’s use of the phrase since that time in legislation, rules, and the constitution is unmistakable: the Utah provisions exist against the backdrop of *Hopt*.

Third, the Utah Supreme Court has repeatedly recognized the defendant’s right to be present at critical stages of the trial and the defendant’s right to be present during jury voir dire. “[C]onstitutionally and statutorily and case-wide defendant has a right to be present at all stages of the trial” and “any communication between judge and jury should be in the presence of the accused, his counsel and the prosecutor.” *State v. Lee*, 585 P.2d 58, 58 (Utah 1978) (footnotes omitted). In *State v. Aikers*, the defendant was not present during voir

dire proceedings because he was not aware that the trial had started. 51 P.2d at 1054-55. He arrived shortly before the court impaneled the jury and the court obtained his express and personal waiver on the record. *Id.* Defendant nevertheless challenged the validity of the proceedings on appeal.

The Utah Supreme Court relied on Utah law and ruled, “[t]here is no doubt but that the constitutional right to appear and defend in person and by counsel is a sacred right of one accused of crime which may not be infringed or frittered away, and is one which may not be denied by a court or be waived by counsel.” *Id.* at 1055. Utah statutory law and constitutional law guarantee the right. *Id.* If the court proceeds in the defendant’s absence and without his express waiver, those circumstances qualify as “ground[s] for reversal.” *Id.* at 1056. Because Aikers expressly consented to the proceedings, which had been conducted outside his presence, the court affirmed his conviction. *Id.* at 1060.

In *State v. Glenny*, the court reiterated that “[j]ury selection has been determined to be a part of the trial” and a defendant has the right to be present. 656 P.2d at 992 (citing *State v. Carver*, 496 P.2d 676, 679 (Idaho 1972) (it is a matter of “settled law” that defendant is entitled to be present for jury selection, including voir dire)). The rationale stems from the defendant’s right to an impartial jury and his right to be present in order to assist with his own defense. *Carver*, 496 P.2d at 679. If defendant is present for voir dire, the defense may be “made easier” and it will be in defendant’s power “to give advice or suggestion”

to counsel or “to supersede his lawyers” and represent himself. *Snyder*, 291 U.S. at 105-06. “We add that an important aspect of any trial is its openness and fairness. The purpose of having an accused present is to insure that he has firsthand knowledge of the actions taken which lead to the eventual outcome of the trial and particularly that he knows how the jurors who decide the facts were selected.” *Carver*, 496 P.2d at 679. “Impartiality and objectivity would be aided by the defendant’s presence.” *Id.*

Fourth, the State asserts that contrary to the above authorities, the defendant’s right to be present during jury voir dire “has not been recognized in Utah.” (Resp.Br. 45.) In support of that assertion, the State cites *State v. Zamora* and *State v. Hodge*. Both *Zamora* and *Hodge* are distinguishable. In *Hodge*, this court ruled that defendant failed to adequately brief whether he was entitled to be present during in-chambers voir dire: “Defendant cites no authority for his claim that it was error not to have [him] present in chambers.” 2008 UT App 409, ¶19, 196 P.3d 124 (none of the individuals questioned served on the jury).

In *Zamora*, this court cited *Hubbard*, 2002 UT 45, ¶33, and ruled that the right to be present during in-chambers voir dire proceedings “has not been expressly recognized in Utah.” *Zamora*, 2005 UT App U196, at *1. It also ruled that defendant failed to demonstrate prejudice under the ineffective-assistance-of-counsel doctrine because he made no argument about impaneled jurors. *Id.* at *1-2. Notably, the *Zamora* court did not fully acknowledge the supreme court’s

holding in *Hubbard* that jury voir dire “arguably has a reasonably substantial relation to the fullness of a defendant’s opportunity to defend against a charge,” and more importantly, “a defendant’s right to a fair and just hearing could be thwarted by his or her absence” in voir dire proceedings. *Hubbard*, 2002 UT 45, ¶33 n.7.³ But even if the *Zamora* court had acknowledged the defendant’s substantial interest in participating in voir dire, the result in that case would be the same because of the lack of prejudice. Thus, the case is inapplicable here.

Fifth, even if the State were correct and case law failed to recognize the right of the defendant to be present during voir dire, counsel was unreasonable when he failed to object here. In *State v. Ison*, the Utah Supreme Court ruled that defense counsel could not be excused for failing to make a motion under the hearsay rules to protect his client’s interests even though the issue was “an open question in our courts.” 2006 UT 26, ¶32, 135 P.3d 864. According to the court, once counsel became aware of the evidence, he should have “scour[ed] the exceptions to the hearsay rule in search of a means to place the findings in the hands of the jury.” *Id.* Counsel’s failure to do so was unreasonable. *Id.*

In this case, counsel had every reason to object to voir dire proceedings in Martinez-Castellanos’s absence: authority dating more than 100 years supports

³ *Zamora* may not qualify as controlling authority. As the supreme court held, if a case does not provide analysis or recognize authority for the issue, it has little persuasive effect and is not dispositive of the matter. *Horton v. Goldminer’s Daughter*, 785 P.2d 1087, 1090 (Utah 1989).

the defendant's right to participate in voir dire; the court and legislature have enacted rules mirroring the language in *Hopt*; and several jurisdictions have recognized policy reasons supporting the right. But counsel failed to object, and no reason, other than ignorance or indifference, supports his conduct.

1.3 The record shows that Martinez-Castellanos did not waive his right to be present during voir dire and counsel failed to involve Martinez-Castellanos for no discernible or strategic reason

According to the State, the record supports the presumption that Martinez-Castellanos waived the right to be present during voir dire because he did not affirmatively assert his right to be present; and alternatively, the record must be construed in favor of the presumption that counsel specifically involved Martinez-Castellanos in voir dire or counsel did not involve him for strategic reasons. (Resp.Br. 12,33-35,47.) The State has relied on contradictory and speculative arguments rather than the evidence; and it has misstated the law.

First, the State cites *Hubbard* and argues that Martinez-Castellanos waived the right to be present during in-chambers voir dire because he did not specifically assert the right. (Resp.Br. 33-34.) In *Hubbard*, the district court examined veniremen at the bench in defendant's presence but out of earshot. 2002 UT 45, ¶¶31-34. There is no indication that the trial court impaneled the veniremen for trial and no indication that *counsel* failed to involve the defendant in the process. *Id.* Indeed, the defendant in *Hubbard* was well aware of the proceedings and had no complaints about counsel. *Id.*

While the State suggests that Martinez-Castellanos was required under *Hubbard* to speak up when the judge and counsel conducted voir dire in his absence, the record supports that unlike the defendant in *Hubbard*, Martinez-Castellanos was not aware of the proceedings.⁴

Contrary to the State's assertion, the district court did not state in open court that "it would question individual prospective jurors in chambers," let alone examine them about biases or prejudices. (Resp.Br. 34 (citing R.440:21).) It announced that it would take a brief recess for a few minutes to "meet with counsel" in chambers to determine "any additional questions that they'd like to ask." (R.440:21.) The court stated, "we may be calling you" and "ask[ing] questions of you," but it did not specify that prospective jurors would be invited back in chambers for the process. The court then directed the attorneys "to join me" in chambers, which they did without any break in the proceedings. (*Id.*) Thus, Martinez-Castellanos had no opportunity to understand that the court and counsel intended to proceed with jury voir dire in his absence. *See Anderson*, 929 P.2d at 1110 (a waiver must be voluntary and involve an intentional relinquishment of a known right; defendant must be free to attend).

Second, while the State urges this court to presume that Martinez-

⁴ Moreover, Martinez-Castellanos had the right to rely on counsel to make the objection and to involve him in the proceedings. *State v. Holland*, 876 P.2d 357, 359 (Utah 1994). Because counsel failed to do so, Martinez-Castellanos has asserted the ineffective-assistance-of-counsel claim.

Castellanos voluntarily waived his right to be present, the law does not support such a presumption. Specifically, courts have eschewed a presumption in favor of waiver if the waiver involves the defendant's right to be present at trial. *Houtz*, 714 P.2d at 678 ("voluntariness may not be presumed"); *Larson v. Tansy*, 911 F.2d 392, 396 (10th Cir. 1990) (indulging "every reasonable presumption against waiver" where defendant was not present during portions of the trial).

Third, the record fails to support that Martinez-Castellanos waived the right to be present and it fails to support that counsel involved him in the proceedings. In fact, the affirmative evidence is to the contrary. It supports that counsel did not discuss jury selection with Martinez-Castellanos or involve him. (R.428.) Counsel's conduct is inexplicable given that Martinez-Castellanos was competent to stand trial and competent to assist in the process. Indeed, there is no conceivable tactical reason for counsel's failure to involve Martinez-Castellanos or even to obtain a waiver. Because of counsel's ignorance or indifference, Martinez-Castellanos had no opportunity to understand the voir dire proceedings or his right to participate.

Fourth, the State faults Martinez-Castellanos for not including his own declaration of the in-chambers proceedings. (Resp.Br. 12,34.) That criticism is unfounded particularly where all parties involved in the proceedings have stipulated to the supplemental record and the record shows that the court did not include Martinez-Castellanos and counsel did not involve him.

(R.440:21;428.) Because Martinez-Castellanos did not have the opportunity to participate, his declaration would be limited and duplicative of non-speculative evidence already in the record. (*Id.*)⁵

Fifth, the State suggests that counsel did not advise Martinez-Castellanos to attend the in-chambers proceedings “because the jurors would likely be more candid if he were not there.” (Resp.Br. 35.)⁶ But nothing suggests that prospective jurors—or specifically, Jurors Mangelson, Sacra, and Jones—would have withheld information. Because venire members had taken an oath before answering voir dire questions, there is no basis for assuming they would withhold information; and Utah courts should be unwilling to make such an assumption. *State v. White*, 577 P.2d 552, 555 (Utah 1978); (R.440:5-6 (prospective jurors took an oath to answer truthfully)).

But even if counsel believed that prospective jurors would violate the oath

⁵ As the court in *Larson* held, the defendant was capable of assisting in his defense; and if he had been allowed to participate, he would have had the opportunity to assist counsel in voir dire. 911 F.2d at 395-96. Nothing more is required to support error. *Id.*; *Aikers*, 51 P.2d at 1056; (Op.Br. 33-37).

⁶ Although the State cites *State v. Alexander* and *United States v. Bertoli*, those cases are inapposite. (Resp.Br. 35-36.) In *Alexander*, the court had concerns about two jurors and examined them in chambers in the middle of trial. 833 N.W.2d 126, 135 (Wis. 2013). During the process, counsel consulted defendant for input. *Id.* And in *Bertoli*, the court examined jurors during trial about premature deliberations. 40 F.3d 1384, 1397 (3d Cir. 1994). In that case, the defendant’s presence would not have contributed to the matter. *Id.*; *United States v. Gagnon*, 470 U.S. 522, 526-27 (1985) (defendants could have done nothing had they been involved in the conference and they would have gained nothing); *see also United States v. Provenzano*, 620 F.2d 985, 997-98 (3d Cir. 1980) (a defendant has no right to be present when a juror is dismissed).

in Martinez-Castellanos's presence, counsel should have taken steps to otherwise involve Martinez-Castellanos in the process, to inform Martinez-Castellanos of the process and obtain a valid waiver, or to alert the court to Martinez-Castellanos's rights. In short, the State has not explained its speculative assertions and how counsel's failure to involve Martinez-Castellanos in the process and failure to object to Martinez-Castellanos's absence may qualify as sound strategy. Instead, the State offers excuses that could have been addressed at trial if counsel had taken action to support Martinez-Castellanos's rights.

In this case, Martinez-Castellanos had no opportunity to understand that in-chambers voir dire implicated a critical stage of the proceedings and his right to participate. Moreover, Martinez-Castellanos had no opportunity to learn that Mangelson had served 40 years with the highway patrol in drug interdiction; and no opportunity – either on his own or with the assistance of counsel – to observe Sacra and Jones and to gauge their demeanor when they revealed biases and reservations. “Since [defendant] was excluded from the in-chambers voir dire, he never heard those prospective jurors['] responses. In particular, he did not have the opportunity to hear [a prospective juror] explain her biases [about cases involving a similar fact pattern]. This prevented defendant from knowing about her prejudices and from insisting that defense counsel strike her with a peremptory challenge.” *State v. Bird*, 43 P.3d 266 (Mont. 2002).

The evidence supports that because counsel was deficient in his

performance, Martinez-Castellanos was not allowed to participate in jury selection in violation of the law.

1.4 Martinez-Castellanos has applied the correct prejudice analysis and has shown prejudice

The State has not addressed whether Martinez-Castellanos was prejudiced when counsel failed to object to his absence during voir dire. Instead, it relies on *State v. King*, 2008 UT 54, and asserts that under the prejudice analysis, Martinez-Castellanos was required to demonstrate “actual bias” in the jury but has failed to do so here. (Resp.Br. 11,20-32.) Martinez-Castellanos responds to the State’s prejudice analysis as follows: First, the State misstates the prejudice analysis in *King*, and it fails to address the traditional *Strickland* prejudice analysis, which is applicable when counsel fails to object to a defendant’s absence at trial. Under the *King* analysis and under the traditional *Strickland* analysis, Martinez-Castellanos has demonstrated prejudice. Second, the State makes unfounded assumptions in its analysis. And third, the State relies on an irrelevant and illegal charge to assert the jury was not biased here.

1.4.1 The State misstates the prejudice analysis in *King* and fails to address the traditional *Strickland* prejudice analysis

The State relies on *King* and asserts that for prejudice, Martinez-Castellanos was required to show that counsel’s deficient performance allowed the court to seat an “actually biased” jury. (Resp.Br. 21.) The State misunderstands *King*.

1.4.1.1 The *King* and *Strickland* standards

The *King* prejudice analysis applies in limited circumstances. It applies if the defendant has asked the court to presume prejudice. In *King* two jurors indicated in voir dire that “they thought they would be fair and impartial despite an experience with abuse.” 2008 UT 54, ¶8. Defense counsel failed to ask follow-up questions and the court impaneled the jurors. *Id.* When the defendant raised the issue on appeal under the ineffective-assistance-of-counsel doctrine, the supreme court ruled that a defendant is entitled to a *presumption of prejudice* if the defendant asserts a claim of ineffective assistance because counsel failed to ask follow-up questions *and* a juror with actual bias was impaneled. 2008 UT 54, ¶¶2,13,18-19. Because the jurors in *King* demonstrated only “the potential for bias,” defendant was not entitled to the presumption of prejudice. *Id.* ¶¶13,17.⁷

The court also referenced the traditional *Strickland* prejudice analysis. *Id.* ¶24. It stated, “we typically place on a defendant the obligation to demonstrate that the error prejudiced him.” *Id.* ¶24 (citing cases for the harmless-error analysis). The supreme court affirmed the utility of the traditional analysis in a case involving “a potentially biased juror” but refused to “stretch[] the bounds” of *presumptive prejudice* to those circumstances. *Id.* ¶¶18,35 (stating the traditional

⁷ The court in *King* ordered proceedings under Utah Rule of Appellate Procedure 23B to determine if jurors, who stated they were *not* biased, would nevertheless be biased. 2008 UT 54, ¶43. Those circumstances are not present here: Sacra took an oath to be truthful in voir dire and then acknowledged that she was biased. (R.440:5;415.)

analysis places the defendant at a disadvantage). Thus, contrary to the State's assertions, the court has not mandated proof of "actual bias" and it has not disavowed the traditional prejudice analysis in a case involving jurors. To the contrary, the court continues to recognize the traditional analysis and it requires proof of "actual bias" if the defendant intends to rely on the presumption of prejudice.

Indeed, if counsel has failed to object to defendant's absence at trial, courts have applied the traditional *Strickland* analysis. *State v. Maestas*, 2012 UT 46, ¶¶61-63, 299 P.3d 892 (stating defendant failed to show impartiality or "an otherwise unfair trial"); *United States v. Washington*, 705 F.2d 489, 498 (D.C. Cir. 1983) (although it was error to exclude the defendant from voir dire, the error was not prejudicial because "the question of guilt or innocence was not close").

1.4.1.2 Martinez-Castellanos has shown prejudice

Martinez-Castellanos has demonstrated both actual bias in the jury (for presumptive prejudice), and prejudice under *Strickland*. (Op.Br. 33-37.)⁸ He has shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694; (Op.Br. 33-37.).

Because the State has failed to appreciate the holding in *King* and has

⁸ Martinez-Castellanos has argued that the proceedings were "unreliable and hence unfair" and he has addressed the standard in the opening brief. (Op.Br. 34-37); *Maestas*, 2012 UT 46, ¶¶61-63 (defendant must show that the proceedings were unfair).

“largely ignore[d]” the *Strickland* analysis applicable to counsel’s failure to object to Martinez-Castellanos’s involuntary absence from voir dire proceedings, Martinez-Castellanos’s argument on that point is uncontested. Under the circumstances, the State has failed to adequately brief the matter and this court may accept Martinez-Castellanos’s arguments and reverse the judgment for a new trial. See *Broderick v. Apartment Mgmt. Consultants, LLC*, 2012 UT 17, ¶¶14,20, 279 P.3d 391 (the adequate briefing standard applies to appellee, and if appellee ignores an argument, the court may accept appellant’s claim).

Alternatively, the State asserts that Martinez-Castellanos failed to demonstrate actual bias for presumptive prejudice. (Resp.Br. 20-32.) The State is incorrect. Martinez-Castellanos has demonstrated actual bias. Because he has, he is entitled to the presumption of prejudice.

An actual bias is shown if a prospective juror makes an express admission in voir dire that is prejudicial to a party’s interest. *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 516-17 (10th Cir. 1998). It is “the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.” *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997). In *Ross v. Oklahoma*, a venireman initially declared that he could follow the law for sentencing, but then expressed bias when he declared that he would vote to impose the death penalty if the jury found the defendant guilty. 487 U.S. 81, 83-84, 85 (1988). Even though the venireman’s subsequent statement was conditional, the Supreme Court ruled

that the statement would require his removal from the panel for cause. *Id.*

In this case, Martinez-Castellanos has argued that “jurors with biases served on the jury,” and “a biased juror’s participation in the trial is prejudicial.” (Op.Br. 34-35.) Sacra revealed a strong bias when she stated during voir dire that in her opinion, “if a person had drugs in the car, they were probably guilty.” (*Id.*) The circumstances in this case are more egregious than the circumstances in *Ross*: Sacra expressed disregard for the presumption of innocence. She would consider a person guilty *in the specific circumstances of the case* even before she heard the evidence in a public courtroom where defendant would have the protection of the right of confrontation and cross-examination.

The State asks this court to disregard Sacra’s statements in voir dire and under oath – as well as statements and disclosures from Mangelson and Jones – and to assume impartiality because those individuals completed questionnaires earlier in the morning before the court called the case for trial. (Resp.Br. 17-18,24-25.) But prospective jurors completed pre-trial questionnaires before they knew anything about the case and before they took an oath to be truthful. (R.440:5-9.) Sacra intimated in her questionnaire that she had “strong feelings” and beliefs but she, Jones, and Mangelson did not disclose their biases and experiences. (R.461: Questionnaires 2,3,13.) They disclosed pertinent information only after taking the oath, supporting the determination that they felt the weight of the oath. Thus, the State’s reliance on the questionnaires is improper. Moreover, the

Supreme Court in *Ross* did not give more weight to the prospective juror's *initial* statements in light of subsequent statements revealing bias. 487 U.S. at 83-84, 85.

The State also argues that because no one removed Sacra or Jones from the panel, the court should presume that each provided appropriate answers of impartiality in voir dire. (Resp.Br. 25-26.) But such a presumption would undermine the record, which supports that counsel failed to acknowledge Sacra's statement of bias and he did nothing in the face of Jones's reluctance. (R.428-30.) The record also supports that Martinez-Castellanos was competent and able to assist in jury selection but counsel failed to involve him. If counsel had involved him, he would have been able to bring to counsel's attention Sacra's bias and Jones's reluctance, and under those circumstances, there is a reasonable likelihood that counsel would have investigated them or removed them from the jury. But Martinez-Castellanos had no opportunity to participate and was not allowed to assist in jury selection or to learn about juror biases and predilections.

Because Martinez-Castellanos has demonstrated actual bias, he is entitled to the presumption of prejudice. Alternatively, this court may rely on Martinez-Castellanos's prejudice arguments set forth in the opening brief. (Op.Br. 33-37.)

1.4.2 The State assumes "follow up questions" where there were none

The State assumes that because the prosecution and defense asked follow-up questions of two or three venire members, they must have asked follow-up questions when Sacra expressed bias and when Jones expressed reluctance about

her ability to function as a juror.⁹ (Resp.Br. 27-29.) But the fact that counsel asked follow-up questions of others demonstrates he did not ask the same of Sacra and Jones. Even more importantly, the State's argument acknowledges that follow-up questions were necessary to assess whether Sacra and Jones were biased and reluctant, or whether their voir dire statements were the product of light impression. Absent the follow-up questions, the record supports bias and reluctance, and under Utah law, Sacra and Jones should have been removed. *State v. Wach*, 2001 UT 35, ¶27, 24 P.3d 948 (if a prospective juror expresses partiality, the challenged juror must be excused or investigated).

The State subsequently assumes that counsel did not ask follow-up questions of Jones because he was not concerned that she expressed reluctance in the face of questions about her ability to be fair, and he was not concerned that the court placed pressure on her. (Resp.Br. 38-39.) The State goes so far as to suggest that a reasonable attorney would not have removed Jones or asked follow-up questions; and it speculates that Jones's reluctance stemmed from her age or employment. But reasonable counsel should know the law. *See Strickland*, 466 U.S. at 688 (counsel must bring skill and knowledge to the process to render it reliable). And under the law, the circumstances fail to support Jones's ability to

⁹ The State has cited several cases that support the need for follow-up questions to assess whether statements of bias are the product of light impression. (Resp.Br. 27-28.) Those cases are not applicable here because the record shows that no one asked follow-up questions of Sacra and Jones.

function as a juror. *Wach*, 2001 UT 35, ¶34 (the court's question, asked twice, is not sufficient to rebut inference of bias).

Counsel was required to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688. Had he done so, Martinez-Castellanos would have been able to bring concerns about jurors to counsel's attention. As it is, Sacra and Jones disclosed bias and reluctance, and counsel did not follow up with them in voir dire.

1.4.3 The fact that the jury acquitted on the weapons charge is irrelevant to the analysis

According to the State, the "split verdict" shows that no juror was biased. (Resp.Br. 30.) But the split verdict shows that Sacra relied on her bias: she believed a person was probably guilty if he had drugs in the car.

The jury was required to determine whether Martinez-Castellanos possessed the drugs and paraphernalia, but it did not have to make that determination for the items charged as weapons because Martinez-Castellanos acknowledged he owned those items. (R.425-26.) Thus, while Sacra relied on her bias to find Martinez-Castellanos guilty of possessing drugs and paraphernalia, she had to rely on other factors to assess items for the weapons charge.

Specifically, the central issue for the jury as it related to the knife and box cutter was whether those items even qualified as weapons. (R.440:39-40;109-10;143-46;167.) The supreme court has answered that question against the

prosecution. *Salt Lake City v. Miles*, 2014 UT 47, ¶¶22-23,25-28, 342 P.3d 212.

In this case, the jury split on the verdict because the State's weapons charge was untenable under Utah law. The split verdict has no bearing on the prejudice analysis. Martinez-Castellanos respectfully asks this court to reverse the case and remand for a new trial.

2. The State improperly assumes findings for the extended traffic-stop issue, thereby usurping the function of the district court

Martinez-Castellanos was deprived of the effective assistance of counsel when counsel failed to file a proper motion to suppress evidence seized during an unlawfully extended traffic stop, and particularly when the district court brought the matter to defense counsel's attention and requested briefing on the issue in post-trial proceedings. (Op.Br. 38-55.) The State disagrees and makes assumptions about how the district court would have resolved the matter if counsel had properly addressed the issue in the district court. Because Martinez-Castellanos's second and third issues on appeal involve the traffic stop and his right to counsel in connection with proceedings where the court expressed concern about the stop, Martinez-Castellanos has responded to the State's arguments for the second and third issues together here.

First, the reasonable suspicion analysis is fact intensive, and this court leaves resolution of facts susceptible to alternative interpretations to the district court. *See State v. Chapman*, 921 P.2d 446, 450 (Utah 1996) (reasonable suspicion is highly fact dependent and facts are variable). In this case, Trooper Sheets

testified that Martinez-Castellanos's mannerisms motivated him to extend the traffic stop, but he made different statements in pre-trial proceedings and at trial about Martinez-Castellanos's mannerisms and the circumstances. Sheets subsequently admitted that the mannerisms he described may have been Martinez-Castellanos's "normal way"; and the dash-cam video supports normal behavior. (Op.Br. 40-42.)¹⁰ Martinez-Castellanos has asked this court to remand the case so that the district court may address the extended traffic stop. But the State seems to urge this court to make its own interpretations of the evidence. (Resp.Br. 52-62.) That is inappropriate. The district court is in the best position to assess whether the trooper's testimony is conflicting, is unsupported by objective information, or lacks credibility. Remand will ensure Martinez-Castellanos the right to counsel in post-trial proceedings involving the traffic stop, and counsel will have the opportunity to scrutinize the evidence and cross-examine Trooper Sheets about the changes in his versions of the events, the differences in his testimony, and the dash-cam video.

Second, Martinez-Castellanos challenges Trooper Sheets' reliance on a three-year-old criminal history as insufficient to support ongoing conduct for reasonable suspicion. (Op.Br. 42-45.) In response, the State asserts the history was

¹⁰ The State asserts that the district court may not take into consideration Sheets' trial testimony or the dash-cam video "in litigating the pre-trial suppression motion." (Resp.Br. 49,55.) The State is mistaken. The district court can take the trial evidence into consideration specifically because it expressed concern with the extended traffic stop in post-trial proceedings. (R.268;422.)

relevant even though it dated back years because it showed recurrence. (Resp.Br. 53,58-60.) The State's argument suggests that a person with a criminal history loses some rights under the fourth amendment, but that is incorrect. Even a person with a criminal history must be allowed to live without risk of constant harassment from officers. *United States v. Pierre*, 484 F.3d 75, 84 (1st Cir. 2007) (officer knew defendant's license had been suspended on an ongoing basis). The district court should be allowed to assess the criminal history and its relevance under the totality of the circumstances.

Third, the State refuses to credit as relevant Martinez-Castellanos's normal behavior as seen in the dash-cam video. (Resp.Br. 60-61.) The video shows that Martinez-Castellanos is polite, honest, and cooperative. Contrary to the State's assertion, it is relevant under the totality of the circumstances and the district court should be allowed to assess it. If the district court agrees with Martinez-Castellanos about his mannerisms, the prior criminal history "standing alone" may be insufficient to support reasonable suspicion for the extended stop. *United States v. Powell*, 666 F.3d 180, 188 (4th Cir. 2011).

Fourth, the State asserts that because Martinez-Castellanos has raised his traffic-stop issue in the context of the ineffective-assistance-of-counsel doctrine, he must show that his claim has merit. (Resp.Br. 49,62.) Martinez-Castellanos has shown his claim has merit, the district court recognized it has merit (R.268,422),

and this court may remand the case under the unique circumstances here to allow Martinez-Castellanos to address the traffic-stop issue.

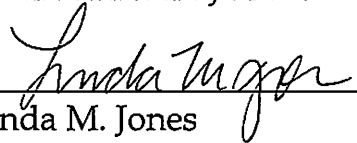
Fifth, the State argues that the court fulfilled its duty when it appointed conflict counsel to represent Martinez-Castellanos in post-trial proceedings to address the circumstances around the extended traffic stop. (Resp.Br. 64.) The State also acknowledges that appointed counsel viewed his role only as “a friend of the court.” (Resp.Br. 65.) The fact that counsel did not view his role as counsel for Martinez-Castellanos is plain and obvious from the record. Likewise, the law is plain on this point: “To be effective, an attorney must play the role of an active advocate, rather than a mere friend of the court.” *State v. Holland*, 921 P.2d 430, 435 (Utah 1996) (citing *Evitts v. Lucey*, 469 U.S. 387, 394 (1985)). Because Martinez-Castellanos was denied the representation of counsel, no one addressed the issue that was most troubling to the district court: the trooper’s reasons for extending the traffic stop. Based on the unique circumstances of this case and given the district court’s concerns with the extended traffic stop, this court should remand the case for further proceedings, and for the appointment of new counsel to represent Martinez-Castellanos in those proceedings.

Conclusion

Martinez-Castellanos respectfully requests that this court reverse the conviction and remand the case for a new trial or for further proceedings; and remand the case to correct the sentence.

DATED this 12th day of August, 2015.

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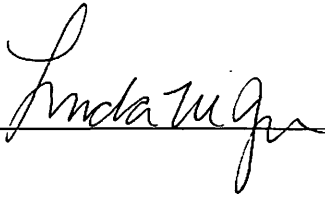
Certificate of Compliance with Rule 24(f)(1)

I hereby certify that:

1. This reply brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 6,935 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Book Antiqua.

DATED this 12th day of August, 2015.



Certificate of Service

I certify that on the 12th day of August, 2015, I caused two true and correct copies of the foregoing to be served on the following via first-class mail, postage prepaid:

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