

2015

**The State of Utah, Plaintiff/Appellee, vs Russell Edward Yalowski,
Defendant/Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff/Appellee,

vs.

RUSSELL EDWARD YALOWSKI,

Defendant/Appellant.

Case No. 20150270-CA

Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from a conviction for one count of burglary, a second degree felony, in violation of Utah Code §76-6-202; one count of threat of violence, a class B misdemeanor, in violation of Utah Code §76-5-107(1); and one count of criminal mischief, a class B misdemeanor, in violation of Utah Code §76-6-106(2)(c), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Robin W. Reece presiding.

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UTAH APPELLATE COURTS

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JURISDICTION

Utah Code §78A-4-103(2)(e) provides jurisdiction. *See* Addendum A.

ISSUES, STANDARDS OF REVIEW, PRESERVATION

Issue I: Whether Yalowski is entitled to a new trial where the trial court precluded him from cross-examining the State's complaining witness regarding her prior acts of dishonesty that were probative of the witness' character for untruthfulness and motive to testify falsely.

Standard of Review/Preservation: "When reviewing a trial court's decision to limit cross-examination, [this Court] review[s] the legal rule applied for correctness and the application of the rule to the facts of the case for an abuse of discretion." *State v. Chavez*, 2002 UT App 9, ¶17, 41 P.3d 1137, 1140. This Court's "review of the trial court's exercise of its discretion includes ensuring 'that no mistakes of law affected a lower court's use of its discretion.'" *Robinson v. Taylor*, 2015 UT 69, ¶8. This issue is

preserved. *See infra* Part I.C. Or, to the extent this Court disagrees, the issue may be reviewed for plain error. *See id.*

Issue II: Whether the trial court committed reversible error where it admitted lay opinion testimony regarding shoe impression evidence that required specialized knowledge and was not helpful to the jury.

Standard of Review/Preservation: This Court “review[s] decisions relating to the qualification of a witness as an expert or as a lay witness for an abuse of discretion.” *State v. Rothlisberger*, 2004 UT App 226, ¶9, *aff’d*, 2006 UT 49, ¶¶8-9. This Court’s “review of the district court’s exercise of its discretion ‘include[s] review to ensure that no mistakes of law affected a lower court’s use of its discretion.’” *Eskelson ex rel. Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 59, ¶5, 242 P.3d 762. The issue is preserved. *See infra* Part II.C. Or, to the extent it is not preserved, this Court should review the issue for plain error. *See id.*

Issue III: Whether the trial court erred in denying the defense’s motion for a mistrial where the State’s complaining witness testified about Yalowski’s prior acts of violence in violation of rule 404(b) after the State stipulated and the trial court agreed that the testimony was inadmissible.

Standard of Review/Preservation: This Court “review[s] a trial court’s denial of a motion for mistrial for abuse of discretion.” *State v. Decorso*, 1999 UT 57, ¶38, 993 P.2d 837. This issue is preserved. *See* R.167:8-9 (counsel informing the court of Yalowski’s stipulation with the State regarding the 404(b) evidence); 167:92-93, 155-56 (counsel

objecting to the witnesses testimony and moving for a mistrial); 167:155-57 (court considering counsel's arguments and denying the motion for a mistrial).

Issue IV: Whether cumulative error requires reversal.

Standard of Review/Preservation: A claim of cumulative error "requires [this Court] to apply the standard of review applicable to each underlying claim of error."

Radman v. Flanders Corp., 2007 UT App 351, ¶4, 172 P.3d 668. Preservation is inapplicable.

STATUTES/RULES/CONSTITUTIONAL PROVISIONS

The following are in Addendum B: Utah Const. art. I, §12; U.S. Const. amend. VI; Utah R. Evid. 403, 404(b), 608, 701.

STATEMENT OF THE CASE

On March 27, 2014, Yalowski was charged by information with burglary, a second degree felony in violation of Utah Code §76-6-202; lewdness, a class B misdemeanor in violation of Utah Code §76-9-702(1); threat of violence, a class B misdemeanor, in violation of Utah Code §76-5-107; and criminal mischief, a class B misdemeanor, in violation of Utah Code §76-6-106(2)(c). R.1-3. At a preliminary hearing held on May 15, 2014, Yalowski was bound over on all counts. R.22-23.

A 2-day jury trial was held on December 2, 2014 through December 3, 2014. R.71-75, 167-168. The jury found Yalowski guilty of burglary, threat of violence, and criminal mischief, but acquitted him of lewdness. R.101. On May 16, 2015, the trial court sentenced Yalowski to an indeterminate term of 1-15 years for burglary, 6 months jail for threat of violence, and 6 months jail for criminal mischief. R.145-146. The court ordered

that the jail sentences run consecutive, but gave Yalowski credit for one year of time served. R.145-146. Yalowski timely appealed. R.153-54.

STATEMENT OF FACTS

Background

Bradi Richards and Russell Yalowski knew each other for approximately 18 years before they started dating in December, 2012. R.167:91-92. By December 2013, Richards alleged that “[t]hings were really rocky” and ended her relationship with Yalowski.

R.167:91-92.

On the evening of December 20, 2013, Richards was home with her four children. R.167:95. She had been drinking, testifying that she had consumed one or two shots of alcohol that night. R.167:128. Her cousin, Jennie Lee Tabora, and her three children were staying with Richards, and Tabora was downstairs with most of the children watching TV. R.167:138-40. Richards and Yalowski had exchanged text messages that day, but Richards claimed that she did not invite Yalowski to her home. R.167:94.

Richards went to the upstairs bathroom to rinse off in the tub. R.167:96-97; 122. According to Richards, she was in the bathroom for just a “few minutes” when she heard “a loud bang.” R.167:97-98. She alleged that she heard a second loud bang at which time she opened the shower curtain and saw Yalowski standing in the bathroom. R.167:97-98; 122. Tabora testified that she heard two loud bangs as well. R.167:139-40.

In the bathroom, Richards claimed that Yalowski “threaten[ed]” her, telling her that he was going to rip her shirt off and that “he had about eight N words” outside

“waiting to shoot up the house.” R.167:98-100. She believed Yalowski had been drinking and testified that he began to urinate on the bathroom walls with his genitalia visible.

R.167:99, 125-126. Tabora “heard them arguing upstairs” and later went upstairs to find Richards and Yalowski “bickering.” R.167:140-41.

Richards claimed that she then dialed 911 from her bedroom phone as Yalowski and Tabora were in the hallway, but hung up because she was afraid Yalowski would overhear. R.167:101. The 911 operator called back several times, but Richards claimed that she did not want Yalowski to see “Unified Police Department” on the caller ID, so she proceeded to answer and hang up the phone a number of times. R.167:102. Richards and Yalowski then went outside. R.167:102. Richards claimed that Yalowski threatened to “rip[] off [her] shirt” and “take [her] somewhere and beat [her] up and leave [her] for dead where nobody could find [her].” R.167:102.

Meanwhile, Tabora claimed she did not want to be present during Yalowski and Richards’s argument, so she called a friend for a ride. R.167:103-04; 140-43. While Tabora was in the process of moving her belongings and children out to her friend’s car, she and Yalowski had a conversation outside. R.167:142-43. Tabora did not remember what they discussed, but claimed that she remembered Yalowski asking, “Can I have a cigarette? I think I’m going to jail.” R.167:142. As Yalowski and Tabora were outside, Richards went back into the house, spoke to the 911 operator, and returned outside. R.167:103-04, 129-30.

The police arrived and arrested Yalowski. R.167:162. A search of his person revealed a key to Richards’s house and car. R.167:104-05, 164; 168:19-20. Richards

claimed Yalowski had taken the keys earlier that week without her permission. R.167:94, 104-05. Police also took Yalowski's shoes into evidence, and forensic technician Alan Kalinowski later took photographs of various shoe impressions in the snow around the property. R.167:198-200, 204. He also photographed damage to the backdoor and bathroom door, which Richards and Tabora claimed did not exist prior to Yalowski's arrival that evening. R.167:105-06; 108-16, 141, 145-48, 204; Exhs. 4-17. Although several sets of pry marks were found on the door, no tool that could have been used to pry open the door was located. R.167:188-89, 214. Additionally, police did not observe or recover any evidence of urine in the bathroom. R.167:187, 212-13; 168:25.

The Trial

Richards's Prior Acts of Misconduct: Before the jury was impaneled, the defense sought to introduce three instances of Richards's prior misconduct under rule 608 of the Utah Rules of Evidence. R.167:10. These acts included (1) a plea in abeyance for theft by deception, (2) using a false name to enter the jail to visit Yalowski, and (3) a June, 2014 arrest for theft by deception and giving a false name to a police officer. R.167:10. The court allowed Yalowski to cross-examine Richards about using a false name to enter the jail. R.167:15-16, 131. However, without conducting any analysis, the trial court summarily denied Yalowski's motion to cross-examine Richards regarding the plea in abeyance and 2014 arrests. R.167:15-16.

Shoe Impression Evidence: Yalowski also made a motion in limine to exclude any testimony that the shoe impressions found at Richards's home matched Yalowski's footwear. R.167:9. Yalowski argued that an expert, rather than a lay witness, was

required for this testimony. R.167:9. The court explained that it would “have to rule on that when [it] hear[d] what the witness sa[id],” but thought “a layperson could say something to the effect that ‘[t]hat footprint looks a lot like his shoe.’” R.167:9-10. However, the court continued, “if the witness is going to say, ‘I’ve done an expert examination, I’ve matched tread’ and so forth, then he probably couldn’t go that far.” R.167:9-10.

Later, the court allowed forensic technician Kalinowski, a lay witness, to compare the shoe prints with Yalowski’s shoes and present various opinions. R.167:205-11. At one point, Kalinowski testified that the tread pattern of one shoe impression was “identical” to the Nike sneakers recovered from Yalowski. R.167:208; State’s Exh. 35. Also, looking at a photograph of the door, *see* State’s Exhs. 43-45, Kalinowski testified that

“[although] there’s not much of a shoe impression on the top, . . . you can see . . . down the side here you have that same, similar, block cut pattern on the side of the shoe indicating more of an angled hit towards the door. Therefore, you wouldn’t see much of the shoe itself, but more of the side of the shoe.”

R.167:209-10.

Yalowski’s Prior Bad Acts: Prior to trial, the State and defense stipulated and the court agreed that evidence of Yalowski’s prior bad acts under Rule 404(b) would not be admitted. R.167:8-9. The prosecutor instructed Richards accordingly. R.167:93. Nevertheless, shortly into her direct-examination, Richards testified that Yalowski “was constantly accusing [her] of things [she] wasn’t doing and just constantly fighting with

[her]. *Getting violent.*” R.167:92 (emphasis added). Yalowski immediately objected and moved for a mistrial, which was denied. R.167:93, 155-57.

SUMMARY OF ARGUMENT

Issue I: The trial court committed reversible error by limiting Yalowski’s right to cross-examine Richards regarding a theft by deception plea in abeyance as well as a 2014 arrest for giving a false name to a police officer and theft by deception. Testing a witness’ credibility is a critical function of the constitutionally guaranteed right of cross-examination, and a defendant must be permitted to introduce all admissible evidence relevant to this purpose. Richards’s prior acts of misconduct were highly probative of her character for truthfulness and motive to testify falsely, and they were admissible under rules 608 and 403 of the Utah Rules of Evidence. By foreclosing cross-examination on these acts without a proper justification, Yalowski was deprived of the right to impeach Richards’s credibility and to subject the State’s case to meaningful adversarial testing. Yalowski’s case requires reversal because the court’s error in limiting his cross-examination was not harmless beyond a reasonable doubt.

Issue II: This Court should reverse because the trial court improperly admitted lay opinion testimony that was not helpful to the jury and required specialized knowledge regarding the complexities of shoe impression evidence. Under rule 701 of the Utah Rules of Evidence, lay opinion testimony must be helpful to the jury’s understanding of a fact in issue and cannot be based on scientific, technical, or other specialized knowledge. In this case, Kalinowski, a lay witness, offered opinions regarding shoe impression evidence that were unfounded and misleading and required a degree of knowledge well

outside the ken of the average bystander. Accordingly, Kalinowski's opinions were inadmissible under rule 701, and the trial court erroneously admitted them. Furthermore, the court's error prejudiced Yalowski because there is a reasonable likelihood that he would have enjoyed a more favorable outcome but for Kalinowski's improper lay opinion testimony.

Issue III: Reversal is required because the trial court erred by denying Yalowski's motion for mistrial after Richards testified about Yalowski's prior acts of violence in violation of rule 404(b) of the Utah Rules of Evidence. Richards's testimony that Yalowski previously became "violent" constituted 404(b) evidence. And, the State stipulated and the trial court agreed that this testimony was inadmissible. Particularly where he was deprived of an opportunity to attack the credibility and character of Richards, Yalowski was prejudiced by this 404(b) evidence, which had a tendency to cast him as a bad person with a proclivity to commit violent acts. There is a reasonable likelihood that Yalowski would have enjoyed a more favorable result if the jury did not hear evidence about him "getting violent," and the trial court erred by denying his motion for a mistrial.

Issue IV: Collectively, these errors undermine confidence in the fairness of Yalowski's trial. Thus, cumulative error requires reversal.

ARGUMENT

I. THIS COURT SHOULD REVERSE BECAUSE THE TRIAL COURT PRECLUDED YALOWSKI FROM CROSS-EXAMINING THE STATE'S COMPLAINING WITNESS REGARDING PRIOR ACTS OF DISHONESTY THAT WERE PROBATIVE OF THE WITNESS' CHARACTER FOR UNTRUTHFULNESS AND MOTIVE TO TESTIFY FALSELY.

The trial court committed reversible error by limiting Yalowski's right to cross-examine the State's complaining witness regarding a theft by deception plea in abeyance as well as a 2014 arrest for giving a false name to a police officer and theft by deception. The credibility of the complaining witness, Bradi Richards, was crucial to the State's case, and it was necessary that Yalowski be allowed to conduct as full an impeachment of her credibility as the rules of evidence allow. Her prior arrest and plea in abeyance were highly probative of her capacity for telling the truth and her motive to testify falsely. Moreover, these prior acts of misconduct were admissible under rules 608 and 403 of the Utah Rules of Evidence. Therefore, the trial court erred by depriving Yalowski of a meaningful opportunity to test Richards's credibility through cross-examination.

"The right to cross-examine is an invaluable right embodied in Article I, Section 12 of the Utah Constitution and in the Sixth Amendment of the United States Constitution which assures the right to confrontation." *State v. Maestas*, 564 P.2d 1386, 1387 (Utah 1977). As Utah appellate courts recognize "[a] complete defense includes 'the right to conduct reasonable cross-examination.'" *State v. Marks*, 2011 UT App 262, ¶13, 262 P.3d 13. "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). It "is the principal means by which the

believability of a witness and the truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Thus, a defendant must ““be permitted to introduce all relevant and admissible evidence.”” *State v. Moton*, 749 P.2d 639, 644 (Utah 1988). “[T]he scope of cross-examination as to credibility is and must be broad if it is to fulfill its designated purpose of exposing bias and purging testimony of intended or unintended error.” *State v. Leonard*, 707 P.2d 650, 656 (Utah 1985). Otherwise, these constitutional rights “would be . . . empty one[s] if the State were permitted to exclude competent, reliable evidence bearing on . . . credibility . . . when such evidence is central to the defendant’s claim of innocence.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

Although the trial court may exercise its discretion to exclude evidence, “there must be a proper basis for doing so.” *State v. Sheehan*, 2012 UT App 62, ¶¶29, 36, 273 P.3d 417; *see also State v. Chavez*, 2002 UT App 9, ¶¶19, 21, 41 P.3d 1137. “[T]o protect [a defendant’s] Confrontation Clause rights,” any limitation on a defendant’s right to cross-examine a State witness should be “narrowly tailored.” *Chavez*, 2002 UT App 9, ¶19. “[I]n the absence of any valid state justification,” exclusion of evidence challenging a witness’ credibility ““deprives a defendant of the basic right to have the prosecutor’s case encounter and survive the crucible of meaningful adversarial testing.”” *Sheehan*, 2012 UT App 62, ¶29.

In this case, the defense sought to introduce three instances of Richards’s prior misconduct under rule 608 of the Utah Rules of Evidence. R.167:10. These acts included (1) a plea in abeyance for theft by deception, (2) using a false name to enter the jail to visit Yalowski, and (3) a June, 2014 arrest for theft by deception and giving a false name

to a police officer. R.167:10. Counsel argued that “two out of the three of these [acts were] fairly recent” and “involve[d] acts of deception with the intent to gain something” as well as “lying to the police” and “lying to the jail.” R.167:10-11. The prosecutor did not contest that Richards committed these acts of misconduct, but argued that they were uncharged and not felony convictions. R.167:11. The court allowed Yalowski to cross-examine Richards about using a false name to enter the jail. R.167:15-16, 131. However, without conducting any analysis, the trial court denied Yalowski’s motion to cross-examine Richards regarding the plea in abeyance and 2014 arrest. R.167:15.

Because the theft by deception plea in abeyance and 2014 arrest were relevant and admissible under rules 608 and 403, the trial court lacked a proper basis for excluding the evidence. Yalowski was therefore deprived of the “‘basic right to have the prosecutor’s case encounter and survive the crucible of meaningful adversarial testing.’” *Sheehan*, 2012 UT App 62, ¶29. And, Yalowski’s inability to cross-examine Richards regarding these acts of misconduct was not harmless beyond a reasonable doubt. The issue is preserved. Or, to the extent it is not preserved, this Court should review the issue for plain error.

A. The Trial Court Erred By Limiting Yalowski’s Cross-examination Of Richards Regarding Her Prior Plea In Abeyance And 2014 Arrest; This Misconduct Was Highly Probative Of Richards’s Credibility And Admissible Under Rules 608 And 403.

Rule 608 ensures a meaningful right to cross-examine witnesses by allowing inquiry into specific instances of conduct that are probative of a witness’ character for

truthfulness and motive to testify falsely. *See* Utah R. Evid. 608. The rule provides in relevant part:

(b) **Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

...

(c) **Evidence of Bias.** Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by other evidence.

Utah R. Evid. 608.

Under rule 608(b), a witness may be cross-examined regarding specific instances of conduct if they are probative of a witness' character for truthfulness or untruthfulness. Utah R. Evid. 608; *Robinson*, 2015 UT 69, ¶15; *State v. Hackford*, 737 P.2d 200, 202 (Utah 1987). Meanwhile, admission is proper under rule 608(c) "if a prior instance of conduct is relevant to a witness'[s] bias or motive to testify differently than would otherwise be the case." *Hackford*, 737 P.2d at 203. ¹

Both subsections (b) and (c) permit impeachment by specific acts that did not result in a criminal conviction. *Robinson*, 2015 UT 69, ¶¶15-21. Additionally, evidence

¹ Rule 608(b) permits cross-examination about prior acts relevant to truthfulness, but does not allow extrinsic evidence to rebut a false answer. *State v. Campos*, 2013 UT App 213, ¶¶90-91, 309 P.3d 1160. Unlike rule 608(b), however, "[e]xtrinsic evidence pertaining to a prior instance of conduct is . . . admissible to show a witness' bias or motive to testify." *Black v. Hennig*, 2012 UT App 259, ¶15, 286 P.3d 1256.

admissible under both subsections is subject to exclusion under rule 403 if its potential for prejudice substantially outweighs its probative value. *State v. Gomez*, 2002 UT 120, ¶¶33-36, 63 P.3d 72. However, a trial court's discretion to limit cross-examination under 403 is not absolute; it is constrained by a defendant's right to confront and cross-examine adverse witnesses. *Maestas*, 564 P.2d at 1388 ("The trial court's obligation to control the trial to prevent prejudice and waste of time must of course be weighed against the competing right of confrontation").

Here, Richards's prior misconduct was admissible under rules 608(b), 608(c), and 403. They were admissible under rule 608(b) because they reveal a pattern of intentional deception and were highly probative of Richards's character for untruthfulness. Her acts were likewise admissible under rule 608(c) because they were probative of her motive to give self-serving testimony. And because the acts were substantially more probative than prejudicial, they were admissible under rule 403 as well. Absent a proper justification for exclusion, the trial court abused its discretion by precluding cross-examination regarding this misconduct and impermissibly impinged on Yalowski's right to confrontation.

1. *Rule 608(b)*.

To be admissible under rule 608(b), the prior instance of misconduct must be probative of the trait of truthfulness or untruthfulness. *See* Utah R. Evid. 608(b). "Specific instances of conduct that have been found to be probative of untruthfulness have tended to be acts of dishonesty or false statement, i.e., involve deceit, untruthfulness, or falsification." 4 *Handbook of Fed. Evid.* §608:4 n.6 (7th ed.); *see also State v. Johnson*, 784 P.2d 1135, 1139 (Utah 1989) (noting in the context of rule 609

“that crimes of dishonesty or false statement are those which involve “some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.””).

An act of misrepresentation surrounding the commission of a theft is highly relevant to a person’s capacity to tell the truth. *See State v. Lucero*, 2004 UT App 334, *1 n.1 (“[the witness’] lying to cover up the theft is clearly probative of his untruthfulness”); *Johnson*, 784 P.2d at 1140 (concluding that prior conviction for theft by deception was properly admitted as a crime of dishonesty under rule 609 because it was a theft “committed by fraudulent or deceitful means and [wa]s indicative of [the witness’] veracity”). Likewise, a witness’ “use of a false name is highly probative of untruthfulness.” *State v. Hall*, 946 P.2d 712, 723 (Utah Ct. App. 1997). “If a man would lie about his name, a jury may reasonably infer that he would lie about other matters, even on the witness stand.” *Id.*

Additionally, multiple acts of misconduct demonstrating a pattern of dishonesty have a greater tendency to show a witness’ character for untruthfulness. *See United States v. Leake*, 642 F.2d 715, 717-19, (4th Cir. 1981) (finding limitation of the defendant’s cross-examination of a prosecution witness “was clearly prejudicial error” where the sum of the witness’ dishonest acts “establish[ed] a pattern of fraudulent activity that, if revealed, would have placed [the witness’] credibility in question”); Wright & Gold, 28 *Federal Practice and Procedure* §6118 (“The courts also have concluded that evidence of specific instances is probative of truthfulness or untruthfulness where the conduct

consisted of acts that, viewed in isolation, do not necessarily impugn veracity but in context did so.”).

In this case, Richards’s plea in abeyance for theft by deception and her 2014 arrest for theft by deception and providing a false name to a police officer are acts highly probative of her character for untruthfulness. First, theft by deception involves an act of “deception,” Utah Code §76-6-405, which occurs when a person “intentionally” misleads another person. Utah Code §76-6-401(5) (defining “deception,” *inter alia*, as intentionally ... creat[ing] ... an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction”); *State v. Sorensen*, 617 P.2d 333, 337 (Utah 1980 (“A conviction of theft by deception requires a determination by the jury that the defendant intentionally made a fraudulent misrepresentation”). Richards’s arrest for giving a false name to a police officer is likewise admissible under 608(b). This act involves the “intent [to] mislead[] a peace officer” and lying about one’s identity. *See* Utah Code §76-8-507 (a person is guilty of false personal information to peace officer “if, with intent of misleading a peace officer ... the person knowingly gives a false name ... to a peace officer”). And significantly, the sum of Richards’s prior acts reveal a pattern of dishonest behavior that is highly probative of her capacity to testify truthfully. Richards’s plea in abeyance for theft by deception, her 2014 arrest for theft by deception, and her 2014 arrest for providing a false name to a police officer were individually and collectively probative of her character for untruthfulness and admissible under rule 608(b).

2. *Rule 608(c)*.

Richards's prior acts of misconduct are similarly admissible under rule 608(c) because they reveal a motive to testify untruthfully. Rule 608(c) recognizes the importance of revealing a witness' motivations by broadly allowing evidence of "[b]ias, prejudice, or *any* motive to misrepresent" for impeachment purposes. Utah R. Evid. 608(c) (emphasis added). "The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316-17. Accordingly, Utah courts have "repeatedly emphasized the importance of permitting a cross-examiner wide latitude in exposing a witness' potential bias." *Hackford*, 737 P.2d at 203.

In this case, Richards's theft by deception plea in abeyance, her 2014 arrest for theft by deception, and her 2014 arrest for giving a false name to a police officer are acts highly probative of her motive to testify falsely. First, these acts had bearing on Richards's motive to lie to the police and fabricate charges in order to serve her self-interests. The record reveals evidence that Richards was angry at Yalowski as Richards broke up with him shortly before the incident. *See* R.167:92 (Richards describing her reasons for breaking up with Yalowski and noting that because he "was constantly accusing [her] of things [she] wasn't doing and just constantly fighting with [her]"). Along with this evidence, Richards's acts of misconduct reveal her willingness to lie to the police and others by falsely incriminating Yalowski based on her own ill-feelings and self-interests.

Evidence of Richards's June, 2014 arrest for theft by deception and giving a false name also reveals a motive for favoring the prosecution in her testimony. As her arrest occurred after Yalowski was charged and relatively close to his trial, Richards could have believed that testifying favorably for the prosecution would minimize the threat of being charged with the misconduct for which she was arrested. In other words, "the mere possibility of future criminal charges" for theft by deception and giving a false name to the police furnished Richards with a motive to provide testimony that satisfied the prosecution, regardless of its truth. *State v. Chesnut*, 621 P.2d 1228, 1233 (Utah 1980), *disapproved of by on other grounds by State v. Crick*, 675 P.2d 527 (Utah 1983) ("The mere possibility of future criminal charges is a sufficient basis to explore the motives of the witness on cross-examination, and place his apprehensions thereof before the jury.").

In evaluating Richards's credibility the jury should have been made aware of these acts of misconduct. Cross-examination should be permitted "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 318. The theft by deception plea in abeyance and 2014 arrest have bearing on her motive to testify falsely and are therefore, admissible under rule 608(c).

3. *Rule 403.*

Richards's prior acts of dishonesty are highly probative of her character for untruthfulness and motive to testify falsely; that probative value was not substantially outweighed by the danger of unfair prejudice. In *Gomez*, the Utah Supreme Court set forth an analysis for determining whether evidence otherwise admissible under rule

608(b) should be excluded under rule 403. 2002 UT 120, ¶¶34-35. Although the *Gomez* court did not tailor the analysis to evidence otherwise admissible under rule 608(c), the same analysis is also useful in determining whether rule 608(c) passes rule 403 muster.

The *Gomez* court explained that the court must first “evaluate and consider the probative value of the proffered testimony, that is, the extent to which the proposed testimony is probative of truthfulness or untruthfulness [or a motive to misrepresent].” *Id.* at ¶34. Next, it must “determine the degree to which the proffered testimony may tend to inflame or prejudice the jury.” *Id.* Finally, the court must “balance the first two concerns to determine whether the danger of unfair prejudice substantially outweighs the testimony's probative value.” *Id.* The *Gomez* court further explained that

The degree of probative value can be a function of several factors, including the relative importance of the credibility of the witness, the extent to which the evidence is probative of other relevant matters, the extent to which the circumstances surrounding the specific instances of conduct are similar to the circumstances surrounding the giving of the witness’ testimony, the remoteness in time of the specific instances to trial, and the likelihood that the alleged specific instances of conduct in fact occurred.

Id. at ¶35.

Here, the danger of unfair prejudice did not substantially outweigh the strong probative value of Richards’s prior acts. The probative value of Richards’s plea in abeyance and 2014 arrest was twofold. First, the acts were probative of her capacity to testify truthfully because they involve acts of intentional misrepresentation, demonstrating a pattern of fraudulent activity and a willingness to lie to the police. *See supra* Part I.A.1. And second, they were probative of a motive to testify falsely because

they bear on Richards's motive to falsely incriminate Yalowski and testify in the prosecution's favor. *See supra* Part I.A.2.

Additionally, Richards's testimony was the lynchpin to the State's case against Yalowski. The testimony of Richards alone was critical to establishing that Yalowski made threats of harm and violence, that he lacked permission to enter/remain in the home, and that the damage to the back and bathroom doors was caused by him. *See* R.167:94, 98-100, 102, 105-06, 108-16. The circumstances surrounding Richards's specific instances of misconduct were also similar to the circumstances surrounding the giving of the Richards's testimony. They involve lying to the police—conduct potentially at issue in this case—and a general pattern of self-serving misrepresentation that has not been dissuaded by the threat of criminal penalty. *See* R.167:10-11. In light of these circumstances, it is reasonable to doubt Richards's truthfulness to the police as well as her capacity to take an oath or affirmation seriously. This is particularly true given that her June, 2014 arrest for theft by deception and giving a false statement occurred less than six months before she testified at trial. R.167:10-11.

It is also likely that Richards committed these acts. She entered a plea in abeyance to theft by deception, meaning that Richards "plead[ed] guilty or no contest." *Layton City v. Stevenson*, 2014 UT 37, ¶48, 337 P.3d 242. Counsel also indicated to the court that she learned of the arrests by way of Richards's RAP sheets, which included a probable cause statement. R.167:14-15. Furthermore, the prosecutor did not contest that Richards committed these acts of misconduct, suggesting there was little possibility that a mini-trial on these acts would take place. R.167:11.

Meanwhile, inquiry into Richards's acts of theft by deception and giving a false name to a police officer carried little risk of inflaming or prejudicing the jury. Use of "a false name is not the type of evidence that is likely to inflame the jury." *Hall*, 946 P.2d at 723. Additionally, acquiring property by way of misrepresentation is similarly unlikely to appeal to the jury's emotions and promote decision on an improper basis. Counsel also proffered that her cross-examination regarding these acts would be brief, suggesting that she did not plan to inquire into irrelevant detail at the risk of the jury's confusion.

R.167:11. These acts offered straightforward, uncomplicated evidence regarding Richards's character for untruthfulness and motive to testify falsely. On balance, the risk of inflaming or prejudicing the jury, if any, certainly did not substantially outweigh the strong probative value of the evidence.

In sum, Richards's theft by deception plea in abeyance and 2014 arrest carried special probative value because the acts had bearing on both her character for untruthfulness and her motive to testify falsely. They were admissible under rules 608(b) and 608(c), and their probative value substantially outweighed any risk of prejudice under rule 403. By limiting the defense's cross-examination of Richards regarding these acts without justification, the court deprived Yalowski of the opportunity to meaningfully test Richards's credibility.

B. Prejudice

“‘[W]here the error results in the deprivation of a constitutional right, [this Court] appl[ies] a higher standard of scrutiny, reversing the conviction unless [it] find[s] the error harmless beyond a reasonable doubt.’” *State v. Crowley*, 2014 UT App 33, ¶17, 320

P.3d 677. This is a “high” standard. *State v. Patterson*, 656 P.2d 438, 439 (Utah 1982). Because the court’s error implicates Yalowski’s constitutional rights to confrontation and cross-examination, *see Maestas*, 564 P.2d at 1387-88; *Leonard*, 707 P.2d at 655-56, “[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.” *Sheehan*, 2012 UT App 62, ¶37. To guide its analysis, this Court looks at the following factors:

the importance of the witness’[s] testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.

Id.

In this case, the trial court’s error in limiting Yalowski’s cross-examination of Richards was not harmless beyond a reasonable doubt. To return a guilty verdict on burglary, threat of violence, and criminal mischief, the jury had to find, respectively, that Yalowski (1) “enter[ed] or remain[ed] unlawfully ... with the intent to commit ... an assault [or] ... lewdness;”² (2) “threaten[ed] to commit any offense involving bodily injury [or] death ... and act[ed] with intent to place [Richards] in fear of imminent serious bodily injury, substantial bodily injury, or death;” and (3) “intentionally damage[d], deface[d], or destroy[ed] the property of another.” Utah Code §76-6-202(1);

² The jury’s consideration of the crimes Yalowski “intended to commit” was limited to assault or lewdness. R.90.

§76-5-107(1); §76-6-106(2)(c). Richards's testimony was critical to the State's case, particularly with respect to the burglary and threat of violence allegations.

First, with regard to burglary, Richards's testimony was necessary to establish that Yalowski did not have permission to enter the home. *See* R.167:94, 104-06. She also supplied the only testimony that Yalowski threatened her in the bathroom and exposed his genitals while urinating on her bathroom floor—evidence crucial in showing that he intended to commit assault³ or lewdness.⁴ *See* R.167:98-100; *see also* Utah Code §76-5-107(1). Additionally, without Richards's testimony, the State lacked the evidence needed to establish that Yalowski threatened bodily injury, which was required to sustain a conviction for threat of violence. *See* R.167:98-100, 102; *see also* Utah Code §76-5-107(1). Her testimony was also important in showing that there was no prior damage to the back and bathroom doors for purposes of establishing criminal mischief. *See* R.167:105-06; 108-16.

Moreover, there was little to corroborate Richards's testimony, and the State's case was not otherwise strong. There was evidence that Yalowski had a key to Richards's home, which undermined her claim that she did not give him permission to enter the back and the bathroom doors. R.167:104-05, 164; 168:19-20. And although an impression on

³ At the time of the offense, section 76-5-102 define[ed] assault as, *inter alia*, “a threat, accompanied by a show of immediate force or violence, to do bodily injury to another.” Utah Code §76-5-102 (2003); *see also* R.95 (instruction defining assault)

⁴ “A person is guilty of lewdness if the person ... performs any of the following acts in a public place or under circumstances which the person should know will likely cause affront or alarm to, on, or in the presence of another who is 14 years of age or older: ... exposes his or her genitals [or] any other act of lewdness.” Utah Code §76-9-702; *see also* R.92 (instruction defining lewdness).

the door was attributed to the tread pattern on Yalowski's shoe, R.167:205-11, and Tabora claimed that there was no prior damage to the doors, R.167:141; 145-48, the jury heard evidence from which they could have concluded that the damage to the doors previously existed. *See* R.167:188-89, 214. For instance, the police located pry marks on the backdoor, but no tool that would have created those marks, such as a crowbar, was recovered from the scene. R.167:188-89, 214. Also, there was evidence that the impression on the backdoor was made of dust or dirt, though the snow on the ground would have likely washed away any dirt residue from the soles of Yalowski's shoes, and there was no evidence that the door was wet from a snowy kick. R.167:189-90, 213.

But even if Yalowski lacked permission to enter or remain in the home and caused the damage to the doors, there was little to corroborate Richards's claims that Yalowski made threats and exposed his genitalia in the bathroom while urinating. Police testified that they did not observe or recover any urine in the bathroom, R.167:187, 212-13; 168:25, and in fact, the jury acquitted on the lewdness count, indicating they were not convinced by Richards's allegation. R.101. There was also an absence of evidence corroborating Richards's claim that Yalowski threatened her life and well-being inside the bathroom and outside the home. *See* R.167:98-100, 102. Tabora offered no testimony claiming that Yalowski made threats, but rather characterized Richards's and Yalowski's argument as "bickering." R.167:140-41. Any notion that Yalowski threatened Richards's with a show of force is similarly inconsistent with evidence of Yalowski and Tabora's casual conversation over a cigarette immediately after the alleged threats were made. *See* R.167:142-43. Given the lack of evidence demonstrating that Yalowski made threats and

exposed his genitals while urinating, it is likely that Richards's testimony heavily influenced the jury's decision regarding burglary and threat of violence.

Additionally, the extent of the cross-examination allowed was insufficient to expose Richards's motive to lie and reveal her incapacity for truthfulness. The court arbitrarily allowed defense counsel to question Richards about using a fake ID to make contact with Yalowski, but that was not sufficient for several reasons. *See* R.167:15-16. First, the defense's ability to fully develop that cross-examination was circumscribed by the fact that Richard's used the fake ID to visit Yalowski at the jail; defense counsel had to be careful to avoid eliciting testimony and asking questions that would reveal that Yalowski was incarcerated. *See* R.167:11-15, 131. For instance, counsel could not ask whom Richards gave a fake ID to. Accordingly, Yalowski was precluded from demonstrating that Richards was willing to lie to individuals working on behalf of the state, whether it be a correctional officer at the jail, or a police officer responding to the scene of the crime.

Second, viewed in isolation, Richards's use of a false ID to visit Yalowski did not serve to undermine her veracity in the same way it would if the sum of her dishonest acts were revealed to the jury. Presenting the jury with a single act of dishonesty only suggested that Richards's made one mistake, but possibly realized that her behavior was wrong and decided to amend her ways. However, by showing the entirety of Richard's dishonest acts, the jury would find a pattern of self-serving misrepresentation that could not be dissuaded by the threat of criminal penalty—or perhaps the consequences of lying under oath. *See* R.167:10-11.

Finally, cross-examination on Richards's single incident of using a fake ID was insufficient to reveal the extent of her motive to falsify her testimony. Because there was no evidence that the police or district attorney's office were even aware of Richards's use of the fake ID at the jail, *see* R.167:10-16, there was little reason for the jury to believe that Richards testifying in the prosecution's favor would subject her to leniency with the state. Thus, by disallowing cross-examination on the plea in abeyance and 2014 arrest, the jury was denied full exposure to Richard's character for untruthfulness and motive to testify falsely. The court's error in limiting Yalowsk's cross-examination of Richards was not harmless beyond a reasonable doubt because there is a "reasonable possibility" that this error "might have contributed to [Yalowski's] conviction." *State v. Gallup*, 2011 UT App 422, ¶24, 267 P.3d 289.

Even if the traditional test for prejudice is applied, however, this case requires reversal. Confidence in the verdict is undermined by the trial court's error in limiting Yalowski's cross-examination of Richards regarding the theft by deception plea in abeyance and 2014 arrest. *See State v. Kohl*, 2000 UT 35, ¶17, 999 P.2d 7 (explaining that reversal is warranted under traditional prejudice test if "there is a reasonable likelihood that there would have been a more favorable result for the defendant"); *id.* ("A reasonable likelihood of a more favorable outcome exists when the appellate court's confidence in the verdict actually reached is undermined.").

As discussed, the State's case against Yalowski was not strong and it is highly likely that Richards's uncorroborated testimony significantly influenced the jury's decision. There is a reasonable likelihood that inquiry into Richards's plea in abeyance

and 2014 arrest would have undermined the believability of her testimony and would have produced a more favorable outcome for Yalowski. Thus, regardless of the prejudice standard used, Yalowski's convictions require reversal.

C. Preservation.

This issue was preserved. To preserve an issue for appeal, “the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” *State ex rel. C.C.*, 2013 UT 26, ¶16, 301 P.3d 1000. “An issue may be raised directly or indirectly, so long as it is ‘raised to a level of consciousness such that the trial judge can consider it.’” *Hill v. Superior Prop. Mgmt. Servs., Inc.*, 2013 UT 60, ¶57, 321 P.3d 1054; *see also Pratt v. Nelson*, 2007 UT 41, ¶24, 164 P.3d 366 (concluding that an issue was preserved because the trial court “was aware” of the issue and resolved it in a “deliberate manner,” even though the trial “court did not have the benefit of the [appellants’] argument”).

Here, citing rule 608, counsel made a motion to cross-examine Richards regarding her plea in abeyance for theft by deception and her 2014 arrest for theft by deception and giving a false name to the police. R.167:10. Counsel argued that “two out of the three of these [acts were] fairly recent” and “involve[d] acts of deception with the intent to gain something” as well as “lying to the police” and “lying to the jail.” R.167:10-11. Counsel also argued that admission of the acts was not unfairly prejudicial. R.167:11. Inherent in counsel’s motion was an assertion of Yalowski’s constitutional right to confront and cross-examine Richards for purposes of testing her credibility. Therefore, counsel gave the court an opportunity to rule on the admissibility of the acts as they related to

Yalowski's rights to confrontation and cross-examination as well as their admissibility under rules 608 and 403.

To the extent this Court believes that any aspect of this issue is not preserved, the issue may be reviewed for plain error. To establish plain error, Yalowski "must demonstrate that (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for [him], or phrased differently, [this Court's] confidence in the verdict is undermined." *State v. Beck*, 2006 UT App 177, ¶9, 136 P.3d 1288, *aff'd*, 2007 UT 60, 165 P.3d 1225. "To show obviousness of the error," Yalowski "must show that the law was clear at the time of trial." *Id.*

Part I.A demonstrates that the court committed error by foreclosing cross-examination on Richards's plea in abeyance and 2014 arrest. That error was obvious in light of case law stressing the importance of cross-examination and emphasizing that "the scope of cross-examination as to credibility ... must be broad." *Leonard*, 707 P.2d at 656; *Davis*, 415 U.S. at 316. It was also obvious that there must be "a valid state justification" for limiting cross-examination. *Sheehan*, 2012 UT App 62, ¶¶29-30. Moreover, at the time of trial, rule 608 unequivocally allowed inquiry into acts probative of a witness' character for untruthfulness and motive to misrepresent. *See* Utah R. Evid. 608(b) & (c). Finally, Part I.B demonstrates that this obvious error was prejudicial. Therefore, the court plainly erred by precluding cross-examination on Richards's plea in abeyance and 2014 arrest.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING LAY OPINION TESTIMONY REGARDING SHOE IMPRESSION EVIDENCE THAT REQUIRED SPECIALIZED KNOWLEDGE AND WAS NOT HELPFUL TO THE JURY.

This Court should reverse because the trial court improperly admitted lay opinion testimony that was not helpful to the jury and required specialized knowledge of shoe impression evidence. “Lay opinion testimony, which is treated under rule 701, is opinion or inference testimony not based on scientific, technical, or other specialized knowledge.” *State v. Rothlisberger*, 2006 UT 49, ¶11, 147 P.3d 1176. “Under rule 701 of the Utah Rules of Evidence, testimony of a lay witness is limited to an opinion that is: ‘(a) rationally based on the witness’ perception; (b) helpful to clearly understanding the witness’ testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.’” *State, in interest of K.C.*, 2013 UT App 201, ¶¶5, 309 P.3d 255 (quoting Utah R. Evid. 701).

On the other hand, “[e]xpert testimony, which is treated under rule 702, is opinion or fact testimony based on scientific, technical, or other specialized knowledge.” *Rothlisberger*, 2006 UT 49, ¶11. “[T]he test for determining whether testimony must be provided by an expert is whether the testimony requires that the witness have scientific, technical, or other specialized knowledge; in other words, whether an average bystander would be able to provide the same testimony.” *Id.* ¶34. A lay witness can only give opinions on issues “capable of scientific determination” if the provisions of rule 701 are met. *State v. Ellis*, 748 P.2d 188, 191 (Utah 1987).

In this case, forensic technician Kalinowski's testimony comparing and analyzing shoe impression evidence failed to assist the jury and required specialized knowledge. After Kalinowski was called to Richards's home on December 20, 2014, he photographed various shoe impressions in the snow leading to Richard's back door as well as an impression on the back door itself. R.167:204-08. "At some point" on the first day of trial, Kalinowski looked at a pair of Nike sneakers that Mr. Yalowski was wearing on the evening of the incident R.167:197-200, 208. Kalinowski then gave testimony comparing the tread pattern of the Nikes with a photograph of one of the shoe impressions in the snow. R.167:208-11. He testified that areas of the tread pattern were "[i]dential." R.167:208. Kalinowski also looked at a photograph of a small impression on Richards's back door and testified that

[although] there's not much of a shoe impression on the top, . . . you can see . . . down the side [of the door] you have that same, similar, block cut pattern on the side of the shoe indicating more of an angled hit towards the door. Therefore, you wouldn't see much of the shoe itself, but more of the side of the shoe.

R.167:209-10; *see also* R.167:207; State's Exh. 45.

Kalinowski did not merely relay his observations about points of comparison between the shoe impressions and the Nike Airs, but asserted his conclusion—using an expression of absolute certainty—that the tread patterns were "[i]dential." R.167:208. He also testified about the effect of the angle of impact on the type of shoe impression left and what the impression on the door revealed about the circumstances and source of the impression in this case. This testimony was not helpful to the jury and required

technical knowledge outside the purview of the average bystander. Additionally, the court's admission of the testimony was prejudicial. This issue is preserved, or, to the extent that this Court believes any aspect of this issue is unpreserved, it may be reviewed for plain error.

A. Kalinowski's Lay Opinion Testimony Comparing And Analyzing Shoe Impression Evidence Required Specialized Knowledge And Failed To Assist The Jury.

1. Kalinowski's Testimony Was Not Helpful.

To be admissible, lay opinion testimony must be helpful to the jury. Utah R. Evid 701. An opinion is not helpful if it "do[es] little more than tell the jury what result to reach." *Davidson v. Prince*, 813 P.2d 1225, 1232 n.7 (Utah Ct. App. 1991); *see also United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004) (explaining that jurors were not "helped" by lay opinion testimony that, in addition to telling them "what was in the evidence," also told them "what inferences to draw from it"). Additionally, unfounded and misleading opinions fail to assist the jury. "Where a lay person expresses an opinion that unfairly extrapolates from facts to a conclusion without any methodology or analysis, the court should exclude the opinion." R. Collin Mangrum & Dee Benson, 1 Utah Prac., *Mangrum & Benson On Utah Evidence Rule 701* (2014); *see also Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175 (3d Cir. 1993) ("[a]n opinion based on false assumptions is unhelpful in aiding the jury in its search for the truth, and is likely to mislead and confuse").

Here, Kalinowski's opinions were not helpful to the jury because they told the jury what result to reach and they rested on unfounded assumptions. *See* R.167:208-10.

By characterizing portions of the tread patterns as “identical,” the jury was left with little room to come to their own conclusions regarding any similarities and dissimilarities they observed. R.167:208; *compare Ellis*, 748 P.2d at 190-91 (finding that lay opinion testimony was proper where lay witness merely “compared the footprints outside the house to those inside” and “said that ... a photograph of a footprint ‘with the distinctive heel marking appeared to be the one on the inside of the carpet’”). Additionally, Kalinowski told the jury what inference to draw from the evidence of the impression on the back door—that a shoe consistent with Yalowski’s Nikes “hit” the door. R.167:209-10. Consequently, the jury was foreclosed from concluding that the incomplete impression came from a different shoe or was caused by something else entirely. *See State’s Exhs. 43-45* (photographs of the impression on the door). These were facts for the jury to determine and it was not Kalinowski’s role to draw conclusions regarding the significance of the impression. *See Coulliette v. State*, 119 So. 511, 511 (Ala. Ct. App. 1928) (“Whether the tracks were ‘running tracks’ was one of the very facts for the jury to determine. It was for the witness to describe the tracks, and for the jury to draw the conclusion”).

Kalinowski’s opinions were also unfounded and potentially misleading. He brought no legitimate methodology to bear in drawing the inference that the shoe impressions were identical or the result of an angled kick to the door. *See R.167:208-10*. Aside from a basic comparison of the impressions and the Nikes, nothing in the record indicates that Kalinowski conducted the type of subtle analysis that qualified him to comment, using terms of certainty, on the degree of similarity between complex tread

patterns. *See* R.167:204-08.⁵ Additionally, Kalinowski's testimony that "you wouldn't see much of [a shoe impression]" when there is "an angled hit towards the door" was purely conjectural and unfounded. *See* R.167:209-10. The record fails to demonstrate any training or foundational basis upon which Kalinowski could draw such an inference. *See id.* Nor is there anything to suggest that Kalinowski was capable, based on his personal observations, to go a step further and conclude that the impression actually observed was the product of an angled kick to Richards's back door. *See id.*

The lack of sound methodology used in this case underscores a larger problem with shoe impression comparison evidence and its potential for confusing the jury. "Identifications are largely subjective," and there is little scientific evidence showing that that any one particular tread pattern is actually unique. National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward*, at 146, 149-50 (2009) [hereinafter "NAS Report"]. Additionally, there are no criteria for determining how many unique characteristics must be present before a positive match can be declared. *Id.* at 147 ("there is no defined threshold that must be surpassed, nor are there any studies that associate the number of matching characteristics with the probability that the impressions were made by a common source"); Yaron Shor & Sarena Weisner, *A Survey on the Conclusions Drawn on the Same Footwear Marks Obtained in Actual Cases by Several Experts Throughout the World*, 44 J. Forensic Sci. 380, 383 (1999) (finding a

⁵ The record reveals the following basis for Kalinowski's comparison: (1) he took pictures and observed the impressions at the crime scene, (2) on the day of trial, he observed the Nike Airs and (3) he compared them to the pictures of the impressions in the snow and on the door. *See* R.167:204-11.

wide range of variability in standards that experts use to formulate conclusions in shoe impression cases). Additionally, in the field of impression evidence and beyond, there is a “critical need ... to raise the standards for reporting and testifying about the results of investigations.” NAS Report at 185. Terms such as “‘match,’ ‘consistent with,’ ‘*identical*,’ ‘similar in all respects tested,’ and ‘cannot be excluded as the source of’ have a profound effect on how the trier of fact in a criminal or civil matter perceives and evaluates evidence.” *Id.* (emphasis added).

With the reliability of shoe impression comparisons in question, there is additional reason to discard Kalinowski’s opinions as unsound and potentially misleading. This is particularly true given the lack of indication that his opinions were founded on reliable methodology. And Kalinowski’s overstated claim that the tread patterns were “identical” likely misled the jury regarding the probability that Yalowki’s Nike Air’s were the source of the impressions in the snow and on the door. In short, Kalinowski’s opinions were not helpful to the jury because his unfounded conclusions couched in exaggerated terms were misleading and told the jury what inferences to draw from the shoe impression evidence.

2. Kalinowski’s Testimony Required Specialized Knowledge.

“[L]ay witnesses may testify regarding their direct perceptions, but only a qualified expert may give testimony that relies on scientific, technical, or other specialized knowledge.” *Rothlisberger*, 2006 UT 49, ¶28. “‘The mere percipience of a witness to the facts on which he wishes to tender an opinion,’” however “‘does not trump rule 702.’” *Id.* at ¶32. Therefore, “the real distinction must be based on the level of knowledge that witnesses have from which they can draw their conclusions.” *Id.* at ¶34.

“If [] knowledge is not within the ken of the average bystander, then it is properly characterized as specialized knowledge.” *Id.*

Ellis helps define the proper role of lay opinion testimony on matters otherwise capable of scientific determination by an expert. 748 P.2d 188. In that case, a security guard discovered two sets of footprints: one set in the mud beneath a broken window and the other set inside the house leading away from the broken window. *Id.* at 190. At trial, the security guard “was allowed to testify that footprints outside a broken window looked like the footprints inside the building.” *Rothlisberger*, 2006 UT 49, ¶35; *Ellis*, 748 P.2d. at 190. The *Ellis* court found the comparison proper, explaining that “[s]imply because a question might be capable of scientific determination, helpful lay testimony touching on the issue and based on personal observation does not become expert opinion.” 748 P.2d at 191. However, the court did not say that lay opinion testimony comparing shoeprints is admissible in all forms. *See id.* Rather, lay opinion testimony was proper in *Ellis* because the inference that the footprints looked similar could be “readily drawn by any person who observed both sets of footprints.” *Rothlisberger*, 2006 UT 49, ¶35.

In this case, Kalinowski gave testimony based on observations that could not be readily drawn by any person who looked at the Nike sneakers and pictures of the shoe impressions. By their nature, shoe impressions are “complex to interpret,” Max M. Houck, *Professional Issues in Forensic Science*, 273 (2015), and “[m]ost footwear prints have complex geometric structures.” Tang et al., *Footwear Print Retrieval System for Real Crime Scene Marks*, 6540 Lecture Notes in Comp. Sci., 88-100 (2011). Kalinowski’s conclusion that areas of the tread pattern were “identical” required a degree

of technical certainty that is unavailable to even an expert—let alone a lay witness. *See* NAS Report at 149 (commenting on the lack of scientific consensus regarding the uniqueness of tread patterns).

Similarly, reliance on specialized knowledge was necessary to testify about the angle of impact's effect on the type of shoe impression left and to draw the inference that the impression actually observed was the product of an angled kick to the door. These conclusions required experience in identifying partial shoe impressions, an understanding of the reasons why partial shoe impressions occur, and an understanding of how a shoe's angle of impact affects the appearance of the impression left behind. Kalinowski's conclusions further entailed extrapolating from this knowledge and applying it to his analysis of the impression observed on Richards's back door. This level of knowledge and skill is not within the ken of the average bystander.

By admitting Kalinowski's testimony under rule 701, the State was allowed to evade the applicability of the special rules governing expert testimony. *See Rothlisberger*, 2006 UT 49, ¶¶25-27; *see also id.* ¶25 (noting the advisory committee's concern with allowing evasion of Rule 702's reliability requirements by "proffering an expert in lay witness clothing"). Because Kalinowski's opinions required a degree of knowledge well outside the ken of the average bystander, they were inadmissible under rule 701.

In sum, Kalinowski's lay opinion testimony was unfounded and misleading. It failed to assist the jury's understanding and required technical knowledge regarding the complexities of shoe impression evidence. Accordingly, Kalinowski's opinions were inadmissible under rule 701 and the trial court erroneously admitted them.

B. Prejudice

This Court will reverse a conviction based on admission of improper evidence “if, absent the error, there is a reasonable likelihood that there would have been a more favorable result for the defendant.” *Kohl*, 2000 UT 35, ¶17. “A reasonable likelihood of a more favorable outcome exists when the appellate court's confidence in the verdict actually reached is undermined.” *Id.* When examining prejudice, this Court considers whether the error’s effect on the trial is ““pervasive”” rather than ““isolated”” and ““trivial,”” *State v. Hales*, 2007 UT 14, ¶86, 152 P.3d 321, as well as the strength of the evidence that “*would have been* before the jury absent the trial court’s error.” *State v. Lindgren*, 910 P.2d 1268, 1274 (Utah Ct. App. 1996) (emphasis original).

In this case, there is a reasonable likelihood that Yalowski would have enjoyed a more favorable outcome but for Kalinowski’s improper lay opinion testimony. As discussed above, to find Yalowski committed burglary, threat of violence, and criminal mischief, the jury had to find, respectively, that he (1) entered or remained unlawfully in Richards home with the intent to commit assault or lewdness; (2) threatened bodily injury or death with the intent to place Richards in fear of harm and (3) intentionally damaged Richards’s property. Utah Code §76-6-202(1); §76-5-107(1); §76-6-106(2)(c). First, Kalinowski’s claim that the tread pattern in the snow was “identical” to Yalowski’s Nike sneakers squarely placed Yalowski on the stairwell leading to the damaged back door. R.167:177-78; 207. This evidence, in conjunction with Kalinowski’s testimony that a shoe consistent with Yalowski’s sneakers kicked the back door, could have led the jury to believe that Yalowski lacked permission to enter the home and was the individual who

intentionally damaged Richards's doors. *See* R.168:64, 74, 77-78. The court's erroneous admission of Kalinowski's testimony had a pervasive effect because the State repeatedly relied on evidence of Yalowski kicking the door to prove the unlawful entering/remaining element of burglary. *See, e.g.*, R.168:64 (prosecutor arguing "[y]ou can look at all the pictures [of the footprints]. You can look at his shoes. You can look at the back door. . . . If you've got to enter somebody's house by kicking in their door, you're entering unlawfully."); *see also* R.168:74, 77-78.⁶

Evidence of Yalowski kicking the door also had a tendency to bolster aspects of Richards's testimony, which was critical in satisfying the "intent to commit an assault or lewdness" element of burglary and "threatened bodily injury or death" element of threat of violence. *See supra* Part I.B. In fact, the State relied on the shoe impression evidence, coupled with the damage to the doors, to support its narrative that Yalowski entered Richards's home and bathroom with force. R.168.64-65, 74, 77-78. The jury could have found this influential in finding that Yalowski intended to commit an assault—that is, he made a threat to Richards, which was accompanied by a show of immediate force or violence, to do bodily injury to her. R.168.64-65, 74, 77-78; *see also* Utah Code §76-5-102.

In the absence of Kalinowski's improper testimony, the State's case was far from compelling. *See supra* Part I.B. Richards provided the sole evidence that Yalowski

⁶ The State also encouraged the jury to find that Yalowski's entry into the bathroom was unlawful. R.168:60-65. The jury could have relied on evidence of the impression on the door, which the State used to support an inference that the back door was kicked in, to find that Yalowski similarly kicked in the bathroom door. R.168.64-65.

threatened her and lacked permission to enter the home. *See supra* Part I.B. And although Richards and Tabora testified that the damage did not exist prior to Yalowski's entry, the jury had good reason to doubt the credibility of both women. R.167:105-06, 108-16, 141, 145-48. Richards had a history of lying, which would have been more apparent if Yalowski was able to fully inquire into all her acts of prior dishonesty. *See* R.167:10-11, 131; *supra* Part I. And by acquitting Yalowski of lewdness, it is evident that the jury doubted aspects of Richards's testimony. R.101. Tabora also had credibility problems and gave inconsistent testimony. For instance, Tabora claimed she submitted a police report regarding the incident, but the testifying police officers explained that this did not occur. R.167:153, 185-86; 168:23-24. Additionally, neither Tabora nor Richards observed Yalowski enter the home or kick the door. R.167:130-31, 139-40. The State also failed to call any of the seven young children who were present on the evening of the incident to testify about the nature of Yalowski's entry. *See* R.167-168; R.167:95-96.

There was also evidence upon which the jury could have found that Yalowski entered lawfully and did not cause the damage. The evidence demonstrated that Yalowski had a key to Richards's home. R.167:104-05, 164; 168:19-20. The jury could have doubted that Yalowski forcibly entered the home when instead, he could have simply entered by using his house key. There was also evidence from which the jury could have concluded that Richards's door was previously damaged; although there were pry marks on the door, the police never located a tool, such as a crowbar, that could have been used to pry open the door. R.167:188-89, 214; *see also supra* Part I.B. Finally, there was evidence from which the jury could have reasonably doubted that Yalowski forcefully

threatened Richards. *See supra* Part I.B. For example, Tabora characterized Richards's and Yalowski's disagreement as "bickering." R.167:140-41; *see also supra* Part I.B.

In conclusion, Yalowski was prejudiced by Kalinowski's testimony that the shoe impressions located were "identical" to Yalowski's sneakers and indicative of an angled kick to Richards's back door. The State stressed this evidence at trial, particularly to support the unlawful entry element of burglary. Meanwhile, the State's case against Yalowski was not strong, and there was evidence from which the jury could have acquitted on the charges. Thus, there is a reasonable likelihood that, absent the court's erroneous admission of Kalinowski's testimony, Yalowski would have enjoyed a more favorable outcome.

C. Preservation.

This issue is preserved. *See State ex rel. C.C.*, 2013 UT 26; ¶17; *Hill*, 2013 UT 60, ¶57; *Pratt*, 2007 UT 41, ¶24. Defense counsel made a motion in limine to exclude any testimony that the shoe impressions found at Richards's home matched Yalowski's footwear. R.167:9. Yalowski argued that this testimony should be given by an expert, rather than a lay witness. R.167:9. The court deferred its ruling, implying that it would monitor the testimony of the lay witness. *See* R.167:9-10. Specifically, the court explained that it would "have to rule ... when [it] hear[d] what the witness sa[id]," but thought "a layperson could say something to the effect that 'That footprint looks a lot like his shoe.'" R.167:9-10. However, the court continued "if the witness is going to say, 'I've done an expert examination, I've matched tread' and so forth, then he probably couldn't go that far." R.167:10. By making a motion in limine prior to Kalinowski's

testimony, defense counsel gave the court an opportunity to rule on the admissibility of that testimony both (1) at the time the motion was made and (2) at the time the court actually “hear[d]” what Kalinowski testified to. R.167:9-10.

To the extent that this Court believes any aspect of this issue is unpreserved, the issue may be reviewed for plain error. *See supra* Part I.C (setting forth the test for plain error). Part II.A demonstrates that the court committed error. That error was obvious because the court itself announced that it was disinclined to allow testimony that the tread patterns “matched.” R.167:9-10. It also implied that it would not allow testimony that would require an “expert examination.” R.167:9-10. Accordingly, it should have been obvious that Kalowski’s testimony regarding the “identical” nature of the tread patterns and the effects of an angled kick was inappropriate. Additionally, that error was obvious in light of *State v. Rothlisberger*, 2006 UT 49, ¶11, which explains that only qualified experts should give opinions requiring specialized knowledge, and rule 701, which requires that lay opinion testimony be “helpful to the jury.” Utah R. Evid 701. Finally, as demonstrated, the court’s error prejudiced Yalowski. *See supra* Part I.B.

III. THIS COURT SHOULD REVERSE BECAUSE THE TRIAL COURT IMPROPERLY DENIED THE DEFENSE’S MOTION FOR MISTRIAL AFTER RICHARDS TESTIFIED ABOUT YALOWSKI’S PRIOR ACTS OF VIOLENCE IN VIOLATION OF RULE 404(B) OF THE UTAH RULES OF EVIDENCE.

The trial court erred by denying Yalowski’s motion for mistrial after Richards testified about his prior acts of violence in violation of rule 404(b) of the Utah Rules of Evidence. “It is of course fundamental in our law that a person can be convicted only for acts committed, and not because of general character or a proclivity to commit bad acts.”

State v. Reed, 2000 UT 68, ¶23, 8 P.3d 1025. Therefore, rule 404(b) prevents the admission of bad act evidence if its effect is solely to “besmirch, disgrace or prejudice the defendant in the eyes of the jury.” *State v. Gibson*, 565 P.2d 783, 786 (Utah 1977). Rule 404(b) states:

Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in conformity with the character. . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Utah R. Evid. 404(b)(1)-(2).

The rule against improper use of character evidence works to ensure that a defendant is convicted only because he committed the charged offense, and not because the jury is convinced of his proclivity to commit bad acts or of his cumulative bad behavior. *See Daines v. Vincent*, 2008 UT 51, ¶43, 190 P.3d 1269. Thus, evidence of a defendant’s prior bad acts is only admissible “if it (1) ‘is relevant to,’ (2) ‘a proper, non-character purpose,’ and (3) does not pose a ‘danger for unfair prejudice’ that ‘substantially outweighs its probative value.’” *State v. Killpack*, 2008 UT 49, ¶45, 191 P.3d 17. Evidence that does not meet these requirements “must be excluded.” *State v. Decorso*, 1999 UT 57, ¶21, 993 P.2d 837.

In this case, Richards testified that Yalowski “was constantly accusing [her] of things [she] wasn’t doing and just constantly fighting with [her]. *Getting violent.*” R.167:92 (emphasis added). Richards’s testimony that Yalowski previously became

violent constituted 404(b) evidence that was prejudicial. The trial court erred by denying Yalowski's motion for a mistrial based on this testimony.

A. Evidence of Yalowski "Getting Violent" was Inadmissible Under Rule 404(b).

Richards's testimony that Yalowski became violent was inadmissible 404(b) evidence. The State and court agreed below. Before trial, the State and defense stipulated that no evidence of Yalowski's prior bad acts under Rule 404(b) would be introduced. R.167:8-9. The trial court accepted this stipulation, agreeing that this evidence would be inadmissible. R.167:8-10, 156. The State did not cite a proper non-character purpose for which it should be admitted. Additionally, there was no indication that evidence of Yalowski "getting violent" was relevant to a proper non-character purpose or carried any probative value. Therefore, the evidence was inadmissible under rule 404(b).

B. Prejudice.

Admission of the 404(b) evidence was prejudicial, and therefore, the trial court should have granted Yalowski's motion for a mistrial. This Court will reverse a trial court's denial of a mistrial if ""the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant."" *State v. Pritchett*, 2003 UT 24, ¶10, 69 P.3d 1278; *see also State v. Martinez*, 2015 UT App 193, ¶20 ("in order to obtain reversal, the defendant must make some showing that the verdict was substantially influenced by the challenged testimony."). "For purposes of determining whether a mistrial should have been granted, [this Court's] overriding concern is that defendant received a fair trial." *Pritchett*, 2003 UT 24, ¶10.

In this case, there is a reasonable likelihood that Yalowski would have enjoyed a more favorable result if the jury did not hear evidence about Yalowski “getting violent.” Richards’s claim that Yalowski was “getting violent” with her toward the end of their relationship had direct bearing on his propensity to do so in this case. R.167:92. As Yalowski and Richards broke up in December 2014, Richards implied that the prior violence was *recent*. See R.167:91-92. Unlike *State v. Martinez*, where there was only a reference to a general “history of violence,” the jury in this case was given an idea of when these acts occurred temporally. 2015 UT App 193, ¶18. Based on the fact that the violence occurred recently, the jury could have believed that Yalowski’s behavior had not changed and had a greater inclination to act with force and violence in this particular case. Richards’s testimony could have led to an inference that the allegations were part of a greater narrative, in which Yalowski recently turned to violence and Richards became subject to abuse at Yalowski’s hand. The jury, therefore, could have found that Yalowski had developed a general proclivity to commit acts of violence against Richards and convicted on the belief that he acted in conformity with that bad character. This danger was particularly acute in light of the court’s failure to strike the 404(b) evidence and give a contemporaneous limiting instruction. R.167:92-94. See *State v. Reyes*, 861 P.2d 1055, 1057 (Utah Ct. App. 1993) (finding the absence of “a clear limiting curative instruction . . . given at the earliest possible opportunity” to be a critical component in its prejudice analysis).

The court’s admission of the 404(b) evidence was also problematic in light of the limitations placed on Yalowski’s cross-examination of Richards. See *supra* Part I. While

Richards was allowed to attack Yalowski's character by claiming he was violent, R.167:92, Yalowski was foreclosed from similarly attacking Richards character and credibility. *See supra* Part I. Accordingly, the jury was left with the impression that Yalowski was a bad, violent person who deserved to be punished whereas Richards was a faultless victim of abuse with little motive to lie. This was even more problematic as Richards's testimony was the lynchpin of the State's case. *See supra* Part I.B. Otherwise, the State's evidence was scant, and there was evidence upon which the jury could have acquitted on all charges. *See supra* Parts I.B & II.B.

In sum, based on Richards's testimony about Yalowski previously "getting violent," the jury could have believed that Yalowski's prior violent acts were recent and fit into a fluid narrative of violence ending with the offenses charge in this case. Meanwhile, Yalowski was deprived of an opportunity to similarly attack the credibility and character of Richards, the State's star witness. Accordingly, there is a reasonable likelihood that Yalowski would have enjoyed a more favorable result if the jury did not hear evidence about Yalowski "getting violent."

IV.CUMULATIVE ERROR REQUIRES REVERSAL.

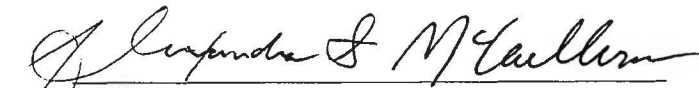
The cumulative error doctrine requires reversal when multiple errors considered collectively "undermine confidence in the fairness of a trial." *State v. Perea*, 2013 UT 68, ¶97, 322 P.3d 624. Even if none of the errors discussed in Parts I, II, and III, is prejudicial on its own, taken together, they undermine confidence in the fairness of Yalowski's trial. Precluding cross-examination on Richards's prior acts of dishonesty increased the likelihood that the jury convicted without considering her serious credibility

issues. Additionally, admission of Kalinowski's improper lay opinion testimony bolstered aspects of Richards's story and increased the likelihood that the jury believed her otherwise doubtful claims. And finally, at the same time the court foreclosed consideration of Richards's character for untruthfulness and motive to lie, the jury was exposed to evidence that Yalowski had previously become "violent," which encouraged conviction upon a finding that he had a bad character for violence. Thus, the cumulative effect of the errors undermines confidence that Yalowski had a fair trial.

CONCLUSION

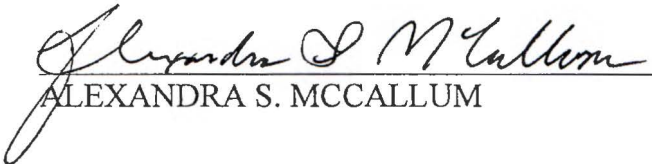
Based on the foregoing reasons, Yalowski respectfully requests that this Court reverse and remand for a new trial.

SUBMITTED this 21 day of September, 2015.


ALEXANDRA S. MCCALLUM
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. MCCALLUM, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 21 day of September, 2015.


ALEXANDRA S. MCCALLUM

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 12,159 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.


ALEXANDRA S. MCCALLUM

DELIVERED this 21 day of September, 2015.



ADDENDUM A

Tab A

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

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCING
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 141903380 FS
RUSSELL EDWARD YALOWSKI,	:	Judge: PAUL B PARKER
Defendant,	:	Date: March 16, 2015
Custody: Jail		

PRESENT

Clerk: nicolemb
Prosecutor: SERASSIO, MELANIE M
Defendant
Defendant's Attorney(s): WEST, JOHN K

DEFENDANT INFORMATION

Date of birth: August 28, 1980
Sheriff Office#: 248657
Audio
Tape Number: s34 Tape Count: 1:15-1:28

CHARGES

1. BURGLARY - 2nd Degree Felony
- Disposition: 12/03/2014 Guilty
3. THREAT OF VIOLENCE - Class B Misdemeanor
- Disposition: 12/03/2014 Guilty
4. CRIMINAL MISCHIEF: INTENTIONAL DAMAGE, DEFACE, DESTROY PROPERTY - Class B Misdemeanor
- Disposition: 12/03/2014 Guilty

HEARING

1:18- Victim speaks.
SENTENCE PRISON

Based on the defendant's conviction of BURGLARY 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.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for

transportation to the Utah State Prison where the defendant will be confined.

SENTENCE JAIL

Based on the defendant's conviction of THREAT OF VIOLENCE a Class B Misdemeanor, the defendant is sentenced to a term of 6 month(s)

Based on the defendant's conviction of CRIMINAL MISCHIEF:INTENTIONAL DAMAGE,DEFACE,DESTROY PROPERTY a Class B Misdemeanor, the defendant is sentenced to a term of 6 month(s)

Credit is granted for 360 day(s) previously served.

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

Jail sentences are to run consecutive. Counts 3 & 4 are given credit for time served. Court orders no credit for time served on Count 1.

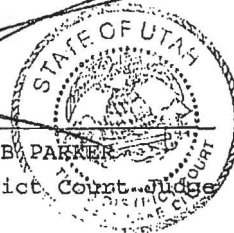
Restitution Amount: \$1872.25 Plus Interest
Pay in behalf of: BRANDI RICHARDS

CUSTODY

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

Date: 3/19/15


PAUL B. PARKER
District Court Judge



ADDENDUM B

Tab B

Utah Constitution, Article I, Section 12

Article I, Section 12. [Rights of accused persons.]

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. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

U. S. Constitution, Amendment VI

Amendment VI

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

Utah Rules of Evidence – Rule 403

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

2011 Advisory Committee Note. -- The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 403. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also *Smith v. Estelle*, 445 F. Supp. 647 (N.D. Tex. 1977) (surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979); *State v. Johns*, 615 P.2d 1260 (Utah 1980); *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982).

Utah Rules of Evidence – Rule 404 (b)

Rule 404. Character Evidence; Crimes or Other Acts

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

Utah Rules of Evidence – Rule 608

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

(c) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by other evidence.

2011 Advisory Committee Note. — The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE

This amendment is in order to be consistent with changes made to the Federal Rule.

Subdivisions (a) and (b) are the federal rule, verbatim, and are comparable to Rules 22 and 6, Utah Rules of Evidence (1971), except to the extent that Subdivision (a) limits such evidence to credibility for truthfulness or untruthfulness. Rule 22(c), Utah Rules of Evidence (1971) allowed a broader attack on the character of a witness as to truth, honesty and integrity.

This rule should be read in conjunction with Rule 405. Subdivision (b) allows, in the discretion of the court on cross-examination, inquiry into specific instances of the witness's conduct relative to his character for truthfulness or untruthfulness or specific instances of conduct of a person as to whom the witness has provided character testimony. See, *State v. Adams*, 26 Utah 2d 377, 489 P.2d 1191 (1971). Attack upon a witness's credibility by specific instances of character other than conviction of a crime is inadmissible under current Utah law. Cf. *Bullock v. Ungricht*, 538 P.2d 190 (Utah 1975); Rule 47, Utah Rules of Evidence (1971). Allowing cross-examination of a witness as to specific instances affecting character for truthfulness is new to Utah practice and in accord with the decision in *Michelson v. United States*, 335 U.S. 469 (1948). The cross-examination of a character witness as to specific instances of conduct which the character witness may have heard about concerning the person whose character is placed in evidence has been sanctioned by a prior decision, *State v. Watts*, 639 P.2d 158 (Utah 1981).

The rule is subject to a witness invoking the statutory privilege against degradation contained in Utah Code Annotated, Section 78-24-9 (1953). See, *In re Peterson*, 15 Utah 2d 27, 386 P.2d 726 (1963). The privilege, however, may be subject to limitation to accommodate an accused's right of confrontation. Cf. *Davis v. Alaska*, 415 U.S. 308 (1974).

Subdivision (c) is Rule 608(c), Military Rules of Evidence, verbatim.

Utah Rules of Evidence – Rules 701

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADDENDUM C

Tab C

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH
FILED DISTRICT COURT
Third Judicial District

STATE OF UTAH,

PLAINTIFF,

VS.

RUSSELL EDWARD YALOWSKI,

DEFENDANT.

MAY - 7 2015

SALT LAKE COUNTY

By Deputy Clerk

Case No. 141903380

TRIAL

VOLUME 1

BEFORE THE HONORABLE ROBIN W. REESE

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

DECEMBER 2, 2014

REPORTED BY: WENDY ALCOCK, RPR, CSR

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1 they won't lock.

2 **THE COURT:** Okay. Now, whatever. And if he chooses
3 to testify, then of course we'll take the jury out before he
4 walks up and then bring them back only after he's on the stand.
5 Okay.

6 **MS. BUCHI:** Thank you, Your Honor.

7 **THE COURT:** Nothing else?

8 **MS. BUCHI:** I think we have a stipulation with the
9 prosecutor as to 404B which is that no prior acts of violence
10 or abuse will be admitted today. And I believe she's
11 instructed her witnesses accordingly.

12 **THE COURT:** On -- on -- as against Mr. Yalowski?

13 **MS. BUCHI:** Yes.

14 **MS. SERASSIO:** Your Honor, we won't get into that
15 unless Mr. Yalowski opens the door for that. So say defense
16 attorneys ask a question that opens the door, Mr. Yalowski
17 testifies and that opens the door, if he's going to claim that
18 he was so drunk that he couldn't form the intent, then I'm
19 going to be able to ask -- I'm going to ask to ask questions
20 about his behavior on other occasions, because I'll have to be
21 able to prove that he was able to form the intent of the crime.
22 So as long as none of those -- as long as they don't open the
23 door or cause me to ask those questions, we won't ask those
24 questions.

25 **THE COURT:** Yeah. And, of course, we'd have to

1 decide about that last point I guess if it arises. But I'm
2 assuming that since Mr. Yalowski is not going to testify, it
3 sounds like he's not going to be opening any doors. And,
4 Counsel, I guess you would be wise not to suggest an opening or
5 something else someplace else that Mr. Yalowski has never had
6 any problems in the past or something such that that needs to
7 be rebutted. Anything else?

8 **MS. LARSON:** We would also ask that no witnesses call
9 Ms. Bradi Richards a victim pursuant to State v. Debbie
10 (phonetic).

11 **THE COURT:** Now, start over again. I'm sorry.

12 **MS. LARSON:** Under State v. Debbie (phonetic) we
13 would just ask that Ms. Richards either be called
14 "Ms. Richards" or "the complaining witness" or "the witness"
15 and not "the victim."

16 **THE COURT:** Oh, sure. Sure. Yeah. Not the victim.

17 **MS. LARSON:** We would invoke the exclusionary rule.
18 And then we would also have a motion in limine. I know that
19 there may be some testimony from one of the police officers
20 that shoe prints match Mr. Yalowski's footwear. We would
21 object to that because we believe that's appropriate for an
22 expert under 702 and on a lay witness.

23 **THE COURT:** I'll have to rule on that when I hear
24 what the witness says, I guess. Just initially without having
25 heard any evidence, I think that a layperson could say

1 something to the effect that "That footprint looks a lot like
2 his shoe." But if the witness is going to say, "I've done an
3 expert examination, I've matched tread" and so forth, then he
4 probably couldn't go that far. I would agree with you.

5 **MS. LARSON:** And then we would like to cross-examine
6 Bradi Richards on three specific instances of prior dishonesty
7 under State v. Gomez. That would be a plea in abeyance to
8 theft by deception, using a false name to enter the jail to
9 visit Mr. Yalowski, and a 2004 arrest for theft by deception
10 and giving a false name to a police officer.

11 **THE COURT:** If she has convictions --

12 **MS. LARSON:** Sorry, 2014.

13 **THE COURT:** -- convictions for those offenses that
14 would be permissible, wouldn't it, Counsel?

15 **MS. SERASSIO:** Your Honor, those are not convictions.
16 The 2014 arrest, nothing has ever even been filed.

17 **THE COURT:** Okay. I would permit it under the rule.
18 If the rule requires convictions, I would allow it only if
19 there are convictions, but let me double-check that.

20 **MS. LARSON:** And that's why we're requesting to do it
21 under Rule 608, which allows examples of conduct probative of
22 truthfulness or untruthfulness which included the use of a
23 false identity, attempting to corrupt or cheat others,
24 attempting to deceive or defraud others. And that's according
25 to State v. Roath (phonetic), and it's a North Carolina case,

1 721 S.E. 2d 408. In State v. Gomez basically the court needs
2 to decide the probative value of the proper testimony, the
3 danger of prejudice, and then the traditional balancing test.

4 What we would argue is that two out of three of these
5 are fairly recent. They involve lying to the jail, they
6 involve lying to the police, they involve acts of deception
7 with the intent to gain something. I don't think that they are
8 unfairly prejudicial. And we would just ask that we be allowed
9 to briefly cross-examine her. It would be approximately three
10 questions on each.

11 THE COURT: What if she denies it?

12 MS. LARSON: Then --

13 THE COURT: You're stuck, huh?

14 MS. LARSON: Yup.

15 THE COURT: I see. Go ahead, Counsel.

16 MS. SERASSIO: Your Honor, here's my issue with a
17 couple of things. First of all, the one is not a conviction.
18 It doesn't rise to even a level of a felony. It's a
19 misdemeanor alleged. It hasn't even been charged. It
20 allegedly happened in June and it still hasn't been filed. So
21 what -- there wasn't even enough evidence or we don't even know
22 why it hasn't been filed.

23 The second thing is that going to the jail brings up
24 issues for the jury that the defendant is incarcerated. It's
25 improper for them to know that he's in the jail. If the Court

1 is going to rule that -- that they can ask questions about her
2 visiting the defendant and -- and using another's
3 identification to do that, I think it needs to be limited to
4 not where was he, in the jail, because I think it's improper.

5 I mean, we go to great lengths to not let the jury
6 know that he's incarcerated. So I think back-dooring and
7 letting them know that he's incarcerated by asking if she's
8 visited him in the jail, it doesn't seem in the balance of
9 things to be quite fair.

10 The State also filed a motion in limine, Your Honor,
11 to actually keep this kind of evidence out, to keep out the
12 fact that she's been having contact with the defendant since
13 the incident occurred. I don't think that that's relevant that
14 she's had contact with him.

15 We're not talking about witness tampering or anything
16 like that. If it was the reverse, if he was calling her to
17 tamper or to try to persuade her not to testify. I don't think
18 that whether or not she's visited him since this incident
19 occurred has anything to do with whether or not the incident
20 actually occurred, Your Honor. First, on a relevancy level it
21 has nothing to do with anything.

22 I think if the Court -- like I said, if the Court is
23 going to rule that they can ask whether or not she used someone
24 else's identification to be able to visit with the defendant, I
25 think that's probably the most appropriate way to do it other

1 than talking about him being in jail or where he was.

2 Also there's the issue on the State's motion in
3 limine that we ask to keep out questions about whether anybody
4 has a warrant. Specifically the victim. The Defense has
5 claimed that they thought she had a warrant, and I haven't been
6 able to find one. And I don't think the existence or
7 nonexistence of a warrant is, first of all, relevant. I think
8 it's overly prejudicial if there was one.

9 MS. LARSON: And we've agreed that we're not going to
10 ask about that -- any of the witnesses about outstanding
11 warrants.

12 MS. SERASSIO: And then lastly there's -- at the
13 preliminary hearing they asked questions about whether or not
14 Bradi had ever possessed or used illegal drugs or paraphernalia
15 and that has no probative value in this case, Your Honor.

16 THE COURT: Whether who had?

17 MS. SERASSIO: The victim.

18 THE COURT: "Complaining witnesses" is what we've
19 agreed to call her.

20 MS. SERASSIO: Complaining witness. Sorry. I
21 felt -- sorry. Out of the presence of the jury.

22 THE COURT: Sure.

23 MS. SERASSIO: The complaining witness, whether or
24 not she had ever possessed or used drugs or illegal substances
25 has nothing to do with what happened on this particular

1 occasion and I just think it's highly prejudicial, Your Honor.

2 **THE COURT:** I see. So the Defense still wants to ask
3 the complaining witness about a visit to the jail where she
4 used someone else's ID, understanding that the jail -- the jury
5 would --

6 **MS. LARSON:** Your Honor, we would not actually say
7 "the jail." We would just ask if she's had contact with him
8 since these charges were filed, and if one of those contacts
9 involved pretending to be someone else.

10 **THE COURT:** And the relevance would just be to show
11 her act of deception?

12 **MS. LARSON:** To show her act of deception, yes.

13 **THE COURT:** What about the other two, the thefts by
14 deception. I didn't remember -- I don't --

15 **MS. LARSON:** One was a plea in abeyance that was
16 eventually dismissed, so that is not a conviction, that's true.

17 **THE COURT:** Yeah.

18 **MS. LARSON:** And the other is an arrest that occurred
19 in June of this year. That is what we -- and you remember
20 yesterday you gave the order so that the rap sheets of the
21 witnesses --

22 **THE COURT:** I did.

23 **MS. LARSON:** -- could be released to us --

24 **THE COURT:** Right.

25 **MS. LARSON:** That's where we learned of that --

1 **THE COURT:** The arrest?

2 **MS. LARSON:** -- particular arrest. So we have not
3 had a chance to get any police reports or anything else, but we
4 do have a probable cause statement of when she was booked into
5 the jail.

6 **THE COURT:** I'll grant your motion, Defense, as far
7 as asking the complaining witness about a visit using false
8 identification. And I'll deny the request to bring up the plea
9 in abeyance or the charge that hasn't yet been filed.

10 **MS. LARSON:** Okay.

11 **THE COURT:** And then -- and then as far as the State
12 is concerned, your motion to keep them from bringing up visits
13 the complaining witness may have made, other than the one I
14 just ruled on, do you intend to talk about other visits that
15 the two may have had since incarceration other than the one I
16 just mentioned that I intend to let you use?

17 **MS. LARSON:** Your Honor, if I can just have a moment.

18 **THE COURT:** Uh-huh. Yeah. In fact, Counsel, I can
19 overhear your conversation. It would be hard if we talked too
20 much about contact. Frankly, the jury is going to speculate,
21 and if they know that there's visitation and that you have to
22 use a name or identification to get in to see this person,
23 wherever they are, I don't think that it's going to be too hard
24 for them to figure out that he's in jail.

25 So I guess just as a part of your strategy, you need

1 to decide how far down that path you want to go, because the
2 jury will probably guess that he's in jail. Either that or
3 he's in a military installation or something. But, I mean,
4 it's going to be hard for them not to think he's in jail.

5 MS. LARSON: And we will be very careful with the
6 phrasing of it, Your Honor.

7 THE COURT: I see, okay.

8 MS. SERASSIO: I just had the one outstanding issue
9 about questioning the complaining witness about whether she had
10 ever used or possessed drugs or paraphernalia.

11 THE COURT: Yeah. It doesn't sound relevant to me.
12 I'll grant your motion.

13 MS. SERASSIO: Thank you.

14 THE COURT: Okay. We'll bring out the venire. Does
15 the State have proposed instructions?

16 MS. BUCHI: Oh, Melanie, did you want to put the
17 offer on (inaudible).

18 MS. SERASSIO: You know I have some, Your Honor. I
19 can email them to you at lunch. I was still working on them
20 because I got theirs yesterday and they --

21 THE COURT: You're both -- all of you seem to me at
22 least to be reasonable attorneys. I'm wondering if I couldn't
23 have you work -- I'd provide the stock, but work to see if you
24 couldn't put together a stipulated set. Is that a possibility?

25 MS. SERASSIO: We can work on it. I think it just

ADDENDUM D

Tab D

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH
FILED DISTRICT COURT
Third Judicial District

STATE OF UTAH,

PLAINTIFF,

VS.

RUSSELL EDWARD YALOWSKI,

DEFENDANT.

MAY - 7 2015

SALT LAKE COUNTY

By _____ Deputy Clerk

Case No. 141903380

TRIAL

VOLUME 1

BEFORE THE HONORABLE ROBIN W. REESE

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

DECEMBER 2, 2014

REPORTED BY: WENDY ALCOCK, RPR, CSR

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1 that you took the pictures in.

2 A. Of course.

3 Q. Do those appear to be in order?

4 A. Yes, they do. I'm sorry, I kind of went a little --

5 Q. It's okay, (inaudible).

6 A. -- camera happy. Yes, they are.

7 Q. Those are in order?

8 A. Yes.

9 Q. Okay.

10 MS. SERASSIO: And, Your Honor, we have an agreement,
11 if I'm not mistaken, that these pictures that I've just shown
12 him, they're the same. They're exhibits and they're numbered
13 the same way, so just so the jury knows. They'll be helpful
14 for them later on.

15 BY MS. SERASSIO:

16 Q. Okay. If I can approach with State's Exhibit 25 and
17 35. I'll have you take a look at those.

18 A. Okay.

19 Q. Do you recognize those at all?

20 A. Yes, those are the photographs I took.

21 Q. Okay. On December 20th?

22 A. Correct.

23 Q. And then Exhibit 45 as well.

24 A. Yes. That's one I took on the same day.

25 Q. So what are 25 and 35?

1 A. Exhibit 25 is photograph No. 9. This is a photograph
2 of a shoe impression that is near the garage.

3 Q. A shoe impression?

4 A. Shoe impression. "Footwear impression in snow near
5 garage."

6 Q. Okay. I'll put that up here so the jury can see it.
7 If you feel like you need to approach it you can. And then did
8 you also take a -- you took this picture 45, right?

9 A. Correct. Yes.

10 Q. And what is 45?

11 A. 45 is a shoe impression that is on the back door. On
12 the exterior side of the back door.

13 Q. Okay. So impression on the door. Did you also take
14 35?

15 A. Yes, I did.

16 Q. Okay. What is that?

17 A. That is a shoe impression in the snow on the
18 stairwell.

19 Q. On the stairwell. Okay. Are there more of these?

20 A. There's several photographs I took. Some photographs
21 did not come out so well, but our policy is not to delete any
22 of our dogs, which are bad photographs, or over or underexposed
23 photographs. So that way there's no missing photos.

24 Q. Did you do an examination of these pictures? Let's
25 just go with 35 for now. Do you want to come up here?

1 A. Yes.

2 Q. Did you look at these pictures -- at some point today
3 did you have a chance to look (inaudible) shoes?

4 A. At some point today, yes, I did.

5 Q. Okay. And when you looked at 35 and the shoes what,
6 if anything, can you tell me about the pictures of the shoes?

7 A. The picture of the shoes, several things stuck out to
8 me as to the pattern.

9 Q. If you point on here it will actually show up on the
10 screen overhead. (Inaudible.)

11 A. Okay. On the tread pattern, this similar pattern,
12 similar block. Identical.

13 Q. We can actually take -- now we're talking about right
14 now Exhibit 35 you're pointing to. And then are you looking at
15 the shoes, State's Exhibit No. 51?

16 A. Correct. Yes.

17 Q. Okay. If you want to put those on the screen, you
18 can project those as well. Yeah. Don't take them out of the
19 plastic.

20 A. Make sure that shows up.

21 Q. It's okay. You can just describe what you see and
22 then I'll let the jury look at it later. But you can point it
23 out.

24 A. The jury -- the jury -- this similar block here of
25 the Nike -- cutup of the Nike is consistent with the same cutup

1 here in the shoe impression. Same pattern that you see on the
2 side here, same block-type pattern is consistent with the same
3 kind of pattern here.

4 As you go further, we can see the curvature as seen
5 by this semi-circular pattern from the same shoe, also evident
6 here down here at the bottom, that similar pattern coming down
7 here. Unfortunately because of the damage when -- during the
8 step, the snow (inaudible) when you step forward, exact sizing
9 can't be determined. However, this pattern is consistent and
10 similar to the same shoe pattern as this.

11 Q. How about State's Exhibit No. 25?

12 A. 25 shows additional -- in fact, probably more, better
13 detail of the same tread pattern seen on the shoe. You can
14 actually see it more here on the sides.

15 Q. And can you see anything like this in the snow?

16 A. On this pattern it came out with this small spot
17 right here, which you can -- I'm not sure if it shows up.
18 There we go. Small indent in the heel of the shoe similar to
19 the indent of the shoe impression in the snow.

20 Q. Okay. And then what about this picture that you saw
21 of the door?

22 A. This picture here struck me very odd to see because
23 there's not much of a shoe impression on the top, however, you
24 can see down -- down the side here you have that same, similar,
25 block cut pattern on the side of the shoe indicating more of an

1 angled hit towards the door. Therefore, you wouldn't see much
2 of the shoe itself, but more of the side of the shoe.

3 Q. You can have a seat. Thanks. There's pictures --
4 pictures -- there's pictures of the shoe prints in the snow,
5 but in the deep snow there's not really --

6 A. In the deep snow I attempted to look for any kind of
7 shoe impressions. Unfortunately in deep snow when you're
8 stepping in and pulling out, a lot of the snow near the surface
9 has a tendency to kind of cave in on itself, and a lot of those
10 small pieces of snow will go in and obscure any tread detail.

11 Q. Okay. So the pictures where you have detail, where
12 are those photographs taken?

13 A. The photographs of decent detail?

14 Q. Of the shoe detail.

15 A. They were taken -- in fact, I can probably --

16 Q. Sure. If you tell us what exhibit you're looking at.

17 A. Exhibit No. 22. This is a photograph of the backside
18 of the house. The garage -- garage door here, stairwell going
19 up to the back door. The shoes I have decent detail of were
20 located up here next to the garage door, also along the
21 stairwell and at the top of the stairwell near the back door.
22 And the last photograph, this impression was on the back door.

23 Q. Okay. So I just wanted to explain for the jury now
24 that you've got this overall picture, we were talking about the
25 numbers on the picture. You took this picture and it's an