2016

State of Utah, Plaintiff/Appellee, v Russell Edward Yalowski

Utah Court of Appeals

39205

Case No. 20150270-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

RUSSELL EDWARD YALOWSKI,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for burglary, a second degree felony; threat of violence, a class B misdemeanor; and criminal mischief, a class B misdemeanor, in the Third Judicial District, Salt Lake County, the Honorable Robin W. Reese presiding

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for burglary, a second degree felony; threat of violence, a class B misdemeanor; and criminal mischief, a class B misdemeanor. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2009 & Supp. 2015).

INTRODUCTION

The victim broke up with Defendant on Tuesday. On Friday, Defendant kicked in her backdoor and bathroom door, and threatened to shoot up her house, rip off her shirt, beat her up, and leave her for dead where nobody could find her. R167:91-92, 98, 102-03.

Police arrived about 20 minutes later to find Defendant and the frightened victim in the garage. The backdoor and bathroom door were

broken. A single set of fresh footprints in the snow led from the front of the house to the broken backdoor. Shoe impressions from those prints and marks on the backdoor looked like the tread on Defendant's shoes.

A jury convicted Defendant of burglary, making a threat of violence, and criminal mischief.

STATEMENT OF THE ISSUES

Issue 1: Rule 608(b), Utah Rules of Evidence, excludes "extrinsic evidence" to prove "specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." But a trial court "may, on cross-examination," allow specific instances "to be inquired into if they are probative of the character for truthfulness or untruthfulness of the witness."

Defendant wanted to cross-examine the victim about (1) using a false name to enter the jail to visit Defendant; (2) an undated plea in abeyance to misdemeanor theft by deception; and (3) an uncharged 2014 arrest for misdemeanor theft by deception and giving a false name to a police officer. The trial court allowed Defendant to ask the victim about using a false name to enter the jail, but precluded cross-examination on the plea in abeyance and uncharged arrest.

Was the trial court within its broad discretion under rules 608(b) and 403 to allow Defendant to cross-examine the victim on some, but not all, of the alleged specific instances of conduct?

Standard of Review. A trial court's decision to admit or exclude evidence under rules 608 and 403, Utah Rules of Evidence, is reviewed for an abuse of discretion. *State v. Gomez*, 2002 UT App 120, ¶12, 63 P.3d 72.

Issue 2: Defendant's shoes and photos of the shoe impressions in the snow and on the backdoor were introduced into evidence.

Was it an abuse of discretion to allow a forensic technician to give lay opinion testimony that the shoe impressions in the snow and on the victim's backdoor looked like the tread patterns on Defendant's shoes?

Standard of Review. A trial court's decision to admit lay opinion testimony under rule 701, Utah Rules of Evidence, is reviewed for an abuse of discretion. *State v. Perea*, 2013 UT 68, ¶31, 322 P.3d 624.

Issue 3: The prosecutor agreed not to introduce Defendant's "prior acts of violence or abuse" and instructed the victim not to mention any prior acts. When the prosecutor asked "who broke up with whom," the victim replied: "We were at my house and I broke up with him. I just told him I couldn't do it anymore. He was constantly accusing me of things I wasn't doing and just constantly fighting with me. Getting violent."

During the rest of the two-day trial, which spans nearly 300 pages of transcript, no one mentioned or otherwise used the "getting violent" comment.

Did the victim's unsolicited, brief, vague reference to "getting violent" require the trial court to declare a mistrial?

Standard of Review. A trial court's mistrial ruling is reviewed for an abuse of discretion. *See State v. Butterfield*, 2001 UT 59, ¶46, 27 P.3d 1133.

4. Has Defendant shown that the cumulative effect of any errors requires reversal?

Standard of Review. A jury verdict will be reversed "under the cumulative error doctrine only 'if the cumulative effect of the several errors undermines . . . confidence that a fair trial was had.'" *State v. Killpack*, 2008 UT 49, ¶56, 191 P.3d 17 (quoting *State v. Widdison*, 2001 UT 60, ¶73, 38 P.3d 1278) (omission in original).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following rules are reproduced in Addendum A:

Utah R. Evid. 403 (excluding relevant evidence for unfair prejudice, confusion, waste of time, or other reasons);
Utah R. Evid. 608 (witness's character for truthfulness or untruthfulness);
Utah R. Evid. 701 (opinion testimony by lay witnesses).

STATEMENT OF THE CASE

A. Summary of facts.[1]

Two missing keys

When they broke up, Bradi Richards and Defendant had been dating for about a year, although Ms. Richards had known Defendant since she was 15 or 16. R167:91-92. They never lived together and Ms. Richards never gave Defendant a key to her house or car. R167:94.

Ms. Richards broke up with Defendant at her house on Tuesday, December 17, 2013. R167:92. She told him that she "couldn't do it anymore." R167:92. He was "constantly accusing [her] of things [she] wasn't doing and just constantly fighting with her." R167:92.

Right after the breakup, Ms. Richardson could not find her house key or her only car key. R167:104-05. She believed that Defendant had taken them. *Id.*

Two loud bangs

Three days later, at about 10 p.m., Ms. Richards—her shirt still on—stepped into the tub to quickly rinse off her bottom. R167:95-96. Her cousin, who was staying with her, was downstairs watching television with

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[1]Unless otherwise stated, the facts are recited in the light most favorable to the jury's verdict. *See State v. Liti*, 2015 UT App 186, ¶3 n.2, 355 P.3d 1078.

most of their children.[2] R167:94-96, 126, 139. Ms. Richards's six-year-old daughter was upstairs watching television. R167:96, 140.

Ms. Richards had only been in the tub a few minutes when she heard a "loud bang." R167:97. She thought it must have been one of the children. R167:97, 122. A second louder bang made her open the shower curtain. She was surprised to find an angry Defendant standing in her bathroom. R167:97-98, 101, 103, 121, 123, 126.

Defendant yelled that "he had people outside. . . . about eight N words out there waiting to shoot up the house." R167:97-98, 101, 124. He threatened to "rip" her shirt off. R167:99-100. And he pulled his pants down and urinated all over the bathroom.[3] R167:99-100, 125.

Ms. Richards was scared. R167:99. She pleaded with Defendant to calm down. R167:100, 124.

Meanwhile, downstairs, Ms. Richards' cousin had also heard the two loud bangs, followed by arguing. R167:139-40, 150. Frightened, the cousin hid in a large closet with the children until Ms. Richards' six-year-old

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[2]Ms. Richards had four children, ranging in ages four to nine. R167:95, 136-37. The cousin had her three young daughters with her, ranging in ages three to seven. R167:136-37.

[3]The jury acquitted Defendant of a lewdness charge that was based on the victim's testimony that she could see Defendant's genitals while he was urinating. R167:99; R168:61-63; R168:83.

daughter came down to say that it was just Defendant and everything was "okay." R167:140, 150.

Two broken doors

Carrying her two-year-old, the cousin went upstairs and found Defendant and Ms. Richards arguing. R167:100-01, 140-41. Defendant's demeanor changed when he saw the cousin; he wasn't yelling in quite the same way. R167:143-44. While Defendant talked to the cousin in the hallway, Ms. Richards slipped into her bedroom to call 911. R167:101. She set the phone down and then hung up because she was afraid Defendant would notice and get angry. *Id.* The police kept calling back and Ms. Richards kept hanging up, hoping that this would make them come. R167:102.

Ms. Richards convinced Defendant to go outside with her so as not to "do this in front of the kids." *Id.* Once outside, Defendant said "he was going to take" Ms. Richards "somewhere and beat [her] up and leave [her] for dead where nobody could find" her. *Id.*

The cousin called a friend to pick her and her children up because she "didn't want to have [her] kids see this." R167:103-04; 140. When the cousin started bringing her bags outside, Defendant began talking to her.

R167:104, 141-43. Ms. Richards took the opportunity to answer a call from police and ask them to come. R167:104, 103-04.

Defendant and the victim's cousin were still talking outside when the police arrived. R167:142. Defendant asked the cousin for a cigarette before saying, "I think I'm going to jail." *Id.* Defendant then walked toward Ms. Richards, who by now was in the garage, and asked her "to stand up for him." R167:104.

Police found an upset Defendant and a scared-looking Ms. Richards in the garage. R167:163; R168:14. They discovered Ms. Richards' missing car and house keys in Defendant's pocket. R167:105, 163-64; R168:19-20.

The police also found that both the backdoor and the bathroom door had been broken. R167:105-120; State's Exhibits (SE) 2-18.[4] The backdoor looked like it had been "kicked in." R168:15. The deadbolt on the backdoor was "completely broken." R167:109; SE 4-6. A long crack ran through the door frame from about where the deadbolt was to below where the doorknob lock was. R167:109; SE 4, 46, 48. The door jamb on the inside was pulled away from the wall. R168:15-16; SE 4,5. The molding was destroyed. R168:15; SE 4,5. The outer backdoor also had what looked like pry marks, one across from the deadbolt and one across from the doorknob. R167:191-

[4]Photos of the two broken doors are in Addendum B.

95. Officers could not tell whether the pry marks were recent. R167:195. No one found an implement on Defendant that could have made the pry marks. R167:191-92.

The bathroom door also looked like it had been forced open. R168:15. The door jamb was broken, the latch plate was off, and the molding was pulled away from the wall. R168:15; SE 13-17.

The victim and her cousin testified that neither door had been damaged before Defendant arrived that night. R167:105-06, 141, 145.

One set of footprints

Police also found a single set of fresh footprints in the snow, leading from the front of the garage to the back of the house and up the steps to the backdoor. R167:166-67; RSE19-23. They found what looked like a partial shoe print on the backdoor. R167:180; SE 43-45.

The tread on Defendant's shoes looked like the partial shoe print on the backdoor and like the shoe impressions in the snowy footprints leading to the backdoor. R167:174-83; R167:207-10; SE 25, 35, 45.[5]

B. Summary of proceedings.

Defendant was charged with one count of burglary of a dwelling, a second degree felony; one count of lewdness, a class B misdemeanor; one

[5]Photos of the marks on the backdoor and of some of the shoe impressions in the snow are in Addendum C.

count of threat of violence, a class B misdemeanor; and one count of criminal mischief, a class B misdemeanor. R1-3.

The victim, her cousin, responding police officers, and a forensic technician testified at Defendant's two-day jury trial. R167:90-216; R168:11-27. The State introduced several exhibits, including Defendant's shoes and photographs of the damaged doors, the victim's key found in Defendant's pocket, and the shoe impressions found in the snow and on the backdoor. R167:106-20, 169, 199.

Defendant did not testify and called no witnesses. R168:27. His defense in closing was that the victim had a motive to fabricate the allegations because of "a bad breakup" and a desire to get Defendant "in trouble" because she wanted her keys back. R168:73. In support, Defendant argued that the victim couldn't be believed because she was dishonest—as shown by her using "someone else's ID. R168:69-70. Defendant also argued that the victim couldn't be believed because of perceived discrepancies in her story and because no physical evidence supported her testimony that he urinated all over the bathroom. R168:69-73.

The jury convicted Defendant of burglary, threat of violence, and criminal mischief, but acquitted him on the lewdness charge. R101; R168:82-83.

The trial court sentenced Defendant to 1-to-15 years in prison on the burglary conviction, and to two consecutive jail terms of six months each on the two misdemeanor convictions. R45-46. The court gave Defendant one year credit for time served on the jail sentences. R45-46.

Defendant timely appealed. R145; R153.

SUMMARY OF ARGUMENT

Point I. Defendant argues that the trial court abused its discretion under rules 608(b) and 403 when it allowed him to cross-examine the victim about using a false name to visit him, but barred him from cross-examining her about a dismissed plea in abeyance to theft by deception and a recent arrest for theft by deception and giving a false name to police.

This Court may easily dispose of this claim on harmlessness grounds. Contrary to Defendant's claim, this case did not turn on the victim's credibility. The cousin's testimony and the unrefuted physical evidence fully corroborated the victim's testimony concerning each of the crimes Defendant was convicted of. And Defendant was allowed to challenge the victim's credibility by cross-examining her on inconsistencies in her story and on her using a false identification to visit Defendant. Under these circumstances, hearing that Defendant had a prior dismissed plea in abeyance and an arrest that never led to charges would not have convinced

the jury that he had not kicked in and damaged two doors and threatened the victim.

The trial court's 608(b) and rule 403 ruling were not an abuse of discretion in any event. While relevant to the victim's general character for truthfulness, the plea in abeyance and arrest were—at most—only marginally probative of whether the victim was telling the truth here. As stated, the victim's credibility was not a crucial issue because all her testimony relating to Defendant's convictions was corroborated by her cousin and the unrefuted physical evidence. The trial court was therefore within its discretion to decide that any probative value was substantially outweighed by the potential for unfair prejudice and for confusing the issues.

This Court should not reach Defendant's unpreserved rule 608(c) claim because he only nominally argues plain error. But he hasn't shown plain error, in any event, where the plea in abeyance and arrest were irrelevant to showing the victim's bias, prejudice, or motive to misrepresent.

Point II. Defendant argues that the trial court improperly allowed the forensic technician to give lay opinion under rule 701 that the tread patterns in the shoe impressions in the snow and on the backdoor were similar to the tread patterns on Defendant's shoes. Defendant can show no

harm, however, because a responding officer gave materially similar testimony that Defendant did not object to and does not challenge on appeal.

Defendant also can show no abuse of discretion where, in *State v. Ellis*, the Utah Supreme Court approved nearly identical lay opinion comparing muddy footprints. Like the testimony in *Ellis*, the testimony required no specialized knowledge, but merely pointed out similarities between the footprints and Defendant's shoes. This testimony was proper because it merely drew an inference that would be readily drawn by anyone who saw the shoes and the shoe impressions.

And the jury had both the shoes and the impressions to compare for themselves. Because the technician did not purport to base his comparison on any scientific methodology, the jury was unlikely to give his comparison greater weight than its own.

Point III. Defendant argues that the trial court should have granted a mistrial after the victim volunteered that she broke up with Defendant because he "was constantly accusing me of things I wasn't doing and just constantly fighting with me. Getting violent." Defendant argues that this violated the parties' pre-trial stipulation to exclude evidence of Defendant's prior acts of abuse against the victim.

The trial court was well within its discretion to deny a mistrial based on the brief, unsolicited, and vague comment about violence. The prosecutor tried to talk over the comment and then immediately tried to change the subject. In the two-day trial spanning nearly 300 pages, no one ever mentioned the comment or tried to use it. Given that and the overwhelming physical evidence supporting Defendant's guilt, it is unlikely that the two words had any effect on the jury's verdict.

Point IV. Defendant cannot show cumulative error where he has not shown that any error occurred.

ARGUMENT

I.

THE TRIAL COURT WAS WELL WITHIN ITS BROAD DISCRETION UNDER RULE 608(B) TO ALLOW DEFENDANT TO CROSS-EXAMINE THE VICTIM ON SOME, BUT NOT ALL, OF THE ALLEGED SPECIFIC INSTANCES OF DISHONEST CONDUCT

Defendant argues that the trial court abused its discretion under rules 608(b) and rule 403 when it allowed him to cross-examine the victim about using a false name to visit him, but barred him from cross-examining her about a prior plea in abeyance to theft by deception and a recent arrest for theft by deception and giving a false name to police. Br. Aplt. 10-12. For the first time on appeal, Defendant adds that the trial court also should have allowed the cross-examination under rule 608(c), which allows examination

on bias, prejudice, or any motive to misrepresent. Defendant asserts that limiting his cross-examination of the victim "implicates" his constitutional right to confrontation and thus requires the State to show harmlessness beyond a reasonable doubt. Br. Aplt. 10-11, 21-27.

Whether or not the trial court should have allowed the additional cross-examination under rules 608(b), 608(c), or 403, this Court should affirm because on this record any error was easily harmless—even beyond a reasonable doubt. And even if it were not, Defendant has not shown that the trial court's slight limitation on the victim's cross-examination was an abuse of the court's broad discretion under rules 608(b) or 403. The same is true for Defendant's unpreserved rule 608(c) argument, which this Court should not reach because Defendant has not properly argued a preservation exception.

A. Proceedings below.

This issue arose when the State filed a pretrial motion to exclude evidence and questions about the victim's criminal history. R60-66. The State sought to exclude misdemeanor convictions for retail theft and drug possession under rule 609 (impeachment by evidence of a criminal conviction), rule 402 (relevance), and rule 403 (excluding relevant evidence for unfair prejudice). R62-64.

On the morning of trial, the defense countered with a request to cross-examine the victim on "three specific instances of prior dishonesty" under rule 608: (1) using a false name to enter the jail to visit Defendant; (2) a dismissed plea in abeyance to theft by deception; and (3) a 2014 arrest for theft by deception and giving a false name to a police officer. R167:10. In a clear reference to rule 403, the defense explained that the trial court would also "have to decide the probative value of the proper testimony, the danger of unfair prejudice, and then the traditional balancing test." R167:10-11. The defense then argued that the specific instances were not "unfairly prejudicial" because "two out of three of these are fairly recent. They involve lying to the jail, they involve lying to the police, they involve acts of deception with the intent to gain something." R167:11. The defense acknowledged that it would be "stuck" if the victim denied the specific instances. R167:11.

The defense proffered no details about either the plea in abeyance or the 2014 arrest. On the plea in abeyance, the defense proffered only that it had been dismissed. R167:11. The defense proffered no date on the plea, although it was apparently not as recent as the two other instances. *See* R167:11 (counsel referring to other two instances as "fairly recent"). On the arrest, the defense proffered only that it happened after the charged

offenses—in June 2014—and that they had not yet "had a chance to get any police reports or anything else" on it, although they did have a probable cause statement from when the victim was booked into jail. R167:15. The defense did not proffer what was in that statement. R167:15.

The prosecutor expressed concern that the victim's continuing contact with Defendant after the offenses was irrelevant and that examining the victim about her visit to Defendant would improperly inform the jury that Defendant was in jail. R167:11-12. The prosecutor also noted that although the arrest had occurred in June 2014 (six months earlier), no charges had ever been filed. R167:11. The prosecutor objected to examination on the plea in abeyance and 2014 arrest essentially because neither rose to the level of a conviction, let alone a felony. R167:10-11.

The defense countered that was why it was invoking rule 608 instead of rule 609. Unlike rule 609, which applies only to convictions, rule 608 "allows examples of conduct probative of truthfulness or untruthfulness which included the use of a false identity, attempting to corrupt or cheat others, attempting to deceive or defraud others." R167:10.

The defense assured the trial court that the purpose of asking the victim about using a false identity to visit Defendant was "just to show her

act of deception." R167:14. The defense did not plan to mention that the visit was at the jail. R167:14.

The trial court granted the defense motion "as far as asking the complaining witness about a visit using false identification." R167:15. But it denied "the request to bring up the plea in abeyance or the charge that hasn't yet been filed." R167:15.

Defendant cross-examined the victim about inconsistencies between her trial and preliminary hearing testimony, *e.g.*, R167:124; about details included in her trial testimony, but not her preliminary hearing testimony, *e.g.*, R167:122, 125; and about gaps in her memory, *see, e.g.*, R167:126-27, 128.

Defendant's last question to the victim was whether there was "a point where you had contact with [Defendant] after these charges were filed where you . . . used someone else's information or pretended to be someone else in order to have that contact?" The victim answered, "Yes. I used my sister's ID." R167:131.

In closing, the defense argued that the victim's testimony could not be believed as a matter of "common sense." R168:68-69. In support, the defense pointed to the victim's wearing a shirt while taking a bath, no one seeing or smelling urine in the bathroom, and to the pry marks on the backdoor, which, according to Defendant, belied the victim's testimony that

the backdoor had no prior damage. R168:69-73. The defense also argued that the victim couldn't be believed because using "someone else's ID" to communicate with Defendant showed that the victim was dishonest. R168:69-70. Finally, the defense argued that the "bad breakup" gave the victim a "motive to fabricate this, to get someone in trouble when you are angry at them, when you want your keys back." R168:72-73.

B. A rule 608 ruling is reversed only when the trial court so abused its discretion that an injustice likely resulted.

Rule 608(b), Utah Rules of Evidence, excludes "extrinsic evidence" to prove "specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." But it allows specific instances of conduct to be inquired into on cross-examination if they are probative of a witness' character for truthfulness:

> **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.

Utah R. Evid. 608(b) (emphasis added).

Under this rule, "no party is *entitled* to inquire of a witness's prior bad acts." *State v. Valdez*, 2006 UT App 290, ¶9, 141 P.3d 614. Rather, the trial court is "afforded broad discretion to allow or disallow inquiry concerning the witness's prior bad acts, *even if* probative of the witness's truthfulness or untruthfulness." *Id.* (Emphasis added). *See also State v. Gomez*, 2002 UT 120, ¶12, 63 P.3d 72 (trial court "has broad discretion in restricting the scope of cross-examination"). Thus, it is not enough to show that the evidence was probative of a witness's truthfulness or untruthfulness and that a trial court would be *within its discretion to allow* cross-examination. A defendant must show that it was *outside the court's discretion to deny* the cross-examination. This Court has held that a trial court's discretion under rule 608(b), "[s]pecifically," includes the "discretion . . . to exclude evidence of previously dismissed criminal charges against the witness." *Valdez*, 2006 UT 290, ¶12 (citation and internal quotation marks omitted).

And even if specific instances might technically be admissible under rule 608(b), cross-examination of a witness's character for truthfulness or untruthfulness "may still be limited or prohibited by the trial court in its sound discretion under rule 403." *Gomez*, 2002 UT 120, ¶33.

A trial court's ruling under rules 608(b) and 403 is not reversed "unless it is manifest that the trial court so abused its discretion that there is

a likelihood that injustice resulted." *Gomez*, 2002 UT 120, ¶12 (citation and internal quotation marks omitted). In other words, Defendant must also show that prohibiting him from asking the victim about the dismissed plea in abeyance and an arrest that never resulted in charges prejudiced him. *See id.*; *State v. Aleh*, 2015 UT App 195, ¶¶19, 28 , 357 P.3d 12 (affirming trial court's rule 608(b) ruling because Aleh had not shown prejudice). To prove that, Defendant must show a reasonable probability of a different outcome if he had been allowed to ask about the plea in abeyance and arrest. *Aleh*, 2015 UT App 195, ¶¶19.

Defendant argues that because the trial court's rule 608(b) ruling "implicates" his "constitutional rights to confrontation and cross-examination," this Court must reverse unless it finds the error harmless beyond a reasonable doubt. Br. Aplt. 21-22. Defendant's argument mistakenly assumes that "a violation of an evidentiary rule equals a constitutional violation." *State v. Hackford*, 737 P.2d 200, 205 (Utah 1987). But the Utah Supreme Court has held—in the rule 608(b) context—that it does not: "the evidentiary standards and the constitutional guarantee are not and ought not to be entirely coextensive." *Id. Cf. Aleh*, 2015 UT App 195, ¶¶19-28 (assuming "evidentiary error" in rule 608(b) ruling and applying ordinary prejudice standard). Defendant has not shown that the

modest limits placed on his cross-examination of the victim amounted to a denial of his constitutional right to confrontation, as opposed to a run-of-the-mill evidentiary error. But even if he had, those limits were harmless beyond a reasonable doubt.

C. Any error in the trial court's rule 608(b) ruling was harmless beyond a reasonable doubt.

This Court may easily dispose of this claim on harmlessness grounds. *See Aleh*, 2015 UT App 195, ¶19 (affirming 608(b) ruling limiting cross-examination on lack of prejudice alone).

At bottom, Defendant's prejudice argument rests on the premise that the State's case turned on the victim's credibility. Br. Aplt. 22-27. According to Defendant, "little" corroborated the victim's testimony, "and the State's case was not otherwise strong." Br. Aplt. 23. Defendant acknowledges that he was allowed to cross-examine the victim about using a false name to visit him, but argues this was not enough to "expose" the victim's "motive to lie and [to] reveal her incapacity for truthfulness." Br. Aplt. 25.

In fact, the State's case neither rose nor fell on the victim's credibility. The unrefuted physical evidence and other witnesses fully corroborated the victim's testimony concerning each of the crimes Defendant was convicted of—burglary, threat of violence, and criminal mischief. Both the victim and the cousin heard two loud bangs just before Defendant appeared in the

house. R167:97, 122, 139-40. Both testified that upon entering the home, Defendant yelled at the victim upstairs. R167:97-98, 101, 124, 139-40, 150. The cousin was frightened enough by the loud bangs and Defendant's yelling that she hid in a closet with the children. R167:140, 150. And the victim was frightened enough to call 911. R167:101-04.

Photos of the extensive damage to the backdoor and bathroom door corroborated the victim's and cousin's testimony of the two loud bangs. *See* Addendum B. Both the victim and her cousin testified that the damage had not been there before Defendant appeared that night. R167:105-06, 141, 145. Fresh shoe impressions in the snow and marks on the backdoor looked like the tread on Defendant's shoes. R167:166-67, 174-83, 207-10. And police arrived to find Defendant still there, the victim looking frightened, and the missing house and car keys in Defendant's pocket. R167:105, 163-64; R168:14, 19-20.

The loud bangs, the newly broken doors, Defendant's yelling and threatening behavior, and Defendant's shoe impressions all corroborated the victim's testimony that Defendant had entered her home without her permission (burglary), that he threatened her (threat of violence), and that he broke her two doors (criminal mischief).

In light of this unrefuted corroborating evidence, asking the victim about a dismissed plea in abeyance and about an arrest for theft by deception that never resulted in charges would not have convinced the jury that she was lying about whether Defendant had her permission to be in her home or whether he had threatened her. The jury's acquittal on lewdness—the one count supported solely by the victim's uncorroborated testimony—supports this conclusion.

Moreover, this is not a case where Defendant was denied any opportunity to challenge the victim's credibility. While Defendant could not ask about the plea in abeyance or the uncharged arrest, he was allowed to ask about using a false name to contact Defendant. And he argued that this incident made the victim unworthy of belief. R168:169-70. He also cross-examined the victim about apparent discrepancies in her story and inconsistencies with her prior testimony.

While the Defendant may have wanted more, he was not entitled to unlimited cross-examination. *See State v. Calliham*, 2002 UT 87, ¶31, 57 P.3d 220 (right to cross-examine not unlimited). Certainly, he has not shown on this record that allowing him incremental cross-examination about a dismissed plea in abeyance and an uncharged arrest would have made the

jury disregard the unrefuted evidence corroborating her story. This Court should affirm the trial court for this reason alone.

D. The trial court properly exercised its discretion to preclude cross-examination on a dismissed plea in abeyance and an uncharged arrest.

The trial court's 608 ruling was well within its discretion in any event. On appeal, Defendant challenges the trial court's ruling under rules 608(b), 608(c), and 403. Br. Aplt. 12-20. Defendant has not shown that the trial court stepped outside its discretion under rules 608(b) and 403. This Court should not reach Defendant's rule 608(c) argument because it is unpreserved and he only nominally argues plain error. But even if this Court reaches the issue, Defendant has shown no abuse of discretion under that rule either.

1. The trial court was well within its discretion under rules 608(b) and 403.

As stated, a trial court has broad discretion "to allow or disallow inquiry" into a witness's prior bad acts under rule 608(b), even when probative of the witness's truthfulness or untruthfulness. *Valdez*, 2006 UT App 290, ¶9. *See also Gomez*, 2002 UT 120, ¶12. This is because evidence admissible under rule 608(b) "may still be limited or prohibited by the trial court in its sound discretion under rule 403." *Gomez*, 2002 UT 120, ¶33.

The "'court's job,'" in "the interplay of rules 608(b) and 403," is "'to balance the probative value of specific-instances evidence against the potential dangers and costs of that evidence.'" *Id.* at ¶34 (quoting 28 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure: Evidence* § 6118, at 94 (1993)). The court does this by evaluating "the extent to which the proposed testimony is probative of truthfulness or untruthfulness" and "the degree to which the proffered testimony may tend to inflame or prejudice the jury," and then balancing those concerns to decide "whether the danger of unfair prejudice substantially outweighs the testimony's probative value." *Id.* at ¶33.

Assessing the "degree of probative value" is "a function of several factors," such as, "the relative importance of the [witness's] credibility"; "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 witness's 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.

The trial court here did not expressly do a rule 403 balancing on the record, although Defendant's 403 argument shows that the court considered

it. R167:10-11 (defense arguing that trial court would need to balance probative value against danger of unfair prejudice). But even without a rule 403 balancing on the record, this Court may "still affirm if [it] can find some basis in the record for concluding that the trial court's action falls within the limits of permissible discretion under Rule 403." *State v. Hackford*, 737 P.2d 200, 204 (Utah 1987). Such a basis is in this record.

First, the dismissed plea in abeyance and uncharged arrest had minimal probative value to whether the victim was telling the truth here. As explained, the victim's credibility was not a crucial issue where her testimony on the convicted counts was fully corroborated by unrefuted physical evidence and her cousin's testimony. Thus, while a theft by deception and giving a false name for a police officer might be relevant to the victim's general character for truthfulness or untruthfulness, it was only marginally relevant to whether she was telling the truth here. Also, the defense proffer about the plea in abeyance and the arrest was too vague to say whether they involved specific instances of conduct similar to the

circumstances here.[6] And while the arrest was six months before trial, Defendant never proffered when the dismissed plea in abeyance was. Finally, given that the arrest never resulted in charges, the trial court could have reasonably viewed it as a mere allegation of misconduct. *See Valdez*, 2006 UT App 290, ¶16 ("the probative value of the circumstances surrounding [the victim's] dismissed charge is negligible in light of other similar impeachment evidence and because a dismissed charge is merely an allegation of misconduct"); *see also Gomez*, 2002 UT 120, ¶35 (likelihood that alleged specific instance of conduct in fact occurred relevant to degree of probative value).

Second, the evidence's minimal probative value was substantially outweighed by the danger of unfair prejudice and confusing the issues. *See* Utah R. Evid. 403. Given the strong corroborating evidence, it was unlikely to have any effect other than to embarrass the victim and to distract the jury from the real issue: whether Defendant broke into her home and threatened her.

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[6]Defendant bore the burden below to proffer sufficient information for the trial court to assess the probative value of the evidence. *Aleh*, 2015 UT App 195, ¶24 (under rules of evidence, "a party may claim error in a ruling excluding evidence only if, among other things, that 'party informs the court of its substance by an offer of proof, unless the substance was apparent from the context'") (quoting Utah R. Evid. 103(a)). His failure to do so counts against him, not the trial court. *Id.*

This case is much like *State v. Gomez*, 2002 UT 120, where the Utah Supreme Court held that the trial court was well within its discretion to preclude questioning into a rape victim's alleged use of a false identification card to engage in underage drinking. *Gomez*, 2002 UT 120, ¶¶7, 33-36. The supreme court agreed with the trial court that any probative value was "fairly low" and that it was outweighed by "the potential of the testimony to inflame the jury and distract them from the real issue in the case," which was the rape charge against Gomez and the victim's credibility. *Id.* at ¶36.

This case is an even easier call than *Gomez* was. Unlike here, Gomez's guilt turned on whether the jury believed the victim when she said she did not consent. *Id.* at ¶¶1-5, 7. If it was not an abuse of discretion to limit cross-examination on the use of a false identification when the victim's credibility is the sole issue, it cannot be an abuse of discretion to limit cross-examination on a dismissed plea in abeyance and an uncharged arrest for theft by deception when the victim's credibility is not the sole issue.

This case is also like *State v. Valdez*, 2006 UT 290. The trial court there would not allow Valdez to question the rape victim about a dismissed charge of false information. *Id.* at ¶¶8-17. Like in *Gomez*, and unlike here, Valdez's case turned largely on the victim's credibility. *Id.* at ¶10. This Court nevertheless held that the trial court was well within its discretion to

exclude the dismissed charge, partly because Valdez was allowed to impeach the victim with a prior forgery conviction, but also because the probative value of a "dismissed charge is negligible," where it is "merely an allegation of misconduct." *Id.* at ¶16. Again, if a trial court is within its discretion to limit cross-examination on a dismissed charge of false information when the victim's credibility is the crucial issue, it must also be within its discretion to limit cross-examination on a dismissed plea in abeyance and an arrest for theft by deception when the victim's credibility is not the crucial issue. This is particularly true where, like Valdez, Defendant was allowed to inquire into another specific instance of conduct—using a false identification.

2. This Court should not reach Defendant's unpreserved rule 608(c) argument where he only nominally asserts plain error.

As stated, Defendant also argues that the victim's plea in abeyance and arrest were admissible under rule 608(c). Br. Aplt. 17-18. That rule states that "[b]ias, 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(c). Defendant argues that the victim's dismissed plea in abeyance and uncharged arrest were "highly probative of her motive to testify falsely." Br. Aplt. 17.

Defendant did not preserve his rule 608(c) claim below. While Defendant cited generally to rule 608, he confined his argument to the language of rule 608(b). R167:10-11. He spoke only in terms of "specific instances" of prior dishonesty and "examples of conduct probative of truthfulness or untruthfulness." R167:10-11. He never uttered the words in rule 608(c): "bias," "prejudice," or "motive to misrepresent." And he expressly invoked *State v. Gomez*, which addressed only rule 608(b). R167:10-11.

To obtain review of an unpreserved claim, a defendant must show plain error. *See State v. Rhinehart*, 2007 UT 61, ¶21, 167 P.3d 1046. Here, Defendant only nominally argues that the trial court plainly erred under rule 608. Br. Aplt. 27-28. His two-paragraph plain error argument does no more than set out the plain error standard and then assert that the alleged 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.'" Br. Aplt. 28 (quoting *State v.* Leonard, 707 P.2d 650, 656 (Utah 1985)). His argument, however, ignores the case law stating that the right to cross-examine is not unlimited and that a trial court has broad discretion to impose reasonable limitations on it. *See, e.g., State v. Calliham*, 2002 UT 87, ¶31; *State v. Hackford*, 737 P.2d 200, 203 (Utah 1987).

Defendant also does not even bother to separate his rule 608(b) and 608(c) arguments in this section, even though the requirements are very different. This is reason alone to disregard Defendant's rule 608(c) argument. *See Rhinehart*, 2007 UT 61, ¶21 (unpreserved argument must be briefed through lens of exception to preservation rule).

Defendant cannot show plain error anyway because, as explained, he hasn't shown prejudice. *See State v. Dean*, 2004 UT 63, ¶15, 95 P.3d 263 (plain error requires appellant to show obvious, prejudicial error). He also cannot show obvious error because nothing in the previously dismissed plea in abeyance or the uncharged arrest showed any bias against Defendant or a motive to fabricate the charges against him. Nothing in Defendant's proffer on either specific instance suggests any connection between Defendant and the victim's accusations in this case.

Defendant asserts that the victim's "acts of misconduct reveal her willingness to lie to the police and others by falsely incriminating [Defendant] based on her own ill-feelings and self-interests." Br. Aplt. 17. But while theft by deception and giving a false name to police might show a willingness to lie for personal gain or to escape punishment, they say nothing about a willingness "to falsely accuse" Defendant "based on ill-feelings." *Id.*

Defendant suggests that the 2014 arrest in particular gave the victim "a motive for favoring the prosecution in her testimony." Br. Aplt. 18. Defendant speculates that because the arrest happened after his offenses and "relatively close" to trial, the victim "could have believed that testifying favorably for the prosecution would minimize the threat of being charged with the misconduct for which she was arrested." *Id.* Defendant forgets that a month before the arrest, the victim had already testified favorably for the prosecution at preliminary hearing. *See* R20. The subsequent arrest, therefore, was not an incentive for her to testify favorably for the prosecution or to fabricate the charges against Defendant in the first instance.

In sum, it is plain from this record that the modest limits on Defendant's cross-examination did not prejudice Defendant's trial. Defendant also has not shown that the trial court abused its discretion in limiting his cross-examination under rules 608 and 403.

II.

IT WAS WELL WITHIN THE TRIAL COURT'S DISCRETION UNDER RULE 701 TO ALLOW A FORENSIC TECHNICIAN TO GIVE LAY OPINION THAT SHOE IMPRESSIONS IN THE SNOW AND ON THE VICTIM'S BROKEN BACKDOOR LOOKED LIKE THE TREAD PATTERNS ON DEFENDANT'S SHOES

Defendant argues that the forensic technician's testimony comparing the shoe impressions in the snow and on the backdoor to the tread on

Defendant's shoes was improper lay opinion under rule 701, Utah Rules of Evidence. Br. Aplt. 29-31. Rule 701 limits lay opinion testimony to an opinion 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." Defendant argues that the technician's testimony was unhelpful and required "specialized knowledge." Br. Aplt. 30-36.

As a threshold matter, Defendant cannot show he was harmed by the technician's testimony because he has not challenged the admission of substantially the same testimony from one of the responding police officers. Further, the jury had both the shoes and the impressions to compare for themselves. Because the technician did not purport to base his comparison on any scientifically methodology, the jury was unlikely to give his comparison greater weight than its own. And the trial court was well within its discretion to allow the forensic technician to testify that the shoe impressions looked like Defendant's shoe tread; in fact that testimony fell squarely within the evidence rule 701 permits.

A. Proceedings below.

Before jury selection, the defense objected to anticipated "testimony from one of the police officers that shoe prints match [Defendant's] footwear." R167:9. The defense objected "because we believe that's appropriate for an expert under 702 and [not] a lay witness." *Id.* The judge said that he would wait to rule until he heard what the witness said, but initially thought "that a layperson could say something to the effect that 'That footprint looks a lot like his shoe.'" R167:9-10. The court did agree with the defense that if the witness was "going to say, 'I've done an expert examination, I've matched tread: and so forth, then he probably couldn't go that far." R167:10.

Officer Fausett's testimony. Officer Fausett testified to discovering the fresh set of footprints leading around the house to the backdoor. R167:166-67. He had forensic technician Alan Kalinowski take photos of the footprints and the backdoor. R167:166-67, 178, 182. The photos of the shoe impressions were all received into evidence without objection during Officer Fausett's testimony. R167:169; SE 19-50.

Officer Fausett then walked the jury through the photos of the footprints. R167:169-83. He showed the jury how some of the close-ups of the footprints—particularly State's Exhibits 25 and 35—showed tread

patterns. R167:173-75. Officer Fausett pointed out some distinctive features in the tread patterns shown in the photos and on Defendant's shoes: "So right here there's flat, round, circular. And then around it several small circle lines. Right here is a void in the shoe, so an indent. On the top of it closest to the toes is somewhat curved." R167:174. Officer Fausett pointed out "additional detail on the shoe print" that could be seen on State's Exhibit 35: "It's little side lines that are going to be on the side of the shoe right in here. . . . Small lines that are next to a little void in the middle," that "look[ed] like" they "would be on the inside edge of the shoe." R167:178.

Officer Fausett testified that these additional markings were "significant" because "they're going to match a mark that we can see on the door as well as match—." R167:178-79. The defense immediately objected to "the terminology of 'matching.'" R167:179. The trial court sustained the objection and struck that testimony. *Id.*

Officer Fausett then testified without objection that the shoe impressions and shoe tread were "similar": "Similar to marks that we can see on the photograph, on the door, as well as on the shoes" that Defendant was wearing. R167:179. Officer Fausett also testified that the "white marks" on the backdoor were "similar to the ones in size and shape" as the shoe impressions in the snow. R167:180-82. Officer Fausett testified that he

had Defendant show him the bottom of his shoes the night he was arrested. R167:183. Defendant's shoes were taken from him at jail and booked into evidence. R167:197-99.

Other than Officer Fausett's saying "match" in a single sentence, Defendant did not object to anything in Officer Fausett's testimony.

Forensic technician Kalinowski's testimony. After Officer Fausett testified, the court asked the prosecution in a sidebar conference what the technician would offer "that we haven't already heard." R167:196. "You do what you want," the court said, "but does he have something significant?" *Id.* The prosecution said he did, but promised he would be "quick." *Id.*

Forensic technician Kalinowski testified that he took all the police photos at the scene, including those of the shoe prints in the snow and on the backdoor. R167:202-10. The technician compared the tread pattern in the photos to Defendant's shoes: "On the tread pattern, this similar pattern, similar block. Identical." R167:207-08. The technician showed how a similar block or "cutup" of the shoes was "consistent with the same cutup" in the shoe impression. R167:208-09. The technician also pointed out details found in both the shoes and the shoe impressions: "On this pattern it came out with this small spot right here . . . . Small indent in the heel of the shoe similar to the indent of the shoe impression in the snow." R167:209.

The technician also compared the shoe's tread patterns to the partial shoe impression on the backdoor: "This picture here struck me very odd to see because there's not much of a shoe impression on the top, however, you can see down—down the side here you have the 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." R167:209-10.

The technician did not measure the patterns or testify that they "matched." R167:216. On cross-examination, the technician confirmed that he was not testifying as an expert, but only "as the person who gathered this evidence." R167:212.

B. Defendant's failure to challenge the admission of similar lay opinion by another witness is fatal to his claim.

On appeal, Defendant challenges only the admission of the technician's shoe impression testimony, but not Officer Fausett's substantially similar testimony. Br. Aplt. 29-36. Because Defendant does not challenge the admission of essentially the same testimony through another witness, he cannot show that he was prejudiced by the technician's testimony. *See State v. Verde*, 770 P.2d 116, 119 (Utah 1989) (no prejudice where challenged testimony was "merely cumulative" of unchallenged evidence); *State v. High*, 2012 UT App 180, ¶51, 282 P.3d 1046 (admission of

challenged gang evidence harmless where jury "would still have heard unchallenged and properly admitted gang evidence); *State v. Lyman*, 2001 UT App 67U, *1 (no prejudice "where jury heard evidence from Defendant's father concerning this exact issue and further evidence would have been cumulative").

While the technician's shoe impression testimony was longer than Officer Fausett's, the substance and import of the two testimonies were the same. Both described distinctive patterns in the shoe impressions in the snow and on the door. R167:174-83, 207-10. Both compared the shoe impressions in the snow and on the door to the tread patterns on Defendant's shoes. *Id.* Both opined that the tread patterns in the snow and on the door looked "similar" to and "consistent" with Defendant's shoes.[7] *Id.* Indeed, Officer Fausett's shoe impression testimony prompted the trial court to question whether the prosecution even needed to call the forensic technician. *See* R167:196 (asking whether technician would offer anything significant that they hadn't already heard).

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[7]As explained below, while the technician once used the word "identical," his overall testimony makes clear that he was not purporting to "match" the tread patterns; rather, he repeatedly used the words "similar" and "consistent." R167:208-10.

Thus, even if the technician's shoe impression testimony were improper, Defendant cannot show that he was harmed by its admission because it was merely cumulative of the officer's similar unchallenged testimony.

C. Testimony pointing out visual similarities between the shoe impressions and Defendant's shoes without purporting to rely on scientific method falls squarely within the lay opinion testimony that rule 701 permits

Rule 701 limits lay opinion testimony to that which 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.

Defendant does not dispute that the technician's testimony was based on his perception. Br. Aplt. 29-31. He argues instead that the comparison testimony was unhelpful because it "told the jury what result to reach and [it] rested on unfounded assumptions." Br. Aplt. 31-32. He alternatively argues that it was inadmissible because it was based on specialized knowledge that only an expert could testify to. Br. Aplt. 34-36.

1. *State v. Ellis* approved nearly identical lay opinion testimony comparing muddy footprints.

The Utah Supreme Court decided both Defendant's arguments against him in *State v. Ellis*, 748 P.2d 188 (Utah 1987). There, a security

guard "compared" two sets of muddy footprints outside a broken window to one set of muddy footprints in the house. *Id.* at 190. He opined that a photograph of a footprint "with the distinctive heel marking appeared to be the one on the inside of the carpet." *Id.*

The *Ellis* court held that the footprint comparison was "helpful lay testimony" under rule 701. *Id.* at 191. And the "security guard [in *Ellis*] did not need specialized knowledge to testify that the footprints looked similar because that inference would be readily drawn by any person who observed both sets of footprints." *State v. Rothlisberger*, 2006 UT 49, ¶35 (explaining *Ellis*, 748 P.2d at 190-91). The *Ellis* court further reasoned that "just because the similarity of footprints could have been scientifically determined and

confirmed in testimony by an expert," that did "not mean that an expert is the only witness capable of providing such testimony."[8] *Id.*

2. The technician's shoe print comparison was the same as that given in *Ellis*.

The technician's shoe impression comparison testimony was no different from the muddy footprint comparison in *Ellis*. Both pointed to distinctive markings in the prints and then opined that they looked similar. *Compare Ellis*, 748 P.2d at 190 (stating that photograph of outside footprint with "distinctive heel marking appeared to be the one on the inside of the carpet"), *with* R167:209 (pointing out "similar" semi-circular pattern in shoe and photo; noting "[s]mall indent in the heel of the shoe similar to the

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[8]A number of other courts agree with *Ellis* that footprint comparisons are proper lay opinion testimony under rule 701. *See, e.g., United States v. Shields*, 480 Fed. Appx. 381, 387 (6th Cir. 2012) (officer's testimony regarding similarities between defendant's shoe tread and photo of shoe prints at crime scene permissible lay opinion); *State v. Haarala*, 398 So.2d 1093, 1098 (La. 1981) (officer's testimony that shoe prints at crime scene were similar to those made by defendant's shoes was permissible lay opinion); *State v. Walker*, 319 N.W.2d 414, 417-18 (Minn. 1982) (deputy's testimony that defendant's and his brother's boots made footprints at crime scene was permissible lay opinion); *Smith v. State*, 725 So.2d 922, 925-26 (Miss. Ct. App. 1998) (officer's testimony that shoe print on kicked-in backdoor was of "same pattern" as sole of shoes seen at defendant's house was proper lay opinion); *State v. Mewborn*, 507 S.E.2d 906, 909-10 (N.C. Ct. App. 1998) (officer's testimony comparing markings on robber's shoes in videotape to defendant's was permissible lay opinion); *State v. Bouie*, 776 S.E.2d 606, 616-18 (W.V. 2015) (officer's testimony that shoes were similar in color and design to shoes worn by defendant in surveillance videos was permissible lay opinion).

indent of the shoe impression in the snow"). The *Ellis* court called this comparison "helpful lay testimony." *Ellis*, 748 P.2d at 191.

Defendant tries to distinguish *Ellis* by arguing that the technician's testimony here went beyond the security guard's comparison. Br. Aplt. 32. Defendant first argues that the security guard in *Ellis* "merely 'compared the footprints outside the house to those inside,'" as evidenced by his words "appeared to be." *Id.* Defendant argues that the technician here essentially told the jury what "result to reach" when he "characteriz[ed] portions of the tread patterns as 'identical.'" Br. Aplt. 31-32.

It is true that the technician once used the word "identical." R167:208. But while the Defendant had successfully objected to Officer Fausett's use of the word "match," Defendant did not bother to object to the technician's use of "identical." R167:178-79, 208. Defendant therefore cannot now complain that the testimony was improper. *See Rhinehart*, 2007 UT 61, ¶12 (appellant must preserve claim to obtain appellate review). This is particularly true here because the trial court initially ruled that it would not allow lay testimony that the tread "matched" (R167:9-10), and it made good on its word when it later struck Officer Fausett's use of the word on Defendant's objection (R167:178-79). On these facts, the only logical conclusion is that the trial court would have sustained an objection to and struck the

technician's testimony using "identical" if Defendant had seen fit to make that objection. He did not and cannot now complain that the trial court did not correct an error he did not ask it to correct.

But with or without that single use of "identical," the technician's testimony did not tell the jury what result to reach. First, it is not at all clear the technician's isolated "identical" meant "matched." The technician immediately prefaced "identical" with talk about "similar" blocks and patterns: "On the tread pattern, this similar pattern, similar block. Identical." R167:208. Thereafter, his comparisons employed only "similar" and "consistent." *See, e.g.*, R167:208 ("this similar block"; "is consistent with the same cutup"; "same block-type pattern is consistent with"; "that similar pattern"; "this pattern is consistent and similar to the same shoe pattern as this").

In short, the thrust of the technician's testimony was the same as that in *Ellis*—showing how the shoe impressions "appeared to be" like the tread on Defendant's shoes. *See Ellis*, 748 P.2d at 190. Thus, the technician's testimony was helpful lay opinion testimony.

Defendant also asserts that the technician's testimony improperly "told the jury what inference to draw from the evidence of the impression on the back door—that a shoe consistent with [Defendant's] Nikes 'hit' the

door." Br. Aplt. 32 (citing R167:209-10). Defendant argues that this testimony "foreclosed" the jury "from concluding that the incomplete impression came from a different shoe or was caused by something else entirely." *Id.*

But here again the technician's testimony—like the security guard's in *Ellis* and the unobjected-to testimony from Fausett—merely compared the patterns on the partial shoe impression with the patterns on the side of Defendant's shoes to suggest an "angled hit":

> This picture struck me very odd to see because there's not much of a shoe impression on the top, however, you can see down—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.

R167:209-10. Far from telling the jury what to decide, the technician merely showed the jury how "similar" the patterns on the sides of Defendant's shoes were to the markings on the door. The technician's inference that this "indicat[ed]" that the shoe struck the door at an angle was proper under rule 701 because the inference was one that "would be readily drawn by any person who observed both" the shoes and the photos. *Rothlisberger*, 2006 UT 49, ¶35.

Defendant alternatively argues that the comparison testimony was unhelpful because it rested on "unfounded assumptions" and "unsound

methodology" and had the potential to confuse the jury. Br. Aplt. 32-33. But there was no methodology to the technician's testimony. Like the security guard's testimony in *Ellis*, the technician merely pointed to similarities in the impressions and the actual shoe treads. That was merely an inference that any person who saw the impressions and shoes would make. *See Rothlisberger*, 2006 UT 49, ¶35.

And in this case, the jury knew that no one expected them to unquestionably accept the technician's comparisons, no matter how strong his opinions. They knew not only that they would be able to make the comparisons themselves, but that it was expected of them. The prosecutor promised the jury that it would have an opportunity to inspect the shoes and photos itself. R167:208 ("You can just describe what you see and then I'll let the jury look at it later."). During closing, the prosecutor encouraged the jury to look at the photos and shoes: "I'm not going to go through the whole thing now, but you've got footprints. You can look at all the pictures. You can look at his shoes." R168:64. And before deliberations, the trial court told the jury that they would have the photos and the shoes with them in the jury room and that if they wanted "to examine the shoes," the court would provide them "with rubber gloves" to do so. R168:51.

Thus, far from "foreclosing" the jury from deciding for itself, the technician's testimony merely drew an inference that any person seeing the shoes and shoe impressions would readily draw. *See Rothlisberger*, 2006 UT 49, ¶35.

3. The technician's footprint comparison—like that made in *Ellis*—required no specialized knowledge.

Defendant acknowledges that the security guard in *Ellis* did not need specialized knowledge to testify that the muddy footprints there looked alike because that inference "could be 'readily drawn by any person who observed both sets of footprints.'" Br. Aplt. 35 (quoting *Rothlisberger*, 2006 UT 49, ¶35). Defendant tries to distinguish *Ellis* again by arguing that the technician's testimony here was "based on observations that could not be readily drawn by any person who looked at the Nike sneakers and pictures of the shoe impressions." Br. Aplt. 35. According to Defendant, shoe impressions, "[b]y their nature," are "'complex to interpret,'" and that "'[m]ost footwear prints have complex geometric structures.'" *Id.* (citations omitted). Defendant argues that the technician's "conclusion" that "areas of the tread pattern were 'identical' required a degree of technical certainty" that even an expert lacks. Br. Aplt. 35-36. Defendant makes the same argument about the technician's testimony on the partial shoe impression on the backdoor. Br. Aplt. 36.

As explained, there is no real difference between the technician's testimony and that approved in *Ellis*. Like the security guard in *Ellis*, the technician here did nothing more than point out similarities in the tread patterns shown in the photos and Defendant's shoes—something that any person who saw them could see. While he once—without objection—used the word "identical," he thereafter used only "similar" and "consistent with." R167:207-10. He never opined that the shoes and impressions were a certain match. And his testimony about the partial shoe impression on the backdoor did nothing more than compare the pattern on the side of the shoe with the pattern appearing on the door. R167:209-10. He then drew the obvious inference that the mark was left by being hit by the side of the shoe—i.e., at an angle.

None of this testimony required specialized knowledge. He pointed to no complexity in "geometric structures" to support his visual comparison, let alone opine that "complex geometric structures" scientifically linked Defendant's shoes to the prints. Rather, the technician's testimony—like the security guard's in *Ellis*—merely drew an inference that could be "readily drawn by any person who observed both" the shoes and shoe impressions. *Rothlisberger*, 2006 UT 49, ¶35.

D. Defendant cannot show prejudice where the jury had both the shoes and the photos and could judge for itself whether the technician's comparison was accurate.

Finally, Defendant cannot show prejudice for essentially the same reasons. The jury had the photos and shoes and could readily judge for itself whether the technician's testimony was accurate. And because the testimony did not purport to draw a conclusion based on scientific methodology, the jury would not likely feel compelled to give the witnesses' lay comparisons any greater weight than its own lay comparison.

III.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MISTRIAL MOTION BASED ON THE VICTIM'S BRIEF, UNSOLICITED, AND VAGUE TESTIMONY THAT DEFENDANT CONSTANTLY FOUGHT WITH HER—"GETTING VIOLENT"

Defendant argues that the trial court abused its discretion by denying his mistrial motion based on the victim's testimony that she broke up with Defendant because he "was constantly accusing me of things I wasn't doing and just constantly fighting with me. Getting violent." Br. Aplt. 43. Defendant argues that this violated the pre-trial agreement that Defendant's prior acts of violence or abuse would not be admitted. Br. Aplt. 43-44. Defendant argues that he had a reasonable likelihood of a more favorable outcome if the jury had not heard about his "getting violent." Br. Aplt. 44.

Defendant cannot show that the trial court abused its discretion in deciding that this "brief mention," with no "description of any violent events," resulted in any "significant harm." R167:156-57. The brief, vague allusion to violence came at the beginning of testimony in a two-day trial and was never mentioned again or exploited. Under these facts, the trial court was well within its discretion to deny a mistrial.

A. Proceedings below.

The morning of trial, the parties announced that unless Defendant opened the door, they had agreed that "no prior acts of violence or abuse [by Defendant] will be admitted today." R167:8. The parties represented that the prosecutor had "instructed her witnesses accordingly." *Id.*

The victim testified first. R167:90-91. On the second page of the victim's testimony, the prosecutor—referring to the breakup—asked, "[H]ow did that happen? I mean, who broke up with whom?" R167:92. The victim replied that she broke up with Defendant at her house. *Id.* She then volunteered why she broke up with him:

> We were at my house and I broke up with him. I just told him I couldn't do it anymore. He was constantly accusing me of things I wasn't doing and just constantly fighting with me. Getting violent.

Id. The prosecutor immediately asked, "You broke it up?" R167:92, 155. The victim answered, "I broke it up." R167:92. At this point, the defense

objected and asked to approach. R167:92-93. In the ensuing bench conference, the defense moved for a mistrial because the testimony violated the agreement "to not discuss any prior violence." R167:93. The trial court reserved further argument on the motion for later. *Id.*

The parties fully argued the mistrial motion after both the victim and her cousin testified. R167:155-57. The defense did not dispute that the prosecutor had instructed her witnesses on the prior bad acts agreement. R167:155. Indeed, the defense conceded that the victim had "volunteered" the challenged comment. *Id.* But the defense argued that whether or not the comment was intentionally elicited, the jury should not have heard that "there was violence within the relationship" and that they could not now "unring" it. R167:156.

The prosecutor confirmed that she had told the victim "to not bring up any prior violent incidents." R167:155. But the prosecutor questioned whether the jury had even "really" heard the testimony because as soon as the prosecutor "started hearing the word [violent] come out of [the victim's] mouth, the prosecutor "started talking over her," so as to prevent the jury from hearing the word. *Id.*

The trial court denied the motion. R167:156. The court agreed "that it shouldn't have been brought up, but I don't see that there's significant

harm. There was no description of any violent events. It was just a brief mention." R167:156-57.

B. Defendant must prove both that the brief, unsolicited, and vague comment deprived him of a fair trial and that he likely would have been acquitted without it.

"In view of the practical necessity of avoiding mistrials and getting litigation finished," a trial court "should not grant a mistrial except where the circumstances are such as to reasonably indicate" that "a fair trial cannot be had and that a mistrial is necessary to avoid injustice." *State v. Butterfield*, 2001 UT 59, ¶46, 27 P.3d 1133 (quotations and citation omitted). Once a trial court "has exercised its discretion" to deny a mistrial, this Court's "prerogative" on appeal "is much more limited." *Id.* (quotations and citation omitted). This Court will not find an abuse of discretion unless "the record clearly shows that the trial court's decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial." *Id.* (quotations and citation omitted). This deference recognizes the trial court's "advantaged position" in assessing "the impact of events occurring in the courtroom on the total proceedings." *Id.* (quotations and citation omitted).

Utah case law has consistently held that "a mistrial is not required where an improper statement is not intentionally elicited, is made in

passing, and is relatively innocuous in light of all the testimony presented." *State v. Allen*, 2005 UT 11, ¶40, 108 P.3d 730; *accord State v. Milligan*, 2012 UT App 47, ¶8, 287 P.3d 1. For example, the Utah Supreme Court has held that no mistrial was required where a witness's improper reference to the defendant's outstanding arrest warrant "was very brief and was only made in passing, stating no details of the circumstances which caused the warrant to issue or of the offense to which it was related." *State v. Griffiths*, 752 P.2d 879, 883 (Utah 1988). *See also State v. Wach*, 2001 UT 35, ¶46, 24 P.3d 948 (no mistrial required where improper statement "was not elicited by the prosecutor and was an isolated, off-hand remark, buried in roughly 244 pages of testimony"). Likewise, this Court has held that no mistrial was required where an officer's improper reference to the defendant's criminal history was not intentionally elicited by the prosecutor, was "'made in passing,'" and was "'relatively innocuous in light of all the testimony presented.'" *State v. Duran*, 2011 UT App 254, ¶¶35-36, 262 P.3d 468 (quoting *Allen*, 2005 UT 11, ¶ 40 (modification in original)).

To prove an abuse of discretion, a defendant must do more than show that "some prejudice" might have resulted from the improper comment. *Butterfield*, 2001 UT 59, ¶ 47 (quotations and citation omitted). Rather, the "defendant must make some showing that the verdict was substantially

influenced by the challenged testimony." *Id.* (quotations, citation, and emphasis omitted). In short, a defendant must "show that there is a substantial likelihood that the jury would have found him not guilty had the improper statement not been made." *Id.*; *see also State v. Dalton*, 2014 UT App 68, ¶35, 331 P.3d 1110 (rejecting an appeal from mistrial denial because court "not convinced that the verdict was substantially influenced by the challenged testimony").

Defendant cannot meet his burden on this record.

C. The trial court did not abuse its discretion in denying a mistrial where the brief, unsolicited, and vague comment likely did not influence the verdict.

The trial court properly denied a mistrial based on the victim's isolated, vague reference to "getting violent." It was unprompted, made in passing, and likely had no effect on the verdict.

Defendant does not dispute that the comment was unprompted. Br. Aplt. 41-44. Indeed, he conceded below that it was "volunteered." R167:155.

More importantly, Defendant has not shown how this two-word vague reference to violence likely influenced the verdict. First, it is not at all clear that the jury caught the comment. The prosecutor tried to talk over it to prevent the jury from hearing it, or at least from seizing on it. R167:155-

56. And the prosecutor's next question—"You broke up?"—was designed to quickly change the subject. R167:92.

Second, that the comment might have been a reference to prior violence acts, likely escaped the jury. The comment contained no description of violent events. *See Griffiths*, 752 P.2d at 883 (mistrial not required where improper reference contained no details). And, in the context of the victim's testimony that Defendant was always arguing with her, "getting violent" could just as easily have meant that he merely yelled at her.

Third, the comment consisted of two words, spoken at the beginning of a two-day trial that spanned nearly 300 pages of transcript. *See State v. Wach*, 2001 UT 35, ¶46, 24 P.3d 948 (no mistrial required where improper statement "was not elicited by the prosecutor and was an isolated, off-hand remark, buried in roughly 244 pages of testimony"). The words were not mentioned again or otherwise highlighted to the jury. *Cf. Allen*, 2005 UT 11, ¶37 (concluding no prejudice because "neither party attracted attention" to improper statement after it was made). And no other reference to Defendant's prior violence was made.

Finally, given the strength of the State's case, it is unlikely that the victim's vague reference to "getting violent" influenced the verdict. The

jury heard and saw unrefuted testimonial and physical evidence that the victim's backdoor and bathroom door were broken and that they were not broken before Defendant showed up that night. The jury heard from both the victim and her cousin that two loud bangs immediately preceded Defendant's appearance in the house. Both testified that Defendant yelled at the victim after he entered. The jury also heard and saw that the tread on the Defendant's shoes looked a lot like the shoe impressions in the snow and the partial shoe impression on the backdoor. All of this led to the reasonable conclusion that Defendant, uninvited, had entered the house and the bathroom by kicking in the two doors. It was only a small step from there to conclude that Defendant also threatened the victim.

Given all this evidence, there is not "a substantial likelihood that the jury would have found [Defendant] not guilty," but for the victim's passing, vague reference to "getting violent." *Butterfield*, 2001 UT 59, ¶47. The trial court was therefore well within its discretion to deny a mistrial.

IV.

DEFENDANT HAS NOT SHOWN CUMULATIVE ERROR

Defendant argues that the cumulative error doctrine entitles him to relief. Utah appellate courts "will reverse a jury verdict under the cumulative error doctrine only 'if the cumulative effect of the several errors

undermines ... confidence that a fair trial was had.'" *State v. Killpack*, 2008 UT 49, ¶56, 191 P.3d 17 (quoting *State v. Widdison*, 2001 UT 60, ¶73, 28 P.3d 1278) (omission in original). As explained, Defendant has not shown any error. His cumulative error claim therefore fails. *See id.* (rejecting cumulative error claim where Killpack failed to demonstrate any error).

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on January 27, 2016.

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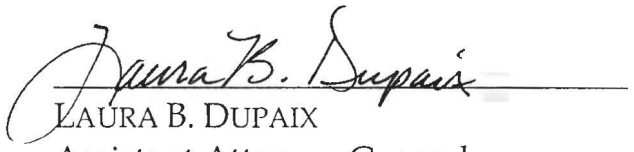
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 12,095 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.



LAURA B. DUPAIX
Assistant Attorney General

CERTIFICATE OF SERVICE

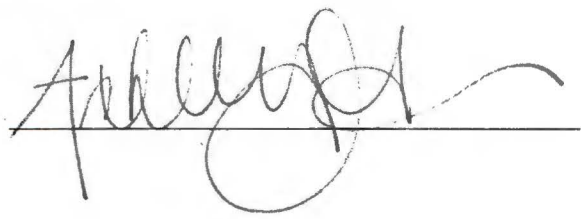
I certify that on January 27, 2016, two copies of the Brief of Appellee were ☐ mailed ☑ hand-delivered to:

Alexandra S. McCallum
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, UT 84111

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.



Addenda

Addendum A

Constitutional Provisions, Statutes, and Rules

Utah R. Evid. 403. Exclusion Of Relevant Evidence On Grounds Of Prejudice, Confusion, Or Waste Of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to 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 evidence otherwise adduced.

Utah R. Evid. R. 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.

Addendum B

Photos of Damaged Doors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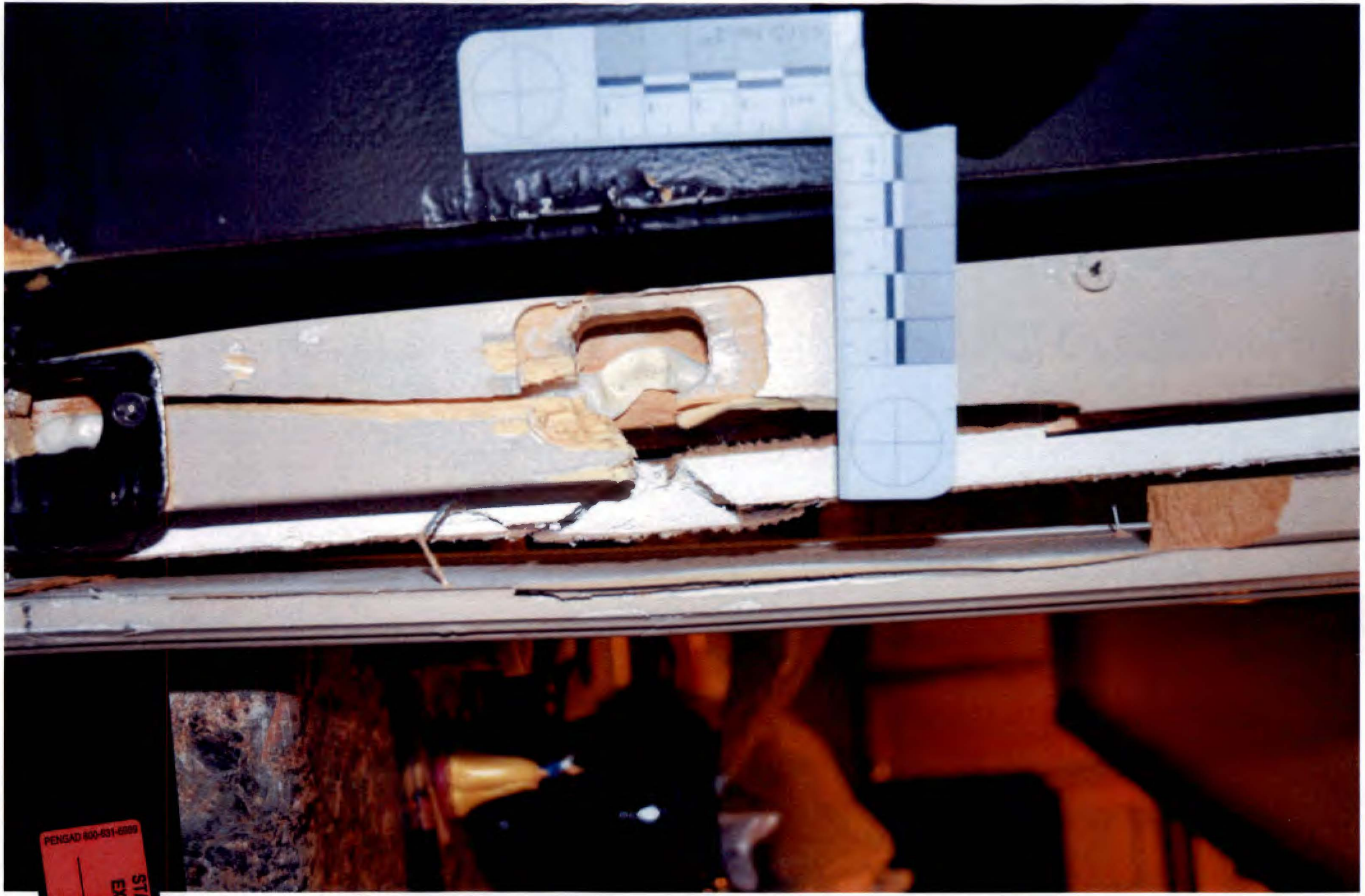
STATE'S
EXHIBIT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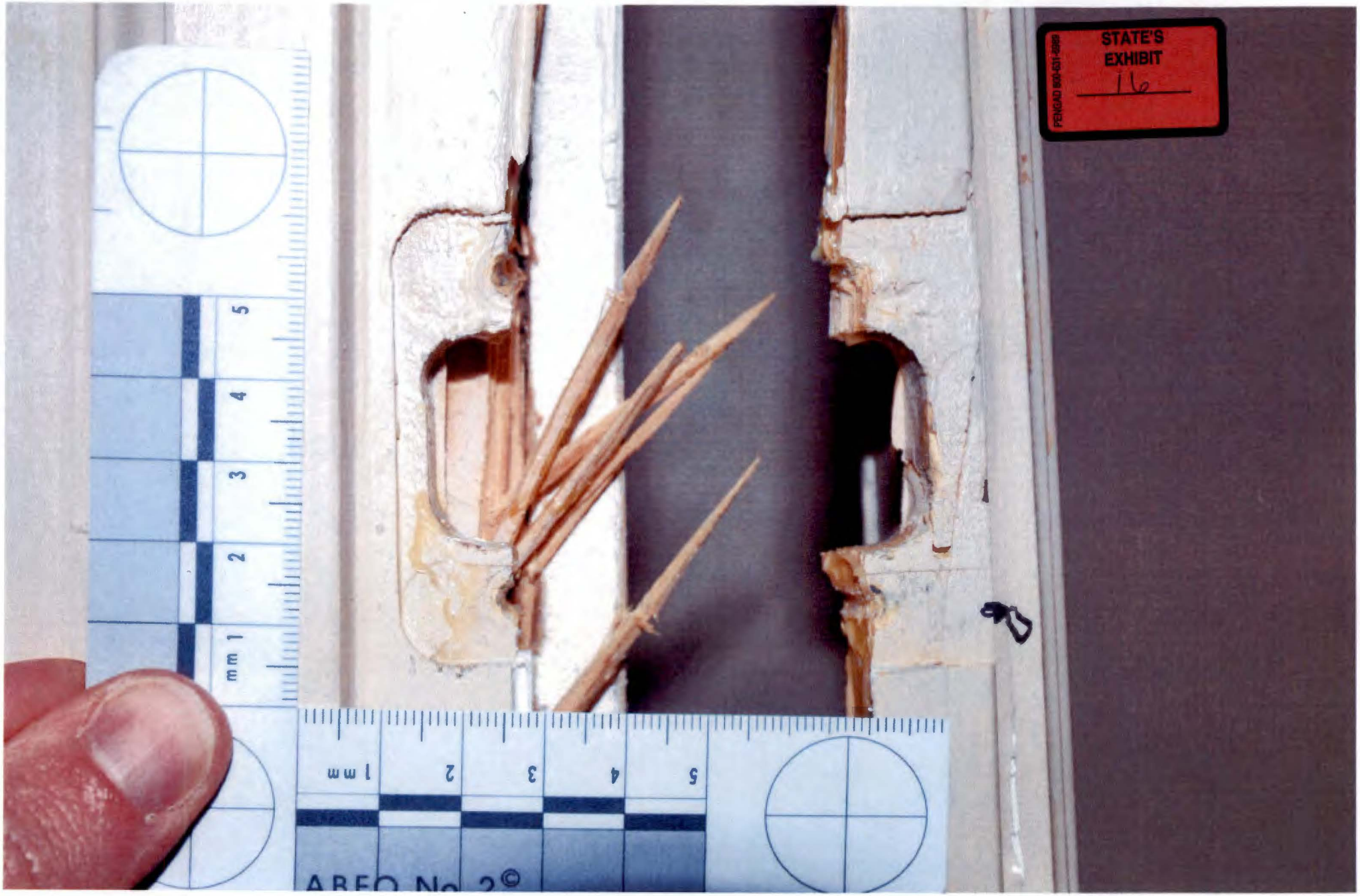
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Addendum C

Photos of Shoe Impressions


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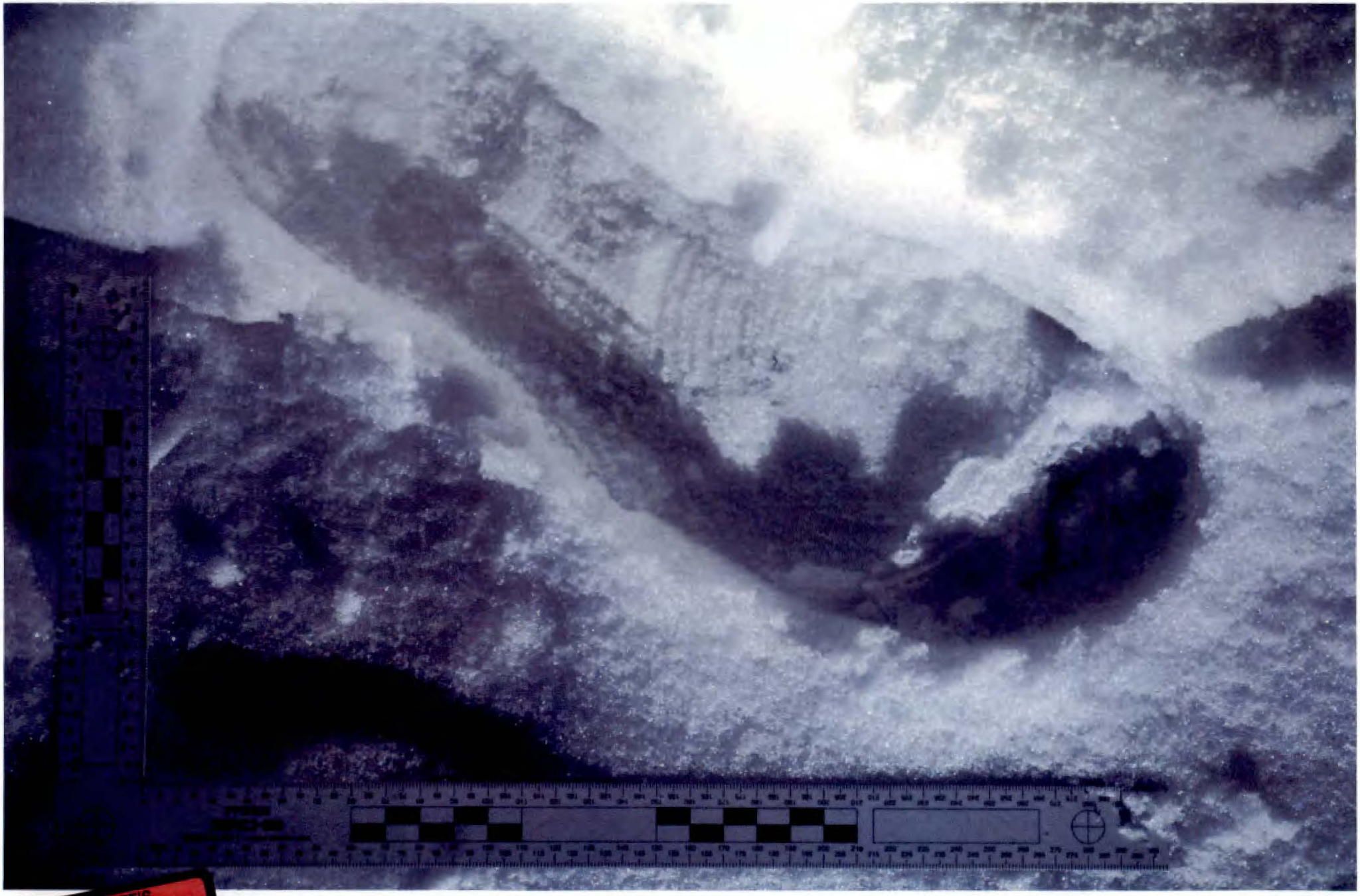

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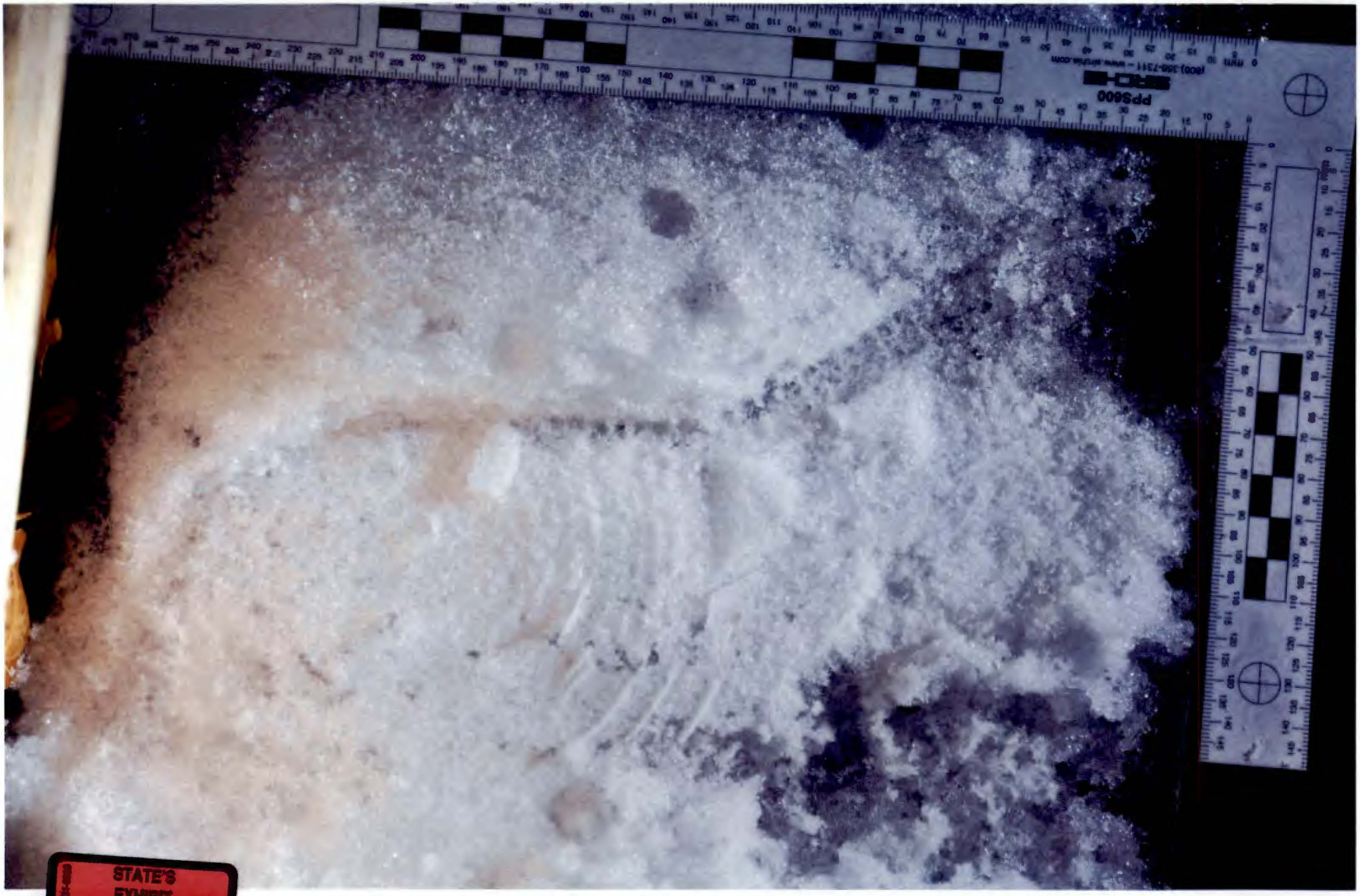
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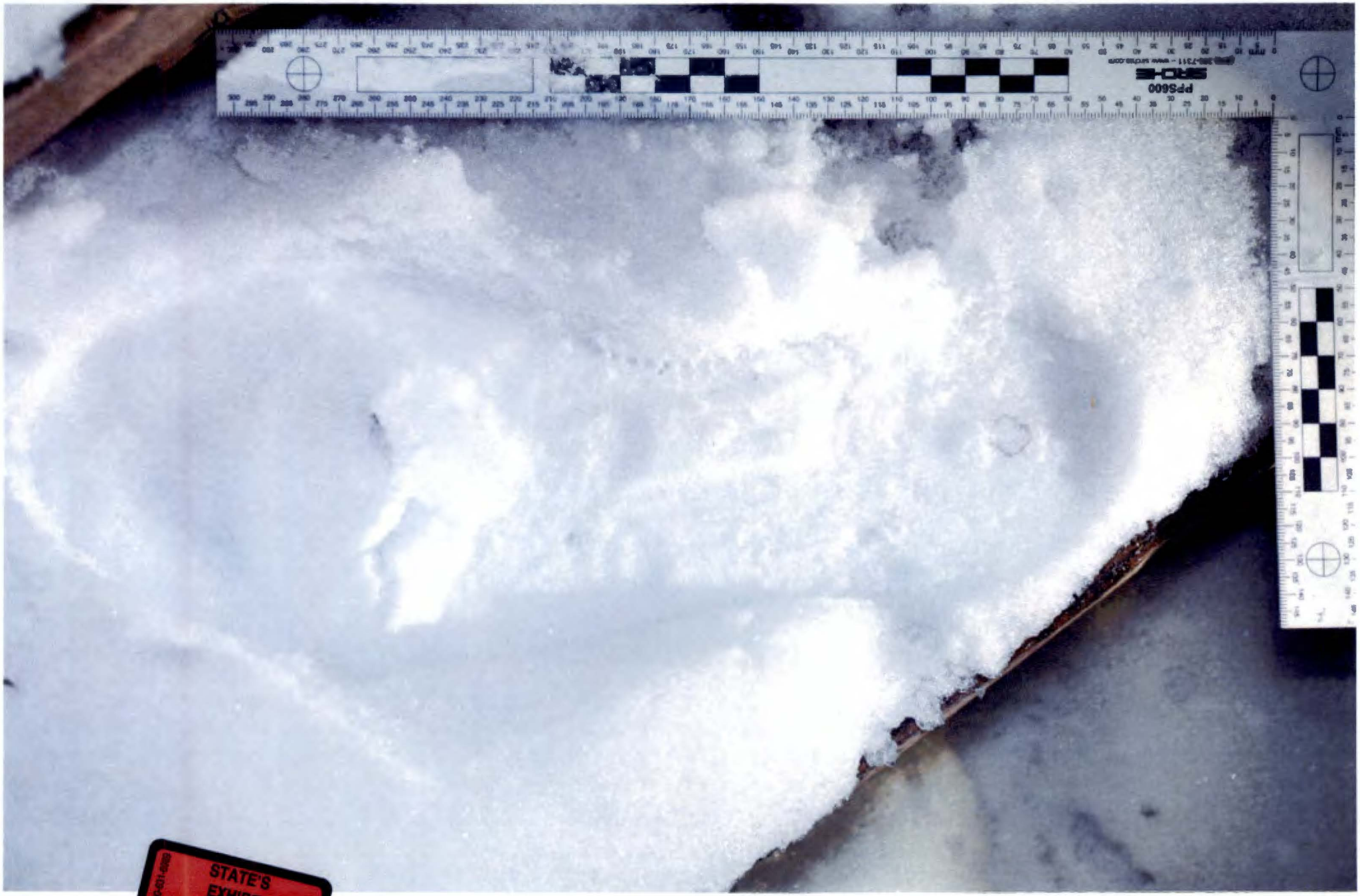
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