

2016

State of Utah, Plaintiff and Appellee, v. Carl Holm, Defendant and Appellant.

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff and Appellee, :
v. : Case No. 20150623-CA
CARL HOLM, :
Defendant and Appellant. : Appellant is not incarcerated.

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Negligent Homicide, in violation of Utah Code § 76-5-206, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Katie Bernards-Goodman presiding.

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Case No. 20150623-CA
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JURISDICTIONAL STATEMENT

Appellant Carl Holm appeals from a Sentence and Judgment for a conviction of Negligent Homicide, a class-A misdemeanor, in violation of Utah Code § 76-5-206. Mr. Holm filed a timely appeal. R.257-258. This Court has jurisdiction pursuant to Utah Code § 78A-4-103(2)(e). [The Sentence and Judgment is included in Addendum A].

STATEMENT OF THE ISSUES, STANDARD OF REVIEW, PRESERVATION

Issue #1: Whether the trial court abused its discretion in voir dire when it denied Mr. Holm the opportunity to conduct individual voir dire on potential jurors who indicated they or a close friend had been involved in a serious car accident, where such follow-up questioning would have enabled Mr. Holm to determine if the potential juror was biased and to exercise informed peremptory challenges.

Standard of Review: “Challenges to the trial court’s management of jury voir dire are reviewed under an abuse of discretion standard.” *Alcazar v. Univ. of Utah Hospitals & Clinics*, 2008 UT App 222, ¶ 9, 188 P.3d 490 (citation omitted). “[T]hat discretion

must be liberally exercised *in favor* of allowing counsel to elicit necessary information for ferreting out bias, whether for a for-cause or a peremptory challenge.” *State v. Saunders*, 1999 UT 59, ¶ 34, 992 P.2d 951 (quotation omitted) (*italics original*).

Preservation: Mr. Holm preserved this issue by requesting the trial court to conduct individual voir dire of the potential jurors who had indicated they or someone close to them had been involved in a serious car accident. R.358-359, 367. The trial court denied Mr. Holm’s request, reasoning that the potential jurors had indicated they would have no bias. R.359, 367.

Issue #2: Whether the trial court erred in admitting a photograph showing Mr. Garcia’s dead body pinned in a vehicle shortly after a fatal car accident with paramedics attending him.

Standard of review: On appeal, “we review ‘the trial court’s ultimate ruling under rule 403 of the Utah Rules of Evidence’ for abuse of discretion.” *State v. Stapley*, 2011 UT App 54, ¶ 11, 249 P.3d 572 (citation omitted).

Preservation: Mr. Holm preserved this issue by filing a *Motion in Limine* on January 28, 2015, *see* R.91-96, which motion was argued on February 2, 2015 and the morning of trial. R.269-305, 319-323. The trial court denied the motion and ruled the photograph was admissible. R.323, 469.

Issue #3: Whether the district court erred in denying Mr. Holm’s request to instruct the jury regarding the definition of “simple negligence.”

Standard of Review: “A trial court’s refusal to give a jury instruction is a question of law, reviewed for correctness.” *State v. Burke*, 2011 UT App 168, ¶ 18, 256 P.3d 1102

(citation omitted).

Preservation: Mr. Holm preserved this issue by requesting the trial court to instruct the jury regarding the definition of “simple negligence.” *See* R.172, 177, 190, 716-720, 726-727.

Issue #4: Whether the State presented sufficient evidence to support each element of Mr. Holm’s conviction for Negligent Homicide and whether the district court erred in denying his motion for directed verdict.

Standard of Review: “A defendant’s motion to dismiss for insufficient evidence at the conclusion of the [State’s] case in chief requires the trial court to determine whether the defendant must proceed with the introduction of evidence in his defense.” *State v. Noren*, 704 P.2d 568, 570 (Utah 1985) (citation omitted). This Court will uphold a trial court’s denial of a motion to dismiss for insufficient evidence if, “upon reviewing the evidence and all inferences that can be reasonably drawn from it, some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt.” *State v. Kihlstrom*, 1999 UT App 289, ¶ 8, 988 P.2d 949 (citations omitted). “If the prosecution has failed to present sufficient evidence to supports its case, the trial court should dismiss.” *Id.* This Court reviews for correctness “the trial court’s conclusion that the evidence established a prima facie case.” *Id.* (citation omitted).

Preservation: Mr. Holm preserved this issue by making a motion for directed verdict based on insufficient evidence. Specifically, at the close of the State’s case at trial, Mr. Holm moved for a directed verdict, arguing that the State failed to present

sufficient evidence that he acted with criminal negligence. R.605-606.

STATEMENT OF THE CASE

An Information was filed on June 10, 2013, charging Mr. Holm with Negligent Homicide, a class-A misdemeanor, in violation of Utah Code § 76-5-206. R.1-3. A jury trial was held on May 12-14, 2015. R.186-189, 226-228, 235-236. After deliberating several hours, the jury found Mr. Holm guilty. R.234. The trial court sentenced Mr. Holms to 365 days in jail. R.254-255.

STATEMENT OF FACTS

I. Introduction.

On September 22, 2012 on Bangerter Highway (hereafter “Bangerter”) and the overpass at State Road 201 (hereafter the “201-Overpass Intersection”), Carl Holm ran a red light causing the death of Francisco Garcia-Ramirez. Neither party disputed that Mr. Holm ran a red light, that he was driving the speed limit at the time of the accident, or that he was not under the influence of drugs or alcohol. The main issue in dispute was whether Mr. Holm acted with criminal negligence.

II. Mr. Holm’s Living Situation in 2012.

Joni Holm has been married to Mr. Holm for thirty-four years. R.608. On September 22, 2012, the couple lived in West Jordan, Utah and had since July 2012. R.608-609, 623, 670. The couple owned one vehicle – a Mazda MPV minivan. R.485. The Holms’ normal morning routine Monday through Saturday was to leave their home around 5:30 a.m. when Ms. Holm would drive Mr. Holm northbound on Bangerter to his work by the airport; after work, she picked him up and drove home. R.609-610, 614-615,

623-624. When Ms. Holm drove Mr. Holm to work, Mr. Holm sat in the passenger's seat relaxing and listening to music on headphones. R.613, 616, 625, 648.

The Holms estimated that Ms. Holm drove Mr. Holm to and from work along this same route (the same route Mr. Holm drove on September 22, 2012) six days a week for two months. R.615-616, 670-672. Mr. Holm drove the route as the driver two to three times prior to September 22, 2012. R.617, 626, 652-653, 676.

Ms. Holm testified that Mr. Holm has a habit of using cruise control on freeways and streets and would move around cars to avoid having to take off cruise control. R.618-619. However, if Mr. Holm did use cruise control, his habit was to set the speed no more than six to seven miles an hour over the speed limit. R.620. Ms. Holm does not know if Mr. Holm had cruise control on the morning of September 22, 2012. R.620.

September 22, 2012 was a unique morning in that Mr. Holm drove himself to work because Ms. Holm had another commitment. R.610. Mr. Holm left his home around 5:30 a.m. R.611. According to Ms. Holm, Mr. Holm's demeanor was normal that morning and seemed as he always does; he did not seem anxious or nervous. R.611-612. Mr. Holm did not seem tired to Ms. Holm; the couple went to bed at 9:00 p.m. the night before, and Mr. Holm believes he slept seven-eight hours that night. R.611, 624.

After Mr. Holm left his home, he stopped at a convenience store in his neighborhood to buy an energy drink. R.626. He then entered Bangerter on 9000 South and started driving northbound. R.626.

III. The Route and 201-Overpass Intersection.

The general layout of Bangerter Highway between 9000 South and shortly before the 201-Overpass Intersection is fairly general in that northbound traffic is on the east side of the highway and southbound traffic on the west side. R.526-527. The following are the intersections with traffic signals between 9000 South and the 201-Overpass Intersection on Bangerter Highway: 9000 South, 7000 South, 6200 South, 5400 South, 4700 South, 4100 South, 3500 South, 3100 South, 2700 South (which is also known as Parkway Blvd), 2400 South, and the Frontage Road. R.685. Each of these intersections and their traffic signals prior to the 201-Overpass Intersection are standard in that each has four corners with a traffic signal on each corner (one facing each direction). R.685.¹

It is 1.2 miles between 4700 South and 4100 South; 2.6 miles between 4100 South and Parkway Blvd; and 1.1 miles between Parkway Blvd and the 201-Overpass Intersection. R.687. The posted speed limit between 9000 South and 3400 South is 55 mph and 50 mph between 3400 South and the 201-Overpass Intersection. R.691.

The layout of 201-Overpass Intersection and its traffic signals is different and unique from standard intersections. R.685. Unlike a standard intersection where eastbound/westbound traffic run perpendicular to northbound/southbound traffic, the northbound and southbound traffic at the 201-Overpass Intersection crossover each other at the beginning of the overpass. R.686. Specifically, as northbound traffic reaches the 201-Overpass Intersection, it crosses over with the southbound traffic lanes, moving from

¹ There are a few unique traffic signals on northbound Bangerter for vehicles making left turns but the traffic signals at the main intersections are standard. R.686.

the east side of the highway to the west side. R.527, 540. The northbound traffic maintains this lane of travel over the overpass, at which point northbound traffic again crosses over the southbound lanes from the west side to the east side of the highway.

R.527, 540. *See also* State's Exhibit 25 and Defense Exhibits 1-2. With regard to traffic signals on the 201-Overpass Intersection, in addition to northbound and southbound traffic signals, there are multiple traffic signals for vehicles exiting SR-201 onto Bangerter Highway. R.532-533. *See also* Defense Exhibits 1-2.

IV. The Granges' Testimony regarding Mr. Holm.

On September 22, 2012 around 5:45 a.m., Mike and Brittany Grange, a married couple, entered northbound Bangerter at 7800 South to drive to work. R.408-409, 430. Mr. Grange drove and Ms. Grange was the passenger. R.432.

It was dark outside with little traffic. R.418-420, 430. As the Granges drove in the middle lane through the intersection at 5400 South, a vehicle also traveling northbound passed them in the left lane. R.409, 430, 437. At this point, according to Mr. Grange, the other vehicle weaved out of its own lane and into the Grange's lane one time and into the medium two times. R.409, 418. Ms. Grange remembers the other vehicle going in and out of its lane and coming all the way into their lane and she believes the vehicle weaved about five times between 5400 South and 4700 South. R.431, 438.

The Granges pulled up to this other vehicle at a stop light at 4700 South. R.409, 420. When the light turned green, both vehicles proceeded at which point, according to the Granges, the other vehicle again weaved out of its lane; Mr. Grange believed between 4700 South and 4100 South, the vehicle weaved into his lane two times and into the

median two times. R.409, 420-421. The other vehicle's speed also increased. R.409, 421, 438. The other vehicle continued to weave out of its lane through the intersection at 4100 South. R.409-410.

Mr. Grange described the other vehicle as being dark and believes it was blue. At trial, he testified that he was unable to tell if it was a minivan or truck. R.410. At trial, he stated that he remembered testifying previously that the vehicle "was kind of [a] blue or greenish truck... And ... it had a shell on it, but I wasn't sure because it was still dark at the time." R.418-419, 426. Ms. Grange testified at trial that this vehicle was a blue Mazda van but she never saw the face of the driver of the other vehicle. R.432, 438, 444.

The Granges decided at some point to try to get the license plate of the other vehicle to call police because they thought the other driver was impaired. R.410, 431.

The Granges lost sight of the vehicle between 4100 South and Parkway Blvd due to the other vehicle's speed and because the road curves. R.410-411, 421, 438-439. Both the Granges estimate they lost visual of the other vehicle for one to two minutes between 4700 South and Parkway Blvd. R.425, 433. They both estimated they themselves were traveling at one point 70 mph trying to catch up to the other vehicle and the other vehicle was "way, way ahead of us." R.411, 439. Mr. Grange knows he was going 70 mph because he looked at his speedometer as he drove through the light at 3500 South. R.427. He estimated that the other vehicle at times was going around 90 mph; Ms. Grange estimated the other vehicle was going 85 mph. R.422, 439.

Ms. Grange testified that they stopped at multiple traffic signals between 4100 South and Parkway Blvd and the other vehicle was not stopped at any of these intersections. R.439.

The Granges regained sight of what they believed to be the same vehicle stopped at the traffic signal at Parkway Blvd. R.410-411, 422, 425, 433, 439. The other vehicle was stopped in a normal fashion. R.424-425, 440. Mr. Grange testified that as they approached the vehicle from behind to get its license plate number, the traffic light turned green and the other vehicle "took off." R.410-411, 422.

The Granges testified at trial that after the traffic signal turned green at Parkway Blvd, the other vehicle continued to weave out of its lane. R.412, 434, 440. With regard to the weaving, however, both Granges remembered testifying previously that the other vehicle did not weave after Parkway Blvd. Mr. Grange remembered testifying at the preliminary hearing that the only time he saw the vehicle weave was between 5300 South and 4700 South. R.424-425. At trial, after testifying that she in fact observed the other vehicle weaving after Parkway Blvd, Ms. Grange remembered previously testifying that the only weaving of the vehicle she observed was between 5300 South and 4700 South. R.441-443, 445.

Mr. Grange estimated that he himself reached speeds of 60 mph between Parkway Blvd and the 201-Overpass Intersection and he was unable to catch up to the other vehicle. R.423. Ms. Grange estimated they drove about 50 mph between Parkway Blvd and the 201-Overpass Intersection. R.440.

Between Parkway Blvd and the 201-Overpass Intersection, there are two intersections with traffic signals – 2400 South and the Frontage Road – both of which had green lights for the other vehicle and the Granges. R.412, 422-423.

As the other vehicle approached the 201-Overpass Intersection, the Granges saw that the traffic signal was red. R.412, 434-435. The other vehicle was the first car to approach the 201-Overpass Intersection.

The Granges observed the other vehicle drive through a red light and cause an accident. R.415. Neither of the Granges saw the other vehicle's brake lights go on as it approached and entered the intersection. R.423, 435, 444. It was still dark outside at the time of the accident. R.445. Mr. Grange estimates they were 200 feet behind the other vehicle when the accident occurred; Ms. Grange estimates they were 50-100 feet away. R.425, 435, 443.

Mr. Grange estimates that the other vehicle was going 70-90 mph when the accident occurred; Ms. Grange estimated it was going at least 70 mph and possibly faster. R.423, 441. Ms. Grange believes they were driving 50 mph when the accident occurred. R.444. Neither of the Granges has training in visually estimating speeds of vehicles, has never enforced speeds, and is not certified in visually estimating speeds of vehicles. R.424, 444. Detective Mower, the State's accident reconstructionist, who has been through Peace Officer Standards and Training ("POST"), discussed that part of "POST" training is visually estimating speeds and that in his opinion, the general public can be horrible at visually estimating speeds. R.540.

Mr. Grange believes that the “blue truck” he observed driving erratically several miles before at 5300 South was the same vehicle that caused the accident. R.415, 427, 687.

V. Mr. Holm’s Testimony regarding the Accident.

After stopping at a convenience store, Mr. Holm entered northbound Bangerter at 9000 South. R.626. Mr. Holm testified that he believes that at some point while he drove between 9000 South and the location of the accident, his energy drink slipped out of the drink holder in the center console area. R.627-628. He reached down to grab the drink and does not know if this caused him to swerve but may have. R.628-629. If he did swerve, he would have done so one time. R.629.

With regard to driving at a high rate of speed, Mr. Holm believes he drove 55-60 mph between 9000 South and shortly before the 201-Overpass Intersection and believes he was driving 50 mph – the speed limit – when the accident occurred, which is consistent with the estimate from the State’s accident-reconstruction expert. R.501, 629, 649, 678, 691.

When the light turned green at Parkway Blvd, Mr. Holm did not speed off at a high rate of speed but thinks he drove no more than a couple of miles per hour over the speed limit. R.631-632. There were no vehicles at this point in front of him in his direction of travel. R.634. The lights were green at the next two intersections at 2400 South and the Frontage Road. R.631-632, 675.

As Mr. Holm went through the green traffic signal at the Frontage Road, he looked towards the next intersection – the 201-Overpass Intersection – and saw a green light.

R.635, 663-664. As it tragically turned out, the green light Mr. Holm observed was not his traffic signal but was the signal for traffic exiting eastbound on the SR-201 to travel northbound on Bangerter Highway. R.636. Mr. Holm knew that the northbound and southbound lanes on Bangerter crossed over one another at this point, “so I thought those green lights were the green lights for me and I was wrong.” R.668. He saw a green light and proceeded. R.636. As he approached the 201-Overpass Intersection, his correct traffic signal – which was red – was at times briefly obscured by traffic poles and the pillar by his vehicle on his windshield connecting the roof panel to the vehicle’s main body. R.636, 639, 649. Mr. Holm believes he may have looked down for a second and when he looked up, he realized he had looked at the wrong traffic signal and that his correct traffic signal was red. R.641. Mr. Holm stated, “I thought it was green and went to go through and as I looked up, I saw the light was red and ... [it was] too late to stop.” R.639. In summary, Mr. Holm proceeded through the 201-Overpass Intersection without slowing down because he mistakenly thought he had a green light and failed to see that his correct traffic signal was red. R.636, 640-641.

Although Mr. Holm tried to brake, it was too late to do so and he hit a Honda Accord that was traveling southbound on Bangerter in a head-on fashion;² the Honda Accord had a green light. R.392, 485.

² The unique layout of the 201 Overpass Intersection caused Mr. Holm to collide with the Honda in a head-on fashion. If Mr. Holm had run a red light at a standard intersection, he likely would have “T-boned” the other vehicle. But, because he ran a red light at this unique intersection where northbound and southbound traffic cross over each other, he hit the other vehicle almost directly head-on.

Defense Exhibits 26, 31, 33, and 36 are photographs at night showing what Mr. Holm's point of view would have been as he approached the 201-Overpass Intersection. R.634-637. Defense Exhibit 5 is a daytime photograph depicting the same intersection; Mr. Holm circled the traffic signal he mistakenly believed was his. R.637-638.³ When it is dark outside, one can see the glow of this traffic signal more than in the daylight, as evident from Defendant's Exhibit 33. R.637-638. Defendant's Exhibits 5 and 6 also depict how traffic poles at times briefly obstruct the traffic signal at the 201-Overpass Intersection as one is driving northbound. R.649.

Mr. Holm did not dispute that his correct traffic signal was red, nor does he dispute that as one approaches the intersection, one can clearly see that the correct traffic signal is visible and clear. R.640, 650, 652, 666-667. He further does not dispute that in a video taken from Detective Mower's vehicle, the correct traffic signal is visible and that one has to look past the correct traffic signal to see the traffic signal Mr. Holm believed was his. R.669.

After the accident, Mr. Holm was transported to the hospital where he spoke with Detective Keldon Arrington with the West Valley Police Department. R.476. Mr. Holm consented to a blood draw and was completely cooperative. R.479. Detective Arrington asked Mr. Holm what had occurred. R.477. Mr. Holm stated he was driving northbound

³ Both Detective Mower and defense's investigator, who both have driven the route, testified that a driver going northbound on Bangerter who is approaching the 201 Overpass Intersection can observe the color of the traffic signal for traffic exiting from eastbound SR-201 to drive north on Bangerter and that the glow of this traffic signal is more visible when it is dark outside although it is visible during the day as well. R.532-535, R.687-688.

on Bangerter, came to the 201-Overpass Intersection, was confused which traffic signal was his, that he went through a red light, and caused an accident. R.478. The parties stipulated that there was no alcohol or controlled substances in Mr. Holm's blood. R.479.

At the time of the accident, Mr. Holm was not on his cell phone, was wearing his properly prescribed glasses, was not adjusting the radio, was not eating anything, and was not driving drowsy. R.627, 647-648, 650. Mr. Holm testified he was not speeding along Bangerter Highway and was not speeding at the time of the accident. R.613, 674. He admits he should have seen that the traffic signal was red. R.650. He accidentally ran a red light with tragic results.

VI. Evidence Whether Mr. Holm Had His Headlights On.

The parties disputed at trial whether Mr. Holm had his headlights on at the time of the accident. Stephanie Daybell was approximately 200-500 feet behind the Honda Accord when she witnessed a blue minivan collide with the Honda. R.447-448, 451-452-454. Ms. Daybell remembers it was dark outside and she could not see the blue minivan before the crash and believes the blue minivan did not have its headlights on although she did not have a reason to be looking for headlights. R.452, 454. On the day of the accident, Ms. Daybell wrote a statement in which she wrote that the minivan did not have its headlights on. R.457-458.

Jeremy Jones was driving shortly behind the Honda Accord at the time of the accident; in fact, the impact of the accident caused the Honda to collide with Mr. Jones' vehicle. R.391-392, 485. Mr. Jones cannot say for certain whether Mr. Holm's minivan had its headlights on. R.400, 406. Something did however briefly catch Mr. Jones

attention coming from the other direction shortly before the collision and Mr. Jones believes it may have been oncoming headlights, reflection, movement, lights, or a combination of those. R.396, 403.

During his investigation, Detective Mower inspected the inside of the minivan and observed that the minivan's headlight switch was not in the full "on" position but was rather in the first position, meaning that the vehicle's rear red lights and front two amber lights would be illuminated but not the front headlights. R.485-486, 488, referencing State's Exhibit 17. Detective Mower did not turn the headlights switch off or adjust them in any way. R.487. Multiple paramedics were in contact with Mr. Holm's vehicle to assist him but none of these paramedics touched the headlight switch. R.603-604.

With regard to his headlights, Mr. Holm testified that the first thought he had after the collision was to exit his vehicle to check on the individuals in the other vehicles. R.641, 643. When his vehicle came to a standstill, Mr. Holm's first reaction, something he described as a reflex, was to turn the knob of the headlights off as he attempted to exit the vehicle. R.643-644. In response to the question, "why [did] you [turn off the headlights?]", Mr. Holm replied, "I don't know. It's a muscle reflex. You're getting out of your car, you turn the lights off. That's ... the only way I can explain it." 644. After realizing he could not get out of the vehicle due to injuries and knowing that his vehicle was sitting in the dark without headlights on with traffic still driving by, Mr. Holm turned the park lights on in order for other drivers to see his vehicle. R.641-645, 659.

Mr. Holm testified that he was driving with his headlights on. R.655. He remembers turning on his headlights when he got in his vehicle at his home. R.656.

Although he does not specifically remember turning them on when he got back into his vehicle at the convenience store, he could see the reflection of the headlights on the road as he drove and believes if his headlights were off, he would have noticed since it was dark outside. R.650, 651, 656-657, 674.

VII. Mr. Garcia's Death.

Paramedic Scott Hall responded to the accident and observed that the front passenger of the Honda Accord – Francisco Garcia – was unconscious, did not have a pulse, and was not breathing. R.465. Paramedic Hall attended Mr. Garcia while Mr. Garcia was pinned in the vehicle. R.465-467. Paramedics were eventually able to extricate Mr. Garcia from the vehicle, performed CPR on him, were unsuccessful, and pronounced Mr. Garcia dead. R.472.

Dr. Erik Christensen, a forensic pathologist employed by the Office of the Medical Examiner, performed the autopsy of Mr. Garcia. R.580-581. Based on the autopsy, Dr. Christensen determined the manner of Mr. Garcia's death was an accident and that the cause of Mr. Garcia's death was blunt force injuries to his chest. R.591.

VIII. Evidence that Mr. Holm was Late to Work.

In September 2012 and the three years previous, Mr. Holm worked at Boise Packaging (a company by the Salt Lake City Airport), about a seven-minute drive from the 201-Overpass Intersection. R.593, 646, 674. James Skinner was Mr. Holm's supervisor at the time. R.593. Mr. Holm was scheduled to work on September 22, 2012 from 6:00 a.m. to 2:00 p.m. R.596, 623. Mr. Holm was expected to be at work at 6:00 a.m.; 6:01 a.m. was considered late. R.596-597. Employees log into a time system when

they arrive at work to verify they arrive on time. R.597. According to the company's attendance policy, if an employee is late for work anywhere between one minute and two hours, that employee receives half an incident point; the employee receives a full incident point if the employee is over two hours late. R.597-598, 647. The company has a scale of disciplinary action depending on points an employee receives: if an employee receives four incident points, the employee receives a verbal warning; additional incident points require harsher actions such as written warning and eventual termination. R.598-599. Mr. Skinner does not know how many incident points Mr. Holm had on September 22, 2012. R.598-599. Mr. Holm thinks he may have received a verbal warning a year previous due to accumulation of incident points but employees can work off incident points by being consistently on time for a period of time. R.647. Although Mr. Holm was scheduled to be at work at 6:00 a.m. that morning, he did not feel that he was in a rush. R.646, 653.

According to Detective Mower, the first 911 call was placed around 6:07-6:08 a.m. R.482. Firefighters/paramedics were dispatched around 6:09 a.m. to respond to the scene of the accident. R.460-464.

IX. Testimony from the State's Accident-Reconstruction Expert.

Darren Mower, the State's accident-reconstruction expert, is a detective with West Valley City and has been part of the traffic-accident-investigation unit for fourteen years. R.480-481. His responsibilities include responding to serious or fatal car crashes, conducting investigations, and reconstructing accidents. R.481. On September 22, 2012, Detective Mower responded to the accident scene. R.482, 485.

Detective Mower did a reconstruction of the accident. R.490. As part of the reconstruction, he created diagrams of the accident (see State's Exhibits 21-22) and gave his best estimate of the speed the minivan was traveling at the time of the accident.

R.490-498. Although Detective Mower is not always able to estimate rates of speed at the point of impact of an accident, he was able to do so in this case although some of the methods he sometimes uses – such as the conservation of momentum equation, the conservation of energy method, and by examining the airbag control module – were not applicable to this specific accident. R.497-500. However, Detective Mower was able to give his best estimate of the minivan's rate of speed at the point of impact based on his years of training and experience in thousands of car accidents. In Detective Mower's opinion, Mr. Holm was traveling 50 mph at the time of the accident. R.501. Detective Mower is confident in his estimate, based on years of experience, even though eyewitnesses estimated Mr. Holm was traveling much faster. R.537.

Detective Mower also believed that the minivan was crossing over from the first lane of travel into the second lane at the point of impact. R.495. State's Exhibit 18 depicts the intersection and traffic signal that Mr. Holm ran.

Detective Mower also took video – State's Exhibit 6 – in January 2015 from his patrol car while he drove 50 mph when it was dark outside starting shortly after Parkway Blvd in the same lane and same travel direction Mr. Holm was driving; Detective Mower did, however, slow down and stop shortly before the 201-Overpass Intersection. R.505-509. The parties stipulated that the intersection layout was the same at trial as it was at the time of the accident. R.506.

X. Testimony that Others are Not Confused with the Intersection.

Multiple people who are familiar with the 201-Overpass Intersection testified that they are not confused with the intersection. Mr. Jones drove through the intersection on a daily basis for around four years and has never been confused by the traffic signals or which lane of travel is his. R.401. The Granges, who also traveled through the intersection for multiple years, have never been confused with the intersection's layout. R.414, 436. Stephanie Daybell has never been confused with the intersection or traffic signal and has never run a red light at that location. R.458. Although Ms. Holm stated that she was never in an accident or ran the red light at the 201-Overpass Intersection, she did think it was difficult at times to identify when she was supposed to stop because there were "some blind spots" as she approached the intersection. R.616, 621.

Detective Mower personally has not been called to investigate a major crash at the 201-Overpass Intersection and has not responded to an accident caused by someone running the traffic signal at issue. R.520, 543. Based on Officer Mower's knowledge and investigation, there have been no other major crashes at the same location at issue from 2012-2015. R.518-520.

XI. Voir Dire.

On the first day of jury trial on May 12, 2015, the trial court conducted voir dire. R.330-376. During voir dire, the trial court told the potential jury that "[t]his is a criminal case. The defendant is charged with ... negligent homicide, that on September 22, 2012, at U-201 overpass Bangerter, ... the defendant did acting with criminal negligence cause the death of another." R.343. At no point did the trial court inform the

potential jurors that the allegations were that Mr. Holm caused a car accident resulting in the death of another.

During voir dire, the trial court asked the venire if anyone or anyone close to them has been involved in a serious car accident. R.353, 355. Several jurors (jurors 1, 6, 8-10, 13, 15, 17, 18, 20, 21-26, 28, 31, and 32) answered in the affirmative. R.353-356. The trial court then asked that of those who had answered in the affirmative, whether there was “anything about that experience that makes you feel like you might be biased for one side or the other?” R.356. Jurors 1, 13, 17, and 26 answered in the affirmative and the trial court spoke with each individually and allowed counsel to do the same. R.356, 359, 362-363.

Mr. Holm requested the trial court to call in each juror individually⁴ who indicated they or someone close had been involved in a serious car accident to find out more details and ask follow-up questions in individual voir dire rather than in front of the entire venire. R.358-359, 367. The trial court refused Mr. Holm’s request, reasoning that the potential jurors had indicated they would have no bias. R.359, 367.

After a two-day trial and after deliberating for several hours, the jury found Mr. Holm guilty of negligent homicide. R.234.

SUMMARY OF THE ARGUMENT

Mr. Holm respectfully requests this Court to reverse his conviction and remand for a new trial because (1) the trial court abused its discretion in refusing to allow Mr. Holm

⁴ In addition to jurors 1, 13, 17, and 26, these would have included jurors 6, 8-10, 15, 18, 20, 21-25, 28, 31, and 32).

to conduct individual voir dire on jurors who indicated they or someone close to them had been involved in a serious car accident; (2) the trial court erred in admitting a disturbing photograph of Mr. Garcia's deceased body pinned in his smashed vehicle despite the unfair prejudice the photograph caused while having little to no probative value; and (3) the trial court refused to instruct the jury as to the definition of "simple negligence" despite it being the theory of Mr. Holm's case that he acted with such negligence but not with criminal negligence. In addition, Mr. Holm asks the Court to reverse his conviction because (4) the State failed to present sufficient evidence to establish that he acted with criminal negligence.

ARGUMENT

I. The Trial Court Abused Its Limited Discretion by Refusing to Conduct Individual Voir Dire.

A. General Law regarding Voir Dire.

Voir dire examination serves two purposes: "the detection of actual bias and the collection of data to permit informed exercise of the peremptory challenge." *State v. Reece*, 2015 UT 45, ¶ 45, 349 P.3d 712 (citation omitted). "Voir dire questioning is essential to choosing an impartial jury, and an impartial jury is as essential to a fair trial..." *State v. Saunders*, 1999 UT 59, ¶13, 992 P.2d 951. Indeed, "the fairness of a trial may depend on the right of counsel to ask voir dire questions designed to discover attitudes and biases, both conscious and subconscious, even though they would not have supported a challenge for cause." *State v. Worthen*, 765 P.2d 839, 845 (Utah 1988) (quotation omitted).

Although a trial court has discretion in limiting voir dire examination, that discretion must be “liberally exercised” in favor of allowing counsel to elicit necessary information for ferreting out bias, whether for a for-cause or a peremptory challenge. *Id.* “[T]rial counsel should be given considerable latitude in asking voir dire questions, especially in view of the fact that only counsel will, at the beginning, have a clear overview of the entire case and the type of evidence likely to be adduced.” *Id.* “All that is necessary for a voir dire question to be appropriate is that it allow defense counsel to exercise his peremptory challenges more intelligently.” *Id.*

While a trial court is “[g]enerally ... afforded broad discretion in conducting voir dire ... that discretion **must** be exercised in favor of allowing discovery of biases or prejudice in prospective jurors.” *Depew v. Sullivan*, 2003 UT App 152, ¶10, 71 P.3d 601 (emphasis added) (quotations omitted). That discretion in voir dire “is most broad when it is exercised with respect to questions that have no apparent link to any potential bias,” but that “discretion narrows ... [when] questions do have some possible link to possible bias, and when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears. The trial court **must** allow such inquires.” *Saunders*, 1999 UT 59 at ¶ 43 (emphasis added). It is not an abuse of discretion for a court to limit voir dire questions when, “considering the totality of the questioning, counsel was afforded an adequate opportunity to gain the information necessary to evaluate the jurors.” *Reece*, 2015 UT 45 at ¶ 45.

B. The Trial Court Erred by Limiting Voir Dire.

Here, the trial court abused its limited discretion in refusing to allow individual questioning regarding jurors' experience with serious car accidents, and this compromised Mr. Holm's ability to seat a fair and unbiased jury.

The trial court refused Mr. Holm's request to speak to each juror individually⁵ who indicated they or someone close to them had been involved in a serious car accident, reasoning that the potential jurors had indicated they would have no bias. R.358-359, 367. This was an emotional case – an individual lost his life due to Mr. Holm running a red light. Reasonable and detailed inquiry into the circumstances surrounding the jurors' own experience with serious car accidents was necessary and imperative where it may have revealed a bias against someone who causes a car accident. By ferreting out the details of the jurors' experience with such accidents – such as the extent of any injuries, whether someone ran a red light, the location of the accident, whether speed played a factor, whether someone died – Mr. Holm would have been able to determine if a juror was biased against him which was critical to a fair trial.

Even if individual voir dire did not reveal a bias, it would certainly have given Mr. Holm more information when exercising his right to peremptory challenges. Mr. Holm would have been able to determine the juror's experience, attitudes, and opinions. *See Taylor v. State*, 2007 UT 12, ¶ 69, 156 P.3d 739 (stating that “the fairness of a trial may

⁵ Although the trial court spoke to jurors 1, 13, 17, and 26 individually because they indicated they would have a bias, the trial court refused Mr. Holm's request to speak to jurors 6, 8-10, 15, 18, 20, 21-25, 28, 31, and 32. R.353-367.

depend on the right of counsel to ask voir dire questions designed to discover attitude and biases, both conscious and subconscious, even though such attitudes would not have supported a challenge for cause”). Besides a few individual jurors the trial court questioned, Mr. Holm knew nothing of the specifics of these other serious car accidents.

Instead of conducting individual voir dire, the trial court asked these jurors whether “there [was] anything about that experience that makes you feel like you might be biased for one side or the other?” R.356. In denying Mr. Holm’s request to speak with each juror regarding their experience with serious car accidents, the trial court stated: “if we speak with – if it turned out that everyone who has ever been in a car accident ends up stricken, we would not have enough people by far because so many people have been in car accidents. So those who said that they are not going to be biased about that, we’re not going to talk to.” R.367.

Utah courts have made clear that “effective voir dire questioning of prospective jurors must not be prevented by a procedure designed to qualify jurors as quickly as possible on the basis of superficial questions and a declaration by each juror that he or she can follow the judge’s instructions and decide the case fairly.” *Saunders*, 1999 UT 59 at ¶ 34. Voir dire should not be restricted to a “stark little exercise” which discloses little. *Worthen*, 765 P.2d at 845 (citations omitted). The reason that such an exercise is inadequate was explained in *State v. Ball*:

The most characteristic feature of prejudice is its inability to recognize itself. It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor and openness to raise their hand in court and declare themselves biased. Voir dire is intended to provide a tool for counsel and the court to carefully and skillfully

determine, by inquiry, whether biases and prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it.

685 P.2d 1055, 1058 (Utah 1984).

“Ruling that a prospective juror is qualified to sit simply because he says he will be fair ignores the common-sense psychological and legal reality of the situation. It is not uncommon for people to believe that their ‘biases’ are in fact nonbiased objective judgments that are true and correct.” *Saunders*, 1999 UT 59 at ¶ 35. “[B]ecause a prospective juror cannot know much about the case at the time of voir dire, a juror cannot anticipate how he will react when asked to decide a case once all the facts are known.” *Id.* The *Saunders* court made “emphatically clear that a juror’s statement alone that he or she can decide a case fairly pursuant to the law given by the trial court is not a sufficient basis for qualifying a juror to sit....” *Id.* at ¶ 36.

Here, the trial court’s substitute question – whether there was anything about their experience that would make the jurors biased – was insufficient. Based on Mr. Holm’s reading of the trial court’s statements, the trial court did not want to take the time to question each juror individually and seemed hesitant to do so because if too many jurors had a bias against Mr. Holm, they would be stricken for cause and there would not be enough jurors to seat a jury. *See* R.367.

The prospective jurors were not able to recognize a bias at this point in the proceedings because they knew next to nothing about the case; the jurors did not even know that the case involved a car accident, let alone the details of the car accident. All the potential jurors knew at this point was that it was a criminal case that occurred at the

“U-201 overpass Bangerter in Salt Lake County” where Mr. Holm was charged with causing the death of another with criminal negligence. R.343. Asking the venire to declare a bias they did not even recognize was inadequate.

C. The Error Was Prejudicial.

The trial court’s error in limiting voir dire was prejudicial. When a court limits voir dire, it is not possible for an appellant to prove prejudice in the traditional way. He cannot “show with any certainty that had certain questions been asked, particular responses would have been received; that certain jurors would then have been challenged for cause or peremptorily; and that particular, more favorably predisposed jurors would have been seated instead, who would have deliberated to a different result.” *Barrett v. Peterson*, 868 P.2d 96, 103 (Utah App. 1993). “Prejudicial error is shown if the appellant’s right to the informed exercise of peremptory challenges has been ‘substantially impaired.’” *Id.*

Here, limiting voir dire was reversible error because Mr. Holm was not afforded an adequate opportunity to gain the information necessary to evaluate jurors. The trial court limited the scope of voir dire, thereby preventing Mr. Holm from asking the jurors about “relevant subject area[s] of potential bias.” *State v. Piansiaksone*, 954 P.2d 861, 867 (Utah 1998). This violated Mr. Holm’s right to a fair trial by substantially impairing his ability to detect biases which would support for-cause and/or peremptory challenges. *Id.* at 868. The trial court’s error limited Mr. Holm’s ability to unearth bias related to individuals who cause serious car accidents. Given the extent and breadth of the erroneous rulings limiting voir dire, Mr. Holm’s right to detect actual bias to support for-

cause challenges and his right to sufficient information to intelligently exercise his peremptory challenges was substantially impaired. *Saunders*, 1999 UT 59 at ¶ 55. Thus, reversal is required.

II. The Trial Court Abused Its Limited Discretion by Allowing Introduction of a Crime-Scene Photograph of Mr. Garcia's Deceased Body.

A. General Law regarding Unfair Prejudice of a Photograph.

In his January 28, 2015 *Motion in Limine*, Mr. Holm argued that pursuant to the three-part test outlined in *State v. Bluff*, 2002 UT 66, ¶ 46, 52 P.3d 1210, a disturbing crime-scene photograph depicting Mr. Garcia's deceased body pinned in the crashed vehicle with a paramedic attending him was irrelevant, gruesome, and unfairly prejudicial pursuant to Rule 403 of the Utah Rules of Evidence. *See* R.91-96, 269-305, 319-323, referencing State's Exhibit 26, attached as Addendum B. The trial court denied Mr. Holm's motion and despite Mr. Holm's restated objection at trial, the trial court allowed admission of the photograph into evidence. R.319-320, 323; 469-470.

The Utah Supreme Court has adopted a three-part test for determining whether a photograph is inadmissible:

First, [the court] determine[s] whether the photograph is relevant. Second, [it] consider[s] whether the photograph is gruesome. Finally, [it] appl[ies] the appropriate balancing test. If the photograph is gruesome, it should not be admitted unless the State can show that the probative value of the photograph substantially outweighs the risk of unfair prejudice. If the photograph is not gruesome, it should be admitted unless the defendant can show that the risk of unfair prejudice substantially outweighs the probative value of the photograph.

State v. Bluff, 2002 UT 66, ¶ 46, 52 P.3d 1210. Pursuant to Rule 403 of the Utah Rules of Evidence, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice.”

Although Mr. Holm argued to the trial court that the photograph at issue was inadmissible because it was irrelevant, gruesome, and unfairly prejudicial, Mr. Holm limits his argument on appeal to the issue that the trial court erred in admitting the photograph pursuant to part three of the *Bluff* test and Rule 403 because the risk of unfair prejudice substantially outweighed the probative value of the photograph. This Court “review[s] the trial court’s ultimate ruling under rule 403 of the Utah Rules of Evidence for abuse of discretion.” *State v. Stapley*, 2011 UT App 54, ¶ 11, 249 P.3d 572.

With regard to part three of the *Bluff* test and because the photograph is not gruesome for purposes of this appeal, “[the photograph] should be admitted unless the defendant can show that the risk of unfair prejudice substantially outweighs the probative value of the photograph.” *Bluff*, 2002 UT 66 at ¶ 46. In other words, because Mr. Holm does not contend on appeal that the photograph is gruesome, this Court must apply the presumptively admissible standard.

B. The Photograph Has Little to No Probative Value.

Photographs of the victim’s injuries have “limited probative value” if they serve only to corroborate “uncontested facts.” *State v. Calliham*, 2002 UT 87, ¶ 40, 57 P.3d 220. On the other hand, photographs can be extremely prejudicial. All the material facts which could conceivably have been adduced from viewing the photograph at issue had been established by uncontradicted testimony.

Here, there is very little – if any – probative value in admitting the photograph. The State admitted State’s Exhibit 26 because “it goes to a key element that [the State has] to prove and that is cause of death.” R.274. Although cause of death was an element of the offense, it was not an element that was “of great importance in the case [or] hotly contested by the parties.” *Calliham*, 2002 UT 87 at ¶ 40. Utah appellate courts have found graphic photographs in murder cases to lack the high degree of evidentiary significance necessary to overcome their potential to unfairly prejudice the defendant when they are offered only to prove death. *Stapley*, 2011 UT App 54 at ¶ 21 n. 6, *citing State v. Dibello*, 780 P.2d 1221, 1230-31 (Utah 1989) (holding that the portion of a video recording that lingered on the deceased’s body should not have been admitted because the cause of death had been established, but concluding that the admission of the video was harmless); *State v. Lafferty*, 749 P.2d 1239, 1257 (Utah 1988) (determining the trial court abused its discretion in admitting gruesome photographs of the victims’ corpses where they “convey[ed] little information beyond the fact that the victims died violent and bloody deaths” but nevertheless upholding the conviction because the error was not prejudicial); *State v. Cloud*, 722 P.2d 750, 753-54 (Utah 1986) (reversing the defendant’s conviction where gruesome photographs of the victim’s mutilated body were admitted after the defendant conceded that he had intentionally killed her with a knife).

Mr. Holm never disputed that he ran a red light that resulted in Mr. Garcia’s death. R.478, 650. Rather, he asserted that he did not act with criminal negligence. State’s Exhibit 26 was not probative of this issue and its evidentiary value was weak.

C. Admission of the Photograph Was Unfairly Prejudicial.

On the other hand, the exhibit created a great danger of unfair prejudice. Unfair prejudicial is defined as “having an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror.” *Stapley*, 2011 UT App 54 at ¶ 18. The main purpose of the State’s Exhibit 26 was to “inflame and arouse the jury”⁶ by showing them a graphic photograph of Mr. Garcia deceased body, elicit sympathy for Mr. Garcia, and create revulsion for Mr. Holm as the person who caused the accident. State’s Exhibit 26 is an enlarged 8 x 10 inch photograph that shows a close-up shot of Mr. Garcia sitting upright pinned in his smashed vehicle with wet blood around his mouth and nose. The photograph is in color and provides a vivid image of how Mr. Garcia’s lifeless body looked shortly after the accident. A paramedic is seen attending Mr. Garcia with wires connected to him and it appears the paramedic is checking for signs of a pulse. Mr. Garcia’s mouth is gapping open and it appears his eyes are rolled back. He is sitting in a smashed vehicle with the windshield cracked in several places due to the accident.

Even the State acknowledged to the trial court the upsetting nature and prejudicial effect of the photograph: “[the photograph is] upsetting but it should be. It’s an upsetting case. Somebody lost their life and that’s what we’re going to be talking about. And the jury needs to know that... [I]t’s a homicide case and a person’s life was lost and so we’re expected to see upsetting photographs. Is it prejudicial? Absolutely.” R.273-274. Weighed together, the limited probative value of the photograph was substantially

⁶ *State v. Poe*, 441 P.2d 512, 515 (Utah 1968).

outweighed by the danger of unfair prejudice. Thus, the trial court abused its discretion by admitting the photograph.

III. The Trial Court Erred in Denying Mr. Holm's Request to Define "Simple Negligence" for the Jury.

A. General Law regarding Requested Jury Instructions.

"A trial court has a duty to instruct the jury on the law applicable to the facts of the case." *State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992). "The defendant has a right to have his or her theory of the case presented to the jury in a clear and understandable way. However, ... it is not error to refuse a proposed instruction if the point is properly covered in the other instructions." *Id.*

"Whether the trial court's refusal to give a proposed jury instruction constitutes error is a question of law, which we review for correctness." *Id.* The appellate court "review[s] jury instructions in their entirety to determine whether the instructions, taken as a whole, fairly instruct the jury on the applicable law." *State v. Stringham*, 957 P.2d 602, 608 (Utah App. 1998).

The trial court denied Mr. Holm's request to define "simple negligence" for the jury. *See* R.172, 177, 190, 16-720, 726-727. Mr. Holm's requested jury instruction defining "simple negligence" is attached as Addendum C.

B. The Trial Court Erred in Refusing Mr. Holm's Requested Jury Instruction.

At trial, Mr. Holm did not dispute that he ran a red light and caused the death of another person. However, the entire theory of Mr. Holm's defense was that he did not act with criminal negligence, but rather acted with simple negligence. An instruction

defining a term is necessary when the term “has a technical legal meaning so different from its ordinary meaning that the jury, without further explanation, would misunderstand its import in relation to the factual circumstances.” *State v. Ekstrom*, 2013 UT App 271, ¶ 15, 316 P.3d 435 (citation omitted).

Mr. Holm was entitled to have a jury instruction that clearly defined the ordinary standard of care – *i.e.*, simple negligence – in order to present his theory of the case to the jury in “a clear and understandable way.” *Hamilton*, 827 P.2d at 238. Mr. Holm’s requested jury instruction defining “simple negligence” is directly from the Utah Model Jury Instructions, attached as Addendum D, which states: “Simple negligence means failing to exercise that degree of care which reasonable and prudent persons exercise under like or similar circumstances.” At trial, it appears the trial court denied Mr. Holm’s requested definition based on the State’s argument, *see* R.717-719, that it was inappropriate to include the definition of “simple negligence” due to the Committee

Notes of the Utah Model Jury Instruction which states:

[The “simple negligence”] instruction will be used in only very limited criminal prosecutions, such as Utah Code Ann. §§ 76-5-207(2)(c), Automobile Homicide, or 76-10-1206, Dealing in Material Harmful to a Minor; *see also State v. Haltom*, 2007 UT 22. Although the Committee is only aware of these two statutes, caution should be exercised to ensure the appropriate mental state instruction is used in criminal cases where negligence is asserted.

The basis of the Committee Note is that there are very limited crimes – in fact only two crimes of which the Committee is aware – in which “simple negligence” is the actual requisite mens rea. However, the Committee Note does not and should not preclude a defendant, such as Mr. Holm, from presenting an alternative mens rea under which he

acted in arguing to the jury that he did not act with the mens rea of the statute under which he is charged. It was important in this type of case in particular where the two types of mens rea at issue (criminal negligence v. simple negligence) have similarities but important differences.

Mr. Holm recognizes that it is not error for a trial court to refuse a requested jury instruction if “the point is properly covered in the other instructions.” *Hamilton*, 827 P.2d at 238. However, the jury had no clear definition from the other jury instructions as to Mr. Holm’s theory of the case – that he was not guilty because he at most acted with “simple negligence.” The only arguable jury instruction which could have given the jury guidance as to the definition of “simple negligence” is Jury Instruction 27 which states:

Conduct is not criminally negligent unless it constitutes a “gross deviation” from the standard of care exercised by an ordinary person. Ordinary negligence, which is the basis for civil action for damages, is not sufficient to constitute criminal negligence. Mere inattention or mistake in judgment resulting even in death of another is not criminal unless the quality of the act makes it so. Criminal negligence must be more than the lack of ordinary care and precaution; it must be something more than mere inadvertence or misadventure.

See R.214.⁷

Although Jury Instruction 27 uses the term “ordinary negligence,” it does not define it and only discusses that it must be more than certain things. In addition, Jury Instruction 27 is inadequate because, among other things, it makes it appear that “ordinary negligence’s” domain is limited to civil actions, something that the Utah

⁷ The language from Jury Instruction 27 was taken from *State v. Larsen*, 2000 UT App 106, ¶ 18, 999 P.2d 1252.

Supreme Court has rejected. *See State v. Haltom*, 2007 UT 22, ¶ 8, 156 P.3d 792 (stating that “[o]rdinary negligence is, of course, the basis for civil damage actions. Its domain is not, however, bounded to civil actions.”).⁸ It was necessary for the jury to understand clearly the legal distinction between simple negligence and criminal negligence. By not having the definitions of both simple and criminal negligence, Mr. Holm was unable to present his defense in a clear and understandable way.

C. The Instruction Error Prejudiced Mr. Holm.

Generally, this Court will reverse for an instruction error “if a review of the record persuades the Court that without the error there was a reasonable likelihood of a more favorable result for the defendant.” *State v. Fontana*, 680 P.2d 1042, 1048 (Utah 1984). In other words, Mr. Holm need not show “that the jury would have more likely than not” returned a different verdict but for the instruction errors. *State v. Hales*, 2007 UT 14, ¶ 92, 152 P.3d 321. Rather, error is prejudicial if there is “a probability sufficient to

⁸ While arguing jury instructions at trial, the parties disagreed as to whether there is a legal distinction between “ordinary negligence” and “simple negligence.” *See* R.719-728. It was and still is Mr. Holm’s position that the two are the same and that the definition of “simple negligence” in the Utah Model Jury Instruction is used in both civil and criminal contexts. *See, e.g., State v. Haltom*, 2007 UT 22, ¶ 8, 156 P.3d 792 (stating that although “ordinary negligence” is the basis for civil actions, “[i]ts domain is not ... bounded to civil actions”); *Mitchell v. Pearson Enter.*, 697 P.2d 240, 243 n.8 (Utah 1985) (defining “negligence” in the context of a wrongful-death action as “the failure to do what a reasonable and prudent person would have done under the circumstances”); *Meese v. Brigham Young Univ.*, 639 P.2d 720, 723 (Utah 1981) (defining “negligence” in the setting of a personal-injury case as “the failure to do what a reasonable and prudent person would have done under the circumstances”); *State v. Chavez*, 605 P.2d 1226, 1227 (Utah 1979) (stating that the definition of “simple negligence,” that is “used generally in tort cases,” is “the failure to do what a reasonable and prudent person would have done under the circumstances”).

undermine [the Court's] confidence in the outcome.” *Id.* Here, there was a reasonable probability of a different result but for the instruction error.

There was evidence to support Mr. Holm's theory of defense that although he may have been negligent, he did not act with criminal negligence. The parties did not dispute that Mr. Holm was driving the speed limit at the time of the accident and that he did not have alcohol or drugs in his system. R.479, 501. Although others were not confused with the layout of the intersection,⁹ there was no dispute that it was a unique intersection and unlike any of the previous intersections that Mr. Holm – who had only driven previously through the 201-Overpass Intersection as the driver a few times – had driven through that morning. R.527, 540, 652-653, 685-686. Mr. Holm erroneously thought he had a green light.

This case is similar to *State v. Larsen*, 2000 UT App 106, ¶¶ 3-7, 999 P.2d 1252, discussed more fully in Section IV below, a negligent homicide case where the defendant failed to yield to oncoming traffic and caused an accident that resulted in the death of another. The *Larsen* court reversed defendant's conviction by concluding that there was insufficient evidence to establish that the defendant acted with criminal negligence in causing the accident. *Id.* at ¶ 22. In so deciding, the *Larsen* court discussed the differences between criminal negligence and ordinary negligence and stated that although the defendant's conduct was “apparently negligent, [it did] not rise to the level of criminal negligence. Defendant's conduct is more accurately characterized as a serious mistake in judgment.” *Id.* at ¶ 20.

⁹ R.401, 414, 436, 458, 518-520, 616.

Had the jury had both definitions of criminal and simple negligence, there was a reasonable likelihood of a more favorable result for Mr. Holm. By having both legal definitions, the jury would have been able to compare the two – like the court did in *Larsen* – and understand that although Mr. Holm’s actions were a serious mistake in judgment and outside the ordinary standard of care, his actions did not rise to the level of criminal negligence. The instruction error prevented Mr. Holm from presenting a complete defense which error seriously calls into question the jury’s verdict.

IV. There is Insufficient Evidence that Mr. Holm Committed the Crime of Negligent Homicide.

If the prosecution fails to produce “believable evidence of the all elements of the crime charged, the trial court must dismiss the charges.” *State v. Hamilton*, 2003 UT 22, ¶ 41, 70 P.3d 111 (citation omitted). “[I]f upon reviewing the evidence and all inferences that can be reasonably drawn from it, the court concludes that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable, [the Court] will uphold the denial of a motion to dismiss.” *Id.*

This Court “will reverse only if the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.” *State v. Gonzales*, 2000 UT App 136, ¶ 10, 2 P.3d 954 (quotation omitted). Though the burden of establishing insufficiency of the evidence “is high, it is not impossible.” *Id.* (citation omitted). This Court “will not make speculative leaps across gaps in the evidence.” *Id.* (citation omitted). “Every element of the crime charged must be proven beyond a reasonable doubt.” *Id.* (citation omitted). In other

words, this Court “must be sure the [State] has introduced evidence sufficient to support all elements of the charged crime.” *Id.* (citation omitted).

Under Rule 24(a)(9) of the Utah Rules of Appellate Procedure, Mr. Holm presents the marshaled evidence:¹⁰

1. A few miles prior to the accident, the Granges observed what they believed to be Mr. Holm’s vehicle weaving out of his lane of travel and speeding at a high rate of speed between 5400 South and 4100 South. R.409, 418, 431, 438. They also believed Mr. Holm was speeding at the time of the accident. R.423, 441.
2. As Mr. Holm approached the 201-Overpass Intersection, he saw a traffic signal with a green light and mistakenly thought it was his light but testified that one can clearly see that the correct traffic signal is visible and clear. R.635, 660-664. 650, 652, 666-667.
3. The layout of 201-Overpass Intersection and its traffic signals is different and unique from standard intersections and the previous intersections Mr. Holm drove through that morning. R.685.
4. Mr. Holm drove the same route as the driver two to three times prior to

¹⁰ In *State v. Nielsen*, 2014 UT 10, ¶ 41, 326 P.3d 645, our supreme court “repudiate[d] the default notion of marshaling.” It also “repudiate[d] the requirements of playing ‘devil’s advocate’ and of presenting ‘every scrap of competent evidence’ in a ‘comprehensive and fastidious order.’” *Id.* at ¶ 43. While marshaling maintains an important role in challenging the sufficiency of the evidence on appeal, the focus on this Court’s analysis should “be on the merits, not on some arguable deficiency in the appellant’s duty of marshaling.” *Id.* at ¶ 42.

September 22, 2012. R.617, 626, 652-653, 676.

5. Mr. Holm ran a red light and caused an accident that resulted in the death of Mr. Garcia. R.415, 472. Mr. Holm did not apply his brakes before entering the intersection and causing the accident. R.423, 435, 444.
6. Mr. Holm was driving 50 mph – the speed limit – when the accident occurred, which neither party disputed and which was the estimate of the State’s accident-reconstruction expert. R.501, 629, 649, 678, 691.
7. There was no alcohol or controlled substances in Mr. Holm’s blood at the time of the accident. R.479.
8. At the time of the accident, Mr. Holm was not on his cell phone, was wearing his properly prescribed glasses, was not adjusting the radio, was not eating anything, and was not driving drowsy. R.627, 647-648, 650.
9. Ms. Daybell believes that Mr. Holm did not have his headlights on at the time of the accident. R.452, 454, 457-458. Detective Mower observed after the accident that Mr. Holm’s vehicle had its headlight switch in the first position, meaning that the vehicle’s rear red lights and front two amber lights would be illuminated but not the front headlights. R.485-486, 488, referencing State’s Exhibit 17. Neither Detective Mower nor paramedics turned Mr. Holm’s headlight switch off or adjusted them in any way. R.487, 603-604.
10. Mr. Holm was running a few minutes late to work when the accident occurred and was expected to be there on time. R.482, 596, 623.

11. Other people who are familiar with the 201-Overpass Intersection are not confused with the intersection's layout or its traffic signals. R.401, 414, 436, 458, 616, 621. There have been no other major crashes at the same location at issue from 2012-2015. R.518-520.

Although at trial Mr. Holm disputed some of the evidence – such as that he was weaving multiple times out of his lane of travel around 4700 South, that he was speeding, and that he did not have his headlights on at the time of the accident – Mr. Holm recognizes that for purposes of this issue on appeal, the Court views the evidence in the light most favorable to the verdict. However, evidence that the parties did not dispute at trial was that at the time of the accident Mr. Holm was going to the speed limit, he did not have any alcohol or drugs in his system, that the 201-Overpass Intersection is different and unique from the other intersections Mr. Holm drove through that morning, and that Mr. Holm had driven through 201-Overpass Intersection as the driver only a few times previously. R.479, 501, 527, 540, 652-653, 685-686.

In a factually similar case, the Utah Court of Appeals reversed a negligent-homicide conviction for insufficiency-of-the-evidence. *See Larsen*, 2000 UT App 106. In *Larsen*, the defendant driver made a left turn at a normal speed at an intersection and collided with an oncoming car (that had the clear right-of-way); the other vehicle would have been visible to the defendant had he been looking. The defendant did not apply his brakes or try to swerve before the other car collided with him. *Id.* at ¶ 18. The defendant had an open container of alcohol in his truck, had a small amount of alcohol in his system, did not have his headlights on (it was dusk at the time of the accident), and failed

to activate his turn signal before turning. *Id.* at ¶¶ 6-7. One of the passengers in the oncoming car was killed as a result of the collision, and the defendant was convicted of negligent homicide. *Id.* at ¶¶ 7-8. The defendant challenged the sufficiency of the evidence on appeal and the Utah Court of Appeals determined that while the defendant's conduct was negligent, it was not a gross deviation from the standard of care. *Id.* at ¶ 24. According to the *Larsen* court, there was no nexus between the collision and the presence of alcohol, the absence of headlights, or inactivated turn signal. *Id.* at ¶ 20. While the defendant's conduct was "apparently negligent, [it] did not rise to the level of criminal negligence. Defendant's conduct is more accurately characterized as a serious mistake in judgment." *Id.* at ¶ 21. The *Larsen* court determined that the state's evidence was insufficient to establish that the defendant acted with criminal negligence and reversed his conviction. *Id.* at ¶ 21.

Like the defendant in *Larsen*, although Mr. Holm may have been negligent, his conduct was not a gross deviation from the standard of care. Both Mr. Holm and the *Larsen* defendant were going the speed limit at the time of the accident; both did not apply their brakes or try to swerve before colliding with the car; both did not have their headlights on when they should have (and the failure to have their headlights on did not contribute to either accident); and both collided with an oncoming car due to a failure to stop or yield when they should have been looking properly but failed to do so. If anything, Mr. Holm was less at fault than the defendant in *Larsen* who at the time of the accident had also failed to signal and had alcohol in his system. *Id.* at 20. Like the court in *Larsen*, Mr. Holm respectfully asks this Court to reverse his conviction for negligent

homicide because the facts do not support the jury's determination that he acted with criminal negligence. Mr. Holm's conduct, like the defendant is *Larsen*, can be "more accurately characterized as a serious mistake in judgment." *Id.* at ¶ 21.

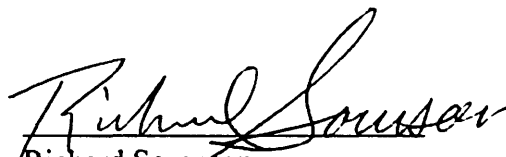
V. The Cumulative Errors Require Reversal.

Considering "all the identified errors" addressed above, "as well as any other errors [this Court] assume[s] may have occurred," this Court should reverse because "the cumulative effect of the several errors undermines [] confidence ... that a fair trial was had." *State v. Kohl*, 2000 UT 35, ¶ 25, 999 P.2d 7 (final alteration in original). Here, the trial court erroneously prohibited Mr. Holm from conducting complete voir dire, admitted prejudicial evidence, refused to instruct the jury as to Mr. Holm's theory of the case, and denied Mr. Holm's motion or a directed verdict. The cumulative effect of these errors undermines confidence that Mr. Holm had a fair trial.

CONCLUSION

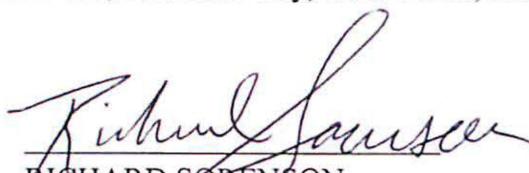
Mr. Holm asks this Court to reverse his conviction for insufficiency of the evidence. In the alternative, Mr. Holm asks this Court to reverse and remand for a new trial.

SUBMITTED this 19th day of February, 2016.


Richard Sorenson
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Richard Sorenson, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Salt Lake District Attorney's Office, 111 East Broadway, Ste. 400, Salt Lake City, Utah 84111, this 19th day of February, 2016.


RICHARD SORENSON

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 11,632 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.


RICHARD SORENSON

DELIVERED to the Salt Lake District Attorney's Office, 111 East Broadway, Ste. 400, Salt Lake City, Utah 84111 and the Utah Court of Appeals as indicated above this 19 day of February, 2016.



Tab A

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

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 131905377 MO
CARL JOHN HOLM,	:	Judge: KATIE BERNARDS-GOODMAN
Defendant.	:	Date: July 10, 2015

PRESENT

Clerk: melodys

Prosecutor: LEAVITT, PETER D

Defendant

Defendant's Attorney(s): SORENSON, RICHARD G

DEFENDANT INFORMATION

Date of birth: March 12, 1964

Sheriff Office#: 368998

Audio

Tape Number: S41 Tape Count: 4.00

CHARGES

1. NEGLIGENCE HOMICIDE - Class A Misdemeanor

Plea: Not Guilty - Disposition: 05/14/2015 Guilty

SENTENCE JAIL

Based on the defendant's conviction of NEGLIGENCE HOMICIDE a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s)

Credit is granted for time served.

Credit is granted for 67 day(s) previously served.

SENTENCE TRUST NOTE

00254

Case No: 131905377 Date: Jul 10, 2015

Restitution is left open.

Date: _____

KATIE BERNARDS-GOODMAN
District Court Judge

00255

Tab B



Tab C

JURY INSTRUCTION ____

A person acts with criminal negligence when he should be aware of a substantial and unjustifiable risk that certain circumstances exist relating to his conduct or the result will occur. The nature and extend of the risk must be of such a magnitude that failing to perceive it is a gross deviation from what an ordinary person would perceive in all the circumstances as viewed from the actor's standpoint.¹

A person acts with simple negligence when he fails to exercise that degree of care which reasonable and prudent persons exercise under like or similar circumstances.²

"Conduct" means either an act or an omission to act.

Denied including this instruction 00190

Tab D

CR305 Simple Negligence.

Simple negligence means failing to exercise that degree of care which reasonable and prudent persons exercise under like or similar circumstances.

References

State v. Haltom, 2007 UT 22, ¶8, 156 P.3d 792.

Meese v. Brigham Young Univ., 639 P.2d 720, 723 (Utah 1981).

Committee Notes

This instruction will be used in only very limited criminal prosecutions, such as Utah Code Ann. §§ 76-5-207(2)(c), Automobile Homicide, or 76-10-1206, Dealing in Material Harmful to a Minor; see also *State v. Haltom*, 2007 UT 22. Although the Committee is only aware of these two statutes, caution should be exercised to ensure the appropriate mental state instruction is used in criminal cases where negligence is asserted.