

2002

## Utah v. Michael Gene Triptow : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	)	
	)	Case No. 20020162-1A
Plaintiff / Appellee,	)	
	)	
v	)	
	)	
MICHAEL GENE TRIPTOW,	)	
	)	
Defendant Appellant.	)	

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REPLY BRIEF OF APPELLANT

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Appeal from Amended Judgment and Commitment to the Utah State  
Prison entered on January 24, 2002, in the Second District  
Court, Davis County, the Honorable Rodney S. Page, presiding

---

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**FILE**  
Utah Court of Appeals

DEC 16 2002

Paulette Stagg  
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	)	
	)	Case No. 20020163-CA
Plaintiff / Appellee,	)	
	)	
v.	)	
	)	
MICHAEL GENE TRIPTOW,	)	
	)	
Defendant / Appellant.	)	

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AMENDED CERTIFICATE OF SERVICE

---

I, Scott L Wiggins, hereby certify that I personally caused to be hand-delivered (2) true and correct copies of the **REPLY BRIEF OF APPELLANT** to the following on this 18th day of December, 2002:

Mr. Christopher D. Ballard  
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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	)	
	)	Case No. 20020163-CA
Plaintiff / Appellee,	)	
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v.	)	
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**STATUTES CITED**

None.

**RULES CITED**

None.

**DETERMINATIVE AUTHORITY**

See cases, etc., cited above . . . . .in passim



## **ARGUMENT**

### **I. RECENT SUPREME COURT CASE LAW INDICATES THAT INSUFFICIENCY-OF-THE-EVIDENCE ISSUES NEED NOT BE RAISED OR PRESERVED BEFORE THE TRIAL COURT FOR CONSIDERATION BY THIS COURT.**

Citing *State v. Holgate*, 2000 UT 74, 10 P.3d 346 and *State v. Marquez*, 2002 UT App. 127, the State contends that “[a] defendant must raise the sufficiency of the evidence by proper motion or objection to preserve the issue for appeal.” See Brief of Appellee, pp. 8-9). The State’s argument, however, fails to consider recent case law from the Utah Supreme Court that is in direct contravention to its position.

In *State v. Fedorowicz*, 2002 UT 67, the Utah Supreme Court recently considered an insufficiency-of-the evidence argument for the first time on appeal. The appellant asserted that an insufficiency argument need not be raised or preserved before the trial court. See Brief of Appellant, p. 1. The State did not argue otherwise. See Brief of Appellee, p. 2. Without reference to a rule that might bar consideration, the Utah Supreme Court proceeded to consider the insufficiency-of-the-evidence issue. See *id.* at ¶¶40-44.

In *State v. Honie*, 2002 UT 4, which was decided prior to *Fedorowicz*, the Utah Supreme Court also addressed an insufficiency-of-the-evidence claim for the first time on appeal.

See *id.* at ¶¶43-51. Although the Court noted the general rule set forth in *Holgate*, the Court proceeded to consider the argument of insufficiency of the evidence for "manifest or prejudicial error." See *id.* at ¶44.

The foregoing case law demonstrates, at the very least, that insufficiency-of-the-evidence issues may be considered for the first time on appeal. Consequently, the insufficiency-of-the-evidence argument is squarely before this Court for due consideration.<sup>1</sup>

**II. THERE IS NO CONCEIVABLE LEGITIMATE TACTIC OR STRATEGY TO BE SURMISED FROM APPOINTED TRIAL COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION FOR A LESSER INCLUDED OFFENSE.**

The State argues that an instruction for the lesser included offense of receiving stolen property "would have been inconsistent with counsel's trial strategy." See Brief of Appellee, pp. 13-14. However, the record reveals that no conceivable legitimate tactic or strategy can be surmised from appointed trial counsel's failure to request such an instruction.

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<sup>1</sup>In its Brief, the State argues that Mr. Triptow failed to marshal various facts in the course of marshaling the evidence. See Brief of Appellee, p. 11. The State, however, neglects to mention that all of the "important facts" listed in its Brief are included within the evidence specifically marshaled by Mr. Triptow in his Brief of Appellant. See Brief of Appellant, pp. 16-18.

According to Utah case law, "[a]n ineffectiveness claim 'succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions.'" *State v. Perry*, 899 P.2d 1232, 1241 (Utah Ct. App. 1995) (quoting *State v. Tennyson*, 850 P.2d 461, 468 (Utah Ct. App. 1993) (citing *State v. Moritzsky*, 771 P.2d 688, 692 (Utah Ct. App. 1989))). Consequently, "this court will not second-guess trial counsel's legitimate strategic choices, however flawed those choices might appear in retrospect." *Id.* (quoting *Tennyson*, 850 P.2d at 465 (citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct 2052, 2065 (1984))).

Not just any conceivable tactic or strategy is sufficient to defeat a claim of ineffective assistance of counsel. Rather, the tactic or strategy must be legitimate and well-founded. See *id.* (quoting *Tennyson*, 850 P.2d at 468) (citation omitted).

In *State v. Perry*, 899 P.2d 1232 (Utah Ct. App. 1995), this Court addressed a contention that trial counsel was ineffective by, among other things, failing to request a jury instruction for the lesser included offense of aggravated assault. *Id.* at 1238. This Court affirmed the defendant's conviction of aggravated kidnaping, concluding that trial counsel's strategy was to claim misidentification, or alternatively, to demonstrate that the State

had failed to show any aggravation - not that the defendant had been involved in a lesser offense. *Id.* at 1241.<sup>2</sup>

In the instant case, appointed trial counsel's argument focused almost exclusively on Mr. Triptow's nonparticipation in the burglary or theft of the Webb property (See, e.g., R. 148, pp. 52-54, p. 56, p. 81). At no time did appointed trial counsel present any evidence or substantive explanation for the stolen property that had been taken from the Webb garage that was subsequently found in Mr. Triptow's vehicle. Instead, appointed trial counsel chose to underscore the fact that "other" stolen property had been found in Mr. Triptow's vehicle, and that Mr. Triptow "knew or should have known, if he didn't know," that the other property had been stolen (See R. 148, pp. 43-44).<sup>3</sup>

Contrary to the State's argument, the record demonstrates that appointed trial counsel did not make a strategic decision not to request an instruction on a lesser included offense. For example, shortly before resting, appointed trial counsel

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<sup>2</sup>In *Perry*, at a hearing before the trial court during which the defendant's claims of ineffective assistance of counsel were considered, trial counsel expressly stated that to have requested an instruction for the lesser included offense of aggravated assault would have been wholly "incompatible" with his strategy. *State v. Perry*, 899 P.2d 1232, 1241 (Utah Ct. App. 1995).

<sup>3</sup>A copy of appointed trial counsel's opening statement is set forth as Addendum A to this Reply Brief of Appellant (See R. 148, pp. 42-45).

stipulated "that the property referred to in Count 2 which [sic] an allegation of theft, that that the property was found in the van that Michael Triptow was driving . . . ." (See R. 148, p. 79). Appointed trial counsel further stipulated "that the property referred to in Count 3 which is the theft by receiving stolen property which is also called possession of stolen property, that that property was also found in the van that Mr. Triptow was driving . . . ." (See *id.*).

An instruction on the lesser included offense of theft by receiving stolen property would have been wholly consistent with the theory of the case that Mr. Triptow did not participate in the burglary or theft of the Webb property. Moreover, an instruction on the lesser included offense is a logical extension of that theory and would have provided the jury with a legitimate alternative for purposes of a conviction. This legitimate extension is demonstrated by the prosecutor's factual scenario presented during closing argument, explaining how Mr. Triptow knew what his "buddy" was doing (See R. 148, pp. 124-25).<sup>4</sup>

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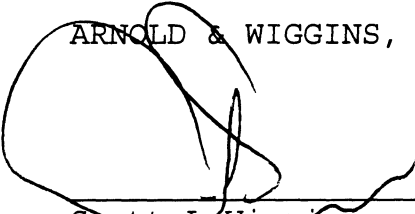
<sup>4</sup>A copy of the prosecutor's factual scenario that explains Mr. Triptow's knowledge is set forth in Addendum B to this Reply Brief of Appellant (See R. 148, pp. 124-25).

### CONCLUSION

Based on the foregoing, as well as that forth in the previously submitted Brief of Appellant, Michael G. Triptow, respectfully requests that this Court vacate his convictions, and that the Court remand the case for further proceedings consistent with the instructions set forth in its opinion, and for such other relief as the Court deems just and appropriate under the circumstances of this case.

RESPECTFULLY SUBMITTED this 16th day of December, 2002.

ARNOLD & WIGGINS, P.C.



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**CERTIFICATE OF SERVICE**

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 17th day of December, 2002:

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\_\_\_\_\_  
Scott L. Wiggins

## **ADDENDA**

- Addendum A: Transcript of Appointed Trial Counsel's  
Opening Statement (R. 148, pp. 42-45)
- Addendum B: Transcript of Portion of Prosecutor's  
Closing Argument (R. 148, pp. 124-25)



Tab A

1 find beyond a reasonable doubt when you use your common sense  
2 and ask what is reasonable here, what's reasonable inferences  
3 and explanations, that the evidence is going to show you that  
4 Mr. Triptow was involved and committed himself or with another  
5 party as a party, an accomplice, all three of the crimes  
6 mentioned and charged in the information today. And that in  
7 good conscious and good faith and being fair, after you hear  
8 the evidence you will be able to render a guilty of burglary, a  
9 verdict of guilty on all three counts.

10 THE COURT: Thank you, Mr. Rawlings.

11 Mr. Cella?

12 MR. CELLA: Thank you, Judge. Most of what Mr.  
13 Rawlings has said we don't want to dispute. We don't dispute  
14 that this lady's house in Farmington was burglarized. We don't  
15 dispute that somebody entered into her garage and took some  
16 stuff out of her garage. But one of the things that Mr.  
17 Rawlings didn't really talk about was the fact that there were  
18 two people there that night. Mrs. Smith will testify today and  
19 she'll talk about how there were two people that she saw. We  
20 don't know what this other guy was doing there. Mr. Triptow,  
21 however, what the evidence will be when talked to this officer  
22 over here, when he was questioned that night, he said I'm in  
23 this neighborhood to find a girl I know. We don't know what  
24 the other guy was doing while this was going on and what he'd  
25 done before but that would explain Mr. Triptow's presence in

1 the neighborhood that night and that's what he was doing there.  
2 Like I say, I don't have any information about the other fellow  
3 and it appears that it probably did burglarize, the other  
4 fellow probably did burglarize this lady's house because the  
5 property was found abandoned and Mr. Triptow and this other  
6 individual (inaudible). So this other individual pretty  
7 clearly is guilty of burglary. The question is whether or not  
8 they can prove beyond a reasonable doubt that Mr. Triptow  
9 committed that burglary.

10 It's important to remember that right now Mr. Triptow  
11 starts off innocent. We don't have to prove anything. We  
12 don't have to call any witnesses. I don't have to present a  
13 theory. I don't have to argue anything. I don't have to prove  
14 who did it. I don't have to prove who didn't do it. The State  
15 has to prove every element of the burglary charge and the theft  
16 charge connected to that burglary to you beyond a reasonable  
17 doubt. I don't have to prove he didn't do it. Because how you  
18 prove a negative? It's just not going to happen.

19 Now, in the van in which Mr. Triptow was driving  
20 there was this other property which was taken from Bountiful on  
21 a previous occasion. And Mr. Triptow knew or should have  
22 known, if he didn't know, he should have known that this  
23 property was stolen, this other property from the other  
24 burglary in Bountiful. Like I said, we don't dispute that  
25 count and that's Count 3 and at the conclusion of the case

1 we'll ask you find Mr. Triptow guilty of Count 3 which is that  
2 a theft case because we don't dispute that. That was taken  
3 from a different, a different case and he's not charged with  
4 the burglary, he's just charged with having in his possession  
5 property which he knew or should have known was stolen. That's  
6 all they can charge him with on that Count 3. We don't dispute  
7 that. He had in his possession property which he knew or  
8 should have known was stolen. We do dispute the burglary and  
9 the theft charge connected to the burglary. This other guy  
10 that Mr. Triptow was with that night, it appears to be he did  
11 it. That's the person that's guilty of the burglary and not  
12 Mr. Triptow.

13 And, Judge, while we were busy striking, striking  
14 some of you and sending some of you on your way, you guys were  
15 probably all wishing you had said you were all Canadians so you  
16 could (inaudible). While you were doing that, while we were  
17 doing that I think the Judge was talking to you about the right  
18 to a jury trial and how it's not guaranteed in very many  
19 criminal justice systems in the world and ours is one of the  
20 view. Our criminal justice system comes from England and  
21 that's where we got our criminal justice concept from. But  
22 really in England you didn't have a right to a trial by jury  
23 until 1215. You heard about Magna Carta and King John had  
24 (inaudible) and he got caught by the Lords and they said hey,  
25 we don't want to be tried by (inaudible), we want to be tried by

1 people like us. And so, really, since 1215 you've had a right  
2 to a trial by your peers and you are the peers of Mr. Triptow  
3 today.

4 And one of the other things that was granted  
5 (inaudible) of 1215 which has been the staple to the criminal  
6 justice system since then is that you're not guilty unless you  
7 can proven guilty beyond a reasonable doubt. And they can't  
8 prove that he committed this burglary and the theft connected  
9 to that burglary beyond a reasonable doubt.

10 THE COURT: Thank you, Mr. Cella.

11 Mr. Rawlings, you may call your first witness.

12 MR. RAWLINGS: Your Honor, we would call Kathy Smith.

13 THE COURT: Kathy Smith? Ms. Smith, would you step  
14 up here, please? If you'll come right up here. Come right  
15 here if you would, raise your hand and face the clerk and  
16 she'll place you under oath.

17 KATHY SMITH

18 having first been duly sworn, testified  
19 upon her oath as follows:

20 THE COURT: If you'll have a seat up here, please,  
21 and pull that chair right up in front of that microphone.

22 DIRECT EXAMINATION

23 BY MR. RAWLINGS:

24 Q Good morning, ma'am.

25 A Morning.

Tab B

1 about why is Triptow found here and the van is found over here  
2 and that the other guy does all this unbeknownst to Mr.  
3 Triptow. Well, I would submit to you this, ladies and  
4 gentlemen of the jury, a couple of different theories that  
5 answer that. Number 1, is the time. Mr. Cella, himself,  
6 brought out through Officer Winkelman it could have been as  
7 much as maybe ten minutes from the time of Kathy Smith calls  
8 until it's dispatched, three more minutes until he gets there.  
9 There is plenty of time for Mr. Triptow to have driven the van  
10 around, to have gotten out and walked around to have been  
11 heading back this way.

12 But I'd also submit to you this, let's say that Mr.  
13 Cella's theory is correct. Mr. Triptow's walking back around  
14 this way, the other guy steals the stuff, jumps in the van and  
15 brings it this way. How does Triptow know it? If the other  
16 guy does all this, why does Mr. Triptow, how is walking back  
17 this way heading toward the van if he doesn't know what his  
18 buddy is doing? Because he knew. When Officer Winkelman  
19 confronts him the van is right over here, they're right by it.  
20 You know, they go over to it, they look in the van. Mr.  
21 Triptow never says, hey, I don't know how that van got here. I  
22 parked it down here. Somebody else must have brought that van  
23 around. He never offers than explanation, ladies and gentlemen  
24 of the jury because he knew where the van was. So, whether  
25 Triptow drove it there himself and got out and walks over here

1 or whether his buddy does it while he comes around this way, he  
2 knew where his buddy was going and he knew the van was going to  
3 be here, that's why he's heading there for a rendezvous. Mr.  
4 Triptow never expressed surprise to Officer Winkelman,  
5 according to his testimony, that the van is sitting up here and  
6 he's come in proximity to it. And why? Because he knew it was  
7 there. If he wouldn't have, if their explanation holds water,  
8 he would have expressed to the officer that I parked the van  
9 way down there. I don't know how it got up here. Somebody  
10 else must have stole that stuff and drove my van here because I  
11 parked it way down there. But he never said that because he  
12 knew the van was there either because he drove it himself or  
13 the other guy who only Mr. Triptow knows, who was never  
14 apprehended so unfortunately we couldn't bring him here today  
15 to testify because we don't know who he is - only Triptow does  
16 because he knows what the other guy was up to, too. And I'll  
17 submit to you there is a rationale explanation for why Mr.  
18 Triptow is out there by the van whether he took it around or  
19 the buddy took it around, he knew the rendezvous point.

20 THE COURT: Thank you, Mr. Rawlings.

21 Bailiff, if you'll step forward and be sworn.

22 (Whereupon the bailiff was sworn.)

23 THE COURT: Now, ladies and gentlemen, I again will  
24 send the jury instructions with you. Remember the verdict  
25 forms are at the back of the jury instructions. We'll send you