2016

State of Utah, Plaintiff/Appellee, v. Cullen Christopher Carrick, Defendant/Appellant : Brief of Appellee

Utah Court of Appeals

Case No. 20160249-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

CULLEN CHRISTOPHER CARRICK,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for burglary, a second degree felony, in the First Judicial District, Box Elder County, the Honorable Brandon J. Maynard presiding

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STATEMENT OF JURISDICTION

Defendant appeals from a conviction for burglary, a second degree felony. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2012).

STATEMENT OF THE ISSUES

1. Did the trial court properly deny Defendant's directed verdict motion, where the evidence showed that Defendant unlawfully entered the home of his deceased lover through a window when no one was home, exited five minutes later, and then fled?

Standard of Review. When reviewing a trial court's ruling on a directed verdict motion, this Court's standard of review is "highly deferential." *State v. Nielsen*, 2014 UT 10, ¶30, 326 P.3d 645. This Court "will uphold the trial

court's decision if, 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 doubt." *State v. Montoya*, 2004 UT 5, ¶29, 84 P.3d 1183.

2. Did the trial court properly admit a witness's prior inconsistent statement to impeach the witness, where the statement was not admitted for the truth of the matter asserted and was not used as evidence of Defendant's intent?

Standard of Review. This Court reviews "a trial court's evidentiary rulings for an abuse of discretion." *State v. Isaacson*, 2017 UT App 1, ¶9, 391 P.3d 364.

3. Was the trial court required to give sua sponte, or was defense counsel constitutionally compelled to seek, an instruction defining "intent" for the "intent to commit … theft" element of burglary, where its meaning is evident from its plain language?[1]

Standard of Review. The invited error doctrine precludes plain error review of the trial court's alleged error. *See State v. Geukgeuzian*, 2004 UT 16,

[1] This Point responds to Points III and IV in Defendant's brief.

¶9, 86 P.3d 742. "When a claim of ineffective assistance of counsel is raised for the first time on appeal, there is no lower court ruling to review, and this court must decide whether the defendant was deprived of effective assistance as a matter of law." *State v. Allgood*, 2017 UT App 92, ¶18, ___ P.3d ___ (citation and internal quotation marks omitted).

4. Has Defendant shown cumulative error, where he has not shown error, let alone any prejudice therefrom?[2]

Standard of Review. No standard of review applies to this issue.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

> U.S. Const. amend. VI;
> Utah Code Ann. § 76-6-202 (West Supp. 2014) (burglary);
> Utah Code Ann. § 76-6-206 (West Supp. 2012) (criminal trespass).

STATEMENT OF THE CASE

A. Summary of facts.

Defendant and April Taylor were lovers when April unexpectedly died. R612. April was married at the time, but her husband, Zakary, did not find out about the affair until a few days before April's death. R436-38.

[2] This Point responds to Point V in Defendant's brief.

Defendant and April had spent time at April and Zakary's home during their affair. R431,612. Defendant took April's death "really rough." R613.

April was Celeste Atkinson's best friend. R424. Celeste knew about April's affair with Defendant, and April had shown her photos of Defendant. R407,415,425. Celeste had also met Defendant once at April's home when she had visited April unexpectedly. R431. Celeste's husband, Steve, also knew about the affair and had seen the same photos. R407,415.

Over 100 people attended April's funeral, including neighbors and friends of the couple. R440. Defendant also attended, wearing a "western cowboy" hat with feathers on it. R319,363,406-07,427,614. Kristine Starkey, who was one of the Taylors' neighbors, and her daughter Jessica Roberts, who knew April and Zakary pretty well, both saw Defendant at the funeral. R319,321,360. Neither one of them knew Defendant at the time; but they both noticed his hat. R321,363.[3]

It was still daylight when Kristine and Jessica went to Kristine's home after the funeral. R323-24,325,370,406,625. When they arrived, they saw Defendant—still wearing his hat—walking down the Taylors' driveway to

[3] The funeral included a balloon release in the parking lot afterwards. R320-22. For ease of reference, the State refers to the funeral and balloon release as simply the funeral.

the back of the Taylors' house. R324,365-66,387. Kristine and Jessica then watched as Defendant carefully removed the screen from a window and crawled into the Taylors' garage. *Id.* Though they thought Defendant's conduct "weird," they did not call the police; Kristine figured Zakary had asked Defendant to stop at the Taylors' house to get something, and Jessica had just seen Defendant with April's cousin at the funeral. R326,366-67.

Kristine and Jessica went inside Kristine's house for about five minutes and then went back outside. R334,366,377. At that point, they saw Defendant crawl back out of the Taylors' garage window and then carefully replace the screen. R327,366. Kristine did not see Defendant carrying anything. R334. And when they waved at Defendant, Defendant waved back. R327-28,378.

Jessica tried to call a friend of the Taylors, Celeste Atkinson, to see if anyone was supposed to be at the Taylor home at the time. R367,370,384. Jessica then called the police. R369. As she did, Defendant walked back down the Taylors' driveway and left. R329. Kristine tried to follow Defendant, but Defendant had disappeared by the time she reached the end of the driveway. R329-30.

Just before Defendant left, Celeste and her husband arrived at the Taylors' home. R369,384. Both of them saw Defendant there. R407,427. Celeste called Steve and asked him what Defendant was doing there. R428.

Steve then saw Defendant get into a silver SUV that was waiting just south of the Taylors' home. R409. Steve didn't think to get the SUV's license plate number. R421.

By the time Officer Fielding arrived at the Taylors' home, several people had identified Defendant on Facebook. R379. Officer Fielding then looked up Defendant's name on his computer, got a picture of Defendant's license, and showed the picture to Jessica, who confirmed that he was the person who had just left the Taylors' home. R374,380,383,479.

One of the people who had gathered at the Taylors' home then called Defendant and, after Defendant answered, handed the phone to Officer Fielding. R380,457,479. Officer Fielding told Defendant that the officer was investigating a break-in of the Taylors' home, that numerous people had identified him as the perpetrator, and that the officer wanted Defendant's side of the story. R465. Defendant did not deny breaking into the Taylors' home; rather, after asking how important it was, Defendant said he was busy and on his way to Salt Lake City; Defendant then hung up. R466-67. Although Officer Fielding later left Defendant a message asking Defendant to call him, Defendant never returned Officer Fielding's phone call. R624.

Zakary Taylor had not given Defendant permission to enter the Taylors' home on the day of the funeral. R445-46. After the break-in, Zakary

noticed that golf clubs in his garage had been moved. R451,476. He did not, however, notice anything significant missing from his home. R444,453,481.

Defendant's defense. At trial, Defendant claimed that he never went to the Taylors' home on the day of April's funeral. R615. In support, he presented the testimony of several friends who were also at the funeral. R499,510,595,602. Those friends testified that they never saw Defendant leave the funeral. R502,504,511-12,597. Two of them further testified that after the funeral, Defendant hung out with them for the rest of the night. R597,603-04.

B. Summary of proceedings.

Defendant was charged with one count of burglary, a second degree felony. R13-14. Defendant waived his preliminary hearing. R43-45. At trial, the jury was also instructed on the lesser offense of criminal trespass. R97.

At the close of the State's case-in-chief, the defense moved for a directed verdict on both burglary and criminal trespass, which was denied. R489-96. The jury convicted Defendant of burglary. R130.

Defendant sought a reduction of his conviction under Utah Code Ann. § 76-3-402 (West Supp. 2014). R144-47. The court denied the motion, but told Defendant the court would consider a reduction upon Defendant's successful completion of probation. R176. The court then sentenced Defendant to a

suspended prison term of one-to-fifteen years, and placed him on three years of probation, with sixty days in jail. R185-88.

Defendant timely appealed. R193-94.

SUMMARY OF ARGUMENT

Point I. Defendant argues that the trial court erroneously denied his directed verdict motion. Concerning the burglary charge, Defendant argues the evidence was insufficient to establish the "intent to commit … theft" element. Concerning the criminal trespass charge, Defendant argues the evidence was insufficient to establish that when he entered the Taylors' home, he was "reckless as to whether his presence would cause fear for the safety of another."

A trial court may grant a directed verdict "only if, after examining all evidence in a light most favorable to the non-moving party, there is *no* competent evidence that would support a verdict in the non-moving party's favor." *Merino v. Albertson's, Inc.*, 1999 UT 14, ¶3, 975 P.2d 467 (emphasis added). Thus, if "there is any evidence, however slight or circumstantial, which tends to show guilt of the crime charged or any of its degrees, it is the trial court's duty to submit the case to the jury." *State v. Montoya*, 2004 UT 5, ¶3384 P.3d 1183 (citation and internal quotation marks omitted). Further, a

defendant's criminal intent is rarely susceptible to direct proof. Thus, it is well established that his intent can be proven by circumstantial evidence.

Here, the State presented ample evidence supporting Defendant's intent to commit a theft inside Zakary Taylor's home: Defendant was April Taylor's lover; their relationship was kept secret from April's husband, Zakary, until just before April died; Defendant had spent time at April's house before April's death; Defendant was "very upset" about April's death; Defendant went to April's funeral, where he presumably saw Zakary occupied; after the funeral, Defendant went to the Taylors' home, went into the back yard, carefully removed a screen from a garage window, and crawled into the Taylors' home through the window; about five minutes later, Defendant crawled back out the window and carefully replaced the screen; after responding to a neighbor waving at him, Defendant walked from the Taylors' home, quickly got into a waiting silver SUV, and left; when Officer Fielding called Defendant a short while later to ask what he was doing at the Taylors' home, Defendant said he was busy and hung up; Defendant did not return Officer Fielding's phone call when the officer later left a message asking him to do so; and Defendant did not have permission to enter the Taylors' home on the day of April's funeral.

This evidence—especially the brevity of Defendant's stay in the Taylors' home at a time he could reasonably believe Zakary would not be there and Defendant's unwillingness to talk with Officer Fielding afterward—supports a reasonable inference that Defendant unlawfully entered the Taylors' home with the intent to take something from the home. This evidence thus constitutes "some evidence … from which a reasonable jury could find that the elements" of burglary—particularly Defendant's intent to commit theft—"had been proven beyond a reasonable doubt." *Montoya*, 2004 UT 5, ¶29.

Concerning Defendant's intent for the trespass charge, Defendant entered the Taylors' home without permission when no one was home. R324,365-66,387,445-46. From this evidence, a reasonable jury could find, as a matter of common experience, that Defendant entered the home recklessly disregarding that anyone who might come upon him unexpectedly while he was in the home would likely experience fear for the person's safety. This evidence thus constitutes "some evidence … from which a reasonable jury could find," *Montoya*, 2004 UT 5, ¶29, that when Defendant entered the Taylors' home, he was "reckless as to whether his presence w[ould] cause fear for the safety of another."

Point II. During Defendant's case in chief, Celeste McCulley acknowledged on cross-examination that Zakary Taylor called her a few days after the funeral to ask why Defendant was at the Taylors' house on the day of the funeral. The prosecutor asked, "Isn't it true that you told Zakary Taylor that" Defendant "went to the house to get a momento or a token?" McCulley said, "No, I did not say that." In rebuttal, Zakary testified that when he called McCulley after the funeral, McCulley had told him that Defendant "was just in" the Taylors' home "looking for a momento or some—something sentimental." When Defendant objected to Zakary's testimony as hearsay, the court overruled the objection, ruling that "it's not offered for the truth," but rather "to impeach what [McCulley] denied."

Defendant argues that the trial court erred when it admitted McCulley's prior inconsistent statement through Zakary Taylor. Defendant asserts the error prejudiced him because the State used the statement as substantive evidence—for the truth of the matter asserted—during closing argument. Defendant's argument lacks merit.

First, a witness's prior inconsistent statement is admissible as substantive evidence under rule 804, Utah Rules of Evidence. Thus, Defendant got a windfall when the trial court ruled that it was admissible only for impeachment purposes. Second, the State did not reference

McCulley's statement during closing argument, let alone use it as substantive evidence of Defendant's guilt.

Point III. Defendant argues that the trial court plainly erred when it did not define "intent" for purposes of burglary's "intent to commit … theft" element. Alternatively, he argues that defense counsel was constitutionally ineffective for not requesting such an instruction. By twice informing the trial court that he had no additional instructions to give the jury, Defendant invited any error by the trial court. Thus, his plain error claim is precluded by the invited error doctrine. Defendant's ineffectiveness claim fails because objectively reasonable defense counsel could conclude that the plain meaning of "intent" sufficed to inform the jury of the term's definition.

Point IV. Defendant argues that his conviction must be reversed for cumulative error. Defendant, however, has not shown any trial court error or any ineffective assistance by his counsel. Because Defendant has not demonstrated any error, the cumulative error doctrine is inapplicable.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S DIRECTED VERDICT MOTION BECAUSE THE EVIDENCE WAS SUFFICIENT TO SUPPORT GUILTY VERDICTS

Defendant argues that the trial court erroneously denied his directed verdict motion on the burglary charge, asserting that the evidence was insufficient to support the "intent to commit theft" element of that offense. Aplt.Br. 26-33. Defendant also argues that the court erroneously denied his directed verdict motion on the trespass charge, asserting that the evidence was insufficient to support that when he entered the Taylors' home, he was "reckless as to whether his presence would cause fear for the safety of another." *Id.* Defendant's arguments fail because the intent as to each charge could be inferred from the evidence.

When reviewing a trial court's ruling on a directed verdict motion, this Court's standard of review is "highly deferential." *State v. Nielsen*, 2014 UT 10, ¶30, 326 P.3d 645. This Court upholds "the trial court's decision if, 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 doubt." *State v. Montoya*, 2004 UT 5, ¶29, 84 P.3d 1183. This is because a trial court "is justified in granting a directed verdict only if, after

examining all evidence in a light most favorable to the non-moving party, there is *no* competent evidence that would support a verdict in the non-moving party's favor." *Merino v. Albertson's, Inc.*, 1999 UT 14, ¶3, 975 P.2d 467 (emphasis added). Thus, if "there is any evidence, however slight or circumstantial, which tends to show guilt of the crime charged or any of its degrees, it is the trial court's duty to submit the case to the jury." *Montoya*, 2004 UT 5, ¶33 (citation and internal quotation marks omitted).

A. The burglary charge—jurors could reasonably infer from the evidence that Defendant unlawfully entered his deceased lover's home when no one was home to take something of sentimental value.

Defendant was charged with burglary of a dwelling, a second degree felony. R13-14. The State was thus required to prove that Defendant unlawfully entered another's dwelling "with intent to commit … theft." Utah Code Ann. § 76-6-202(1)(a), (2) (West Supp. 2014); *see also* R96 (Instr. 3A) (instructions attached at Addendum B).[4] On appeal, Defendant challenges only the sufficiency of the evidence supporting an entry into the Taylors' home "with intent to commit … theft." Aplt.Br. 28-30.

[4] "A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Utah Code Ann. § 76-6-404 (West 2004).

The "intent to commit theft is a state of mind, which is rarely susceptible of direct proof." *State v. Brooks*, 631 P.2d 878, 881 (Utah 1981). Thus, it "is well established that [such] intent can be proven by circumstantial evidence." *State v. Whitaker*, 2016 UT App 104, ¶13, 374 P.3d 56 (citations and internal quotation marks omitted).

"When the mental state is proven by circumstantial evidence," a court examines "whether the State presented any evidence that the defendant had the requisite intent or knowledge and whether 'the inferences that can be drawn from that evidence have a basis in logic and reasonable human experience sufficient to prove that [the defendant] possessed the requisite intent.'" *State v. Maestas*, 2012 UT 46, ¶179, 299 P.3d 892 (quoting *State v. Holgate*, 2000 UT 74, ¶21, 10 P.3d 346**).**

Thus, intent "can be inferred from conduct and attendant circumstances in the light of human behavior and experience." *Brooks*, 631 P.2d at 881. And when the intent is an intent to commit theft, such circumstances include "the manner of entry, the time of day, the character and contents of the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation." *State v. Porter*, 705 P.2d 1174, 1177 (Utah 1985); *see also State v. Robertson*, 2005 UT App 419, ¶16, 122 P.3d 895 (jury could reasonably infer intent to commit theft from

defendant's unauthorized presence in victim's residence, evidence of forced entry, and defendant's subsequent flight).

Here, the State presented ample evidence supporting Defendant's intent to commit a theft inside Zakary Taylor's home: (1) Defendant was April Taylor's lover, R612; (2) their relationship was kept secret from April's husband, Zakary, until just before April died, R436-38; (3) Defendant had spent time at April's house before April's death, R431,612; (4) Defendant was "very upset" about April's death, R603,613; (5) Defendant went to April's funeral, where he presumably saw Zakary occupied, R319,363; (6) after the funeral, Defendant went to the Taylors' home, went into the back yard, carefully removed a screen from a garage window, and crawled into the Taylors' home through the window, R324,365-66,387; (7) about five minutes later, Defendant crawled back out the window and carefully replaced the screen, R334,366,377; (8) after responding to a neighbor waving at him, Defendant walked from the Taylors' home, quickly got into a waiting silver SUV, and left, R329-30,409; (9) when Officer Fielding called Defendant a short while later to ask what he was doing at the Taylors' home, Defendant said he was busy and hung up, R466-67; (10) Defendant did not return Officer Fielding's phone call when the officer later left a message asking him to do

so, R624; and (11) Defendant did not have permission to enter the Taylors' home on the day of April's funeral. R445-46.

As the State argued in opposing Defendant's directed verdict motion, R491-92, this evidence—especially the brevity of Defendant's stay in the Taylors' home at a time he could reasonably believe Zakary would not be there and Defendant's unwillingness to talk with Officer Fielding afterward—supports a reasonable inference that Defendant unlawfully entered the Taylors' home with the intent to take something from the home—perhaps something to remember April by. *Cf. Robertson*, 2005 UT App 419, ¶16 (in burglary case, jury could reasonably infer intent to commit theft from defendant's unauthorized presence in victim's residence, evidence of forced entry, and defendant's subsequent flight).

This evidence thus constitutes "some evidence … from which a reasonable jury could find that the elements" of burglary—particularly Defendant's intent to commit theft—"had been proven beyond a reasonable doubt." *Montoya*, 2004 UT 5, ¶29. Consequently, it was "the trial court's duty to submit the case to the jury," *id.* at ¶33, and the court did not err in denying Defendant's directed verdict motion on the burglary charge.

In asserting otherwise, Defendant focuses on the fact that there was no evidence that Defendant actually took anything from the Taylors' home. *See*

Aplt.Br. 29 ("None of the State's witnesses … provided any testimony that Defendant had been seen carrying anything from the house."); *id*. at 29-30 ("Zakary Taylor … did not notice anything missing."). But the fact that no one noticed anything taken from the Taylors' home does not mean that nothing was taken. More to the point, the crime of burglary "is complete when the entry is made with the intent" to commit a theft. *State v. Facer*, 552 P.2d 110, 111 (Utah 1976). "Whether anything is stolen or not has nothing to do with the crime." *Id.*

Defendant also focuses on the State's response to his directed verdict motion—that the State "intended to argue in closing arguments that Defendant is 'where he's not supposed to be. He's having an affair with the victim's wife and he's entering into their home.… A reasonable, plausible explanation is he's there because he's looking for something.'" Aplt.Br. 28. (citing R491-92). According to Defendant, the "prosecutor's assertion that he intended to argue the issue of intent at closing constitutes an admission that the State's case-in-chief lacked evidence of the intent-to-commit-theft element." *Id.* at 30.

That the State intended to argue a reasonable inference arising from the evidence it presented, however, is not a concession that the evidence is insufficient. Rather, it is simply an acknowledgment that the State must prove

the intent element. Because "intent to commit theft is a state of mind, which is rarely susceptible of direct proof," *Brooks*, 631 P.2d at 881, the State properly argued that the evidence was sufficient to prove that element—i.e., the circumstantial evidence presented in the State's case-in-chief supports a reasonable inference that Defendant entered the Taylors' home with the intent to commit theft.

In sum, Defendant has not shown that the trial court erred when it denied his directed verdict motion on the burglary charge.

B. The trespass charge—jurors could reasonably infer from the evidence that Defendant unlawfully entered his deceased lover's home in reckless disregard that his presence would cause fear for the safety of another.

Defendant also challenges the trial court's denial of his directed verdict motion on the lesser trespass charge. *See* Aplt.Brf. at 26-33. But Defendant was not convicted on the lesser trespass charge. R130. He was convicted of the greater burglary offense and, as discussed, the evidence supported that conviction. Accordingly, the trial court's denial of Defendant's directed verdict motion on the lesser trespass offense resulted in no prejudice, even assuming the trial court erred in denying the motion on the lesser charge. *Cf. State v. Valdez*, 30 Utah 2d 54, 513 P.2d 422, 424 (1973) ("under ordinary factual situations where a jury finds the defendant guilty of a greater offense, the

giving of an erroneous instruction on a lesser offense is not deemed prejudicial).

But even if the trial court erred in denying Defendant's directed verdict motion on the burglary offense, it correctly concluded that the evidence of trespassing was sufficient to send the matter to the jury. To obtain a criminal trespass conviction in the case, the State was required to prove that Defendant unlawfully entered the Taylors' home and in doing so, was "reckless as to whether his presence [would] cause fear for the safety of another." Utah Code Ann. § 76-6-206(2)(a)(iii) (West Supp. 2012); R97 (Instr. 3B).

On appeal, Defendant claims that the State's evidence was insufficient to show that he was "reckless as to whether his presence would cause fear for the safety of another" element of trespass. Aplt.Br. 26-33. But as stated, it "is well established that intent can be proven by circumstantial evidence." *Whitaker*, 2016 UT App 104, ¶13 (citations and internal quotation marks omitted). Even if the evidence did not support a finding of the burglary intent element, it certainly supported a finding of the trespass intent element.

Here, Defendant entered the Taylors' home without permission when no one was home. R324,365-66,387,445-46. From this evidence, a reasonable jury could find, as a matter of common experience, that Defendant entered the home recklessly disregarding that anyone who might come upon him

unexpectedly while he was in the home would likely experience fear for the person's safety. This evidence thus constitutes "some evidence … from which a reasonable jury could find," *Montoya*, 2004 UT 5, ¶29, that when Defendant entered the Taylors' home, he was "reckless as to whether his presence w[ould] cause fear for the safety of another," Utah Code Ann. § 76-6-206(a)(iii).

Defendant, therefore, also has not shown that the trial court erred when it denied Defendant's directed verdict motion on the trespass charge.

II

THE TRIAL COURT PROPERLY ADMITTED A WITNESS'S PRIOR INCONSISTENT STATEMENT TO IMPEACH THE WITNESS, WHERE THE STATEMENT WAS NOT ADMITTED FOR THE TRUTH OF THE MATTER ASSERTED AND WAS NOT USED AS EVIDENCE OF DEFENDANT'S INTENT

Defense witness Celeste McCulley testified that she sat near Defendant during April Taylor's funeral and that Defendant spent the rest of the night with her and other friends. R601-04. On cross-examination, the prosecutor asked whether Zakary Taylor called her a few days after the funeral to ask why Defendant was at the Taylors' house on the day of the funeral. R605-07. After the trial court overruled Defendant's hearsay objection, McCulley testified that she had suggested to Zakary that someone else might have broken in. R606-07. The prosecutor asked, "Isn't it true that you told Zakary

Taylor that" Defendant "went to the house to get a momento or a token?" R607. McCulley said, "No, I did not say that." *Id.*[5]

In rebuttal, Zakary testified that when he called McCulley after the funeral, McCulley had told him that Defendant "was just in" the Taylors' home "looking for a momento or some—something sentimental." R621. When Defendant objected to Zakary's testimony as hearsay, the court overruled the objection, ruling that "it's not offered for the truth," but rather "to impeach what [McCulley] denied." *Id.* Defendant did not ask that the jury be given a limiting instruction.

On appeal, Defendant argues that the trial court erroneously admitted McCulley's memento statement to Zakary because it was inadmissible hearsay. Aplt.Br. 33-37. Defendant further argues that its admission prejudiced him because it "was central to the State's case" as "proof of Defendant's intent to commit theft" and, according to Defendant, the State "emphasized the statement at closing." *Id.* at 37.

Defendant's claim fails. McCulley's memento statement was not hearsay because it was a prior inconsistent statement—admissible as

[5]Two witnesses at Defendant's trial were named Celeste—Celeste Atkinson, who testified for the State, and Celeste McCulley, who testified for Defendant. To avoid confusion, the State refers to Celeste McCulley by her last name in this argument.

substantive evidence under evidence rule 801(d)(1). In any event, the trial court admitted the statement as impeachment evidence, not to prove the truth of the matter asserted—which also renders the statement nonhearsay. And the prosecutor did not use the statement as substantive evidence. Even if he had, that use would be harmless because prior inconsistent statements can be used substantively.

Under the Utah Rules of Evidence, hearsay is a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Utah R. Evid. 801(c). A declarant-witness's statement is not hearsay, however, if the "declarant testifies and is subject to cross-examination about a prior statement, and the statement … is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten." Utah R. Evid. 801(d)(1)(A).[6]

Under these rules, Zakary's testimony concerning what McCulley told him was not hearsay because it was a prior inconsistent statement made by McCulley. *See* Utah R. Evid. 801(d)(1)(A). In her testimony during

[6] Extrinsic evidence "of a witness's prior inconsistent statement is admissible … if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." Utah R. Evid. 613(b).

Defendant's case in chief, McCulley denied telling Zakary that Defendant went to Zakary's house to get a memento. R607. In the State's rebuttal case, Zakary testified that McCulley did tell him that Defendant went to the house to get a memento. R621. Zakary's testimony about what McCulley had told him was not hearsay under rule 801(d)(1), because McCulley had denied making the statement when she testified during Defendant's case in chief. Thus, McCulley's statement to Zakary was admissible under rule 801(d)(1)—even for the truth of the matter asserted. *See* Utah R. Evid. 801 Advisory committee note (Rule 801(d)(1) "deviates from the federal rule in that it allows use of prior statements as substantive evidence if (1) inconsistent or (2) the witness has forgotten").[7]

In any event, the trial court admitted McCulley's statement to Zakary solely to impeach McCulley with a prior inconsistent statement—not to prove the truth of the matter asserted. R621-22. And in that case, it was also not hearsay.

[7] Arguably, McCulley's statement relayed Defendant's statement to her explaining why he had unlawfully entered the Taylors' home on the day of April's funeral—to take a memento. But if so, Defendant's statement to McCulley as to why he entered Zakary's house is still not hearsay, because it is an admission of a party-opponent. *See* Utah R. Evid. 801(d)(2) (providing that an out-of-court statement is not hearsay where it is "offered against an opposing party" and "was made by the party in an individual … capacity").

"[O]ut-of-court statements not offered to prove the truth of the matter asserted are by definition not hearsay." *State v. McCullar*, 2014 UT App 215, ¶27, 335 P.3d 900. As this Court has explained, "in many cases a witness who 'relates what he heard someone else say' does not 'purport[] to represent that the statement he heard is true.'" *Id.* (quoting *State v. Sibert*, 6 Utah 2d 198, 310 P.2d 388, 390 (1957)). "Rather, the witness offers the testimony 'simply to prove that someone else made a statement without regard to whether it be true or false.'" *Id.* (quoting *Sibert*, 310 P.2d at 390).

Here, as stated, Zakary's testimony concerning McCulley's statement was not admitted for the truth of the matter asserted. R621. Rather, it was admitted solely to impeach McCulley by showing that her trial testimony concerning what she said to Zakary after the funeral was inconsistent with what Zakary recalled her saying. *Id.* Consequently, the testimony was not hearsay, and the trial court did not err in overruling Defendant's hearsay objection to it.

In arguing otherwise, Defendant acknowledges that statements not admitted for their truth are not hearsay. Aplt.Br. 35. He argues, however, that such statements are not hearsay because they "often reveal reasons for one's actions"—explain why the witness who received the statement took a certain action. *Id.* (citing *Barton v. Barton*, 2001 UT App 199, ¶16, 29 P.3d 13; *In re G.Y.*,

962 P.2d 78, 85 (Utah App. 1998); *State v. Perez*, 924 P.2d 1, 3 (Utah App. 1996)). And here, Defendant argues, Zakary Taylor did not take any action based on McCulley's statements. *Id.*

To the extent Defendant argues that such statements are admissible only to explain the receiver's subsequent actions, Defendant is mistaken. Perhaps because Utah's rules of evidence allow the admission of a witness's prior inconsistent statements as substantive evidence—for the truth of the matter asserted—*see* Utah R. Evid. 801(d)(1)(A), as well as for impeachment purposes, there is scant Utah caselaw distinguishing between prior inconsistent statements admitted for their truth and those admitted solely for impeachment purposes.

But other courts—in jurisdictions that do not allow the admission of out-of-court inconsistent statements as substantive evidence—have consistently held that such statements are admissible for impeachment purposes. *See, e.g., Viramontes v. City of Chicao*, 840 F.3d 423, 430 (7th Cir. 2016) ("Impeachment evidence is used to impugn a witness's reliability, not to prove the truth of the matter asserted."); *United States v. Watson*, 766 F.3d 1219, 1245 (10th Cir. 2014) ("'[A] prior statement offered for impeachment purposes is admissible … to show that the speaker is not worthy of belief; it is not received for the truth of the matter asserted.'") (citation omitted); *United*

States v. Vasquez, 225 Fed.Appx. 831, 833 (11th Cir. 2007) (The "Federal Rules of Evidence do not classify prior inconsistent statements offered for impeachment purposes as hearsay, because they are not offered in evidence to prove the truth of the matter asserted."); *United States v. Hudson*, 970 F.2d 948, 956 (1st Cir. 1992) ("Impeachment evidence … is admitted not for the truth of the matter asserted but solely for the fact that the witness' trial testimony is less believable if he has made inconsistent statements about the matter on earlier occasions. "); *United States v. Graham*, 858 F.2d 986, 990 n. 5 (5th Cir.1988) ("[T]he hallmark of an inconsistent statement offered to impeach a witness's testimony is that the statement ... is not offered for the truth of the matter asserted; rather, it is offered only to establish that the witness has said both 'x' and 'not x' and is therefore unreliable."). The trial court, therefore, did not err when it ruled that McCulley's prior inconsistent statement was admissible for impeachment purposes.

Defendant also argues that McCulley's statement was improperly admitted because despite the trial court's ruling, the trial court allowed the State to use the statement in closing argument as substantive evidence of Defendant's intent when he entered the Taylors' home. Aplt.Br. 35-37. If this were true, the State was in fact entitled to do so under rule 801. *See supra*, at 23-24. Accordingly, there would be no prejudice suffered by Defendant in

any event. But the prosecutor did not use the statement to prove the truth of the matter asserted.

The State did not even reference McCulley's memento statement during its closing argument, let alone use it as substantive evidence of Defendant's intent to commit theft. R642-56,669-80 (attached at Addendum C). The prosecutor argued that "if you can go into the jury room and you can find a reasonable explanation as to why he wasn't there to take something, that's fine." R645. But the "State can't think of any reason," and "it's abundantly clear from the inferences that he was there to go find something and take it." *Id.* Then, after explaining what circumstantial evidence is, the prosecutor argued that the jury could "infer from the fact that [Defendant] went into that house," and that the jury could "infer from the motives that are likely that, in fact, he was in there to find something." R648,650. The prosecutor explained, "that's what we call circumstantial evidence." R648,650.

Similarly, in rebuttal, the prosecutor referred the jury to Instruction 27—the one addressing proof of intent—and reminded the jury that intent, "being a state of mind is seldom susceptible to proof of direct or positive evidence." R671. Again, the prosecutor did not mention McCulley's challenged statement. Rather, the prosecutor asked—where Defendant

entered his deceased lover's home, stayed only a few minutes, and then hung up on the police when they asked him what he was doing there—"what other purpose" was he there for? R671-72.

The record, then, does not support Defendant's contention that the trial court improperly admitted McCulley's challenged statement as hearsay. Nor does it support Defendant's contention that the State used her statement as substantive evidence in closing argument. Defendant's argument that McCulley's statement was improperly admitted hearsay, therefore, fails.

III

DEFENDANT'S CLAIM THAT THE TRIAL COURT PLAINLY ERRED IN NOT INSTRUCTING THE JURY ON THE MENTAL STATE FOR BURGLARY FAILS UNDER THE INVITED ERROR DOCTRINE; HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FAILS BECAUSE HE CAN SHOW NEITHER DEFICIENT PERFORMANCE NOR PREJUDICE

In Point III of his brief, Defendant argues that the trial court committed plain error by not instructing the jury on the mental state required for

burglary. Aplt.Br. 38-42. In Point IV, Defendant argues that defense counsel was ineffective for not requesting such an instruction. *Id.* at 42-45. [8]

Defendant nowhere identifies the specific instructional error he claims occurred at trial. *Id.* at 38-45. However, when setting out the statutory definition of burglary in his plain error argument, he italicizes the "intent to commit" element. *Id.* at 39. And when arguing prejudice related to his ineffective-assistance claim, Defendant asserts that in "light of the issues surrounding Defendant's lack of intent to commit theft, among others, trial counsel should have objected to the lack of instruction." *Id.* at 44. It thus appears that Defendant's complaint on appeal is that the burglary elements instruction was not supplemented with an instruction defining "intent" in the "intent to commit theft" element.

The invited error doctrine precludes Defendant's plain error claim. Defendant's ineffectiveness claim fails because he has not shown that no

[8] Although Defendant also challenges the absence of a specific intent instruction related to the "reckless" element of trespass, Aplt.Br. 38-45, Defendant was not convicted on that charge. R130. Thus, any error in the instructions related to it was necessarily harmless. *See State v. Valdez,* 30 Utah 2d 54, 513 P.2d 422, 424 (Utah 1973) ("under ordinary factual situations where a jury finds the defendant guilty of a greater offense, the giving of an erroneous instruction on a lesser offense is not deemed prejudicial). The State, therefore, responds only to Defendant's arguments related to the burglary charge on which he was convicted.

competent counsel would proceed without requesting an instruction and because he was not prejudiced by the lack of an instruction.

A. Defendant's plain error claim fails under the invited error doctrine.

"While a party who fails to object to or give an instruction may have an instruction assigned as error under the manifest injustice exception, Utah R. Crim. P. 19(e), 'a party cannot take advantage of an error committed at trial when the party led the trial court into committing the error.'" *State v. Geukgeuzian*, 2004 UT 16, ¶9, 86 P.3d 742 (citations omitted). Consequently, under the invited error doctrine, "a jury instruction may not be assigned as error even if such instruction constitutes manifest injustice 'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.'" *Id.* (citation omitted).

In this case, the elements instructions were included in the trial court's opening instructions. R93-112. Before the court read those instructions to the jury, the court asked if defense counsel had "any objections" to them. R291. Counsel responded, "No, Your Honor." *Id.*

The closing instructions—which included various instructions on mental state—were addressed repeatedly during trial. At one point, the court went through each instruction individually and confirmed with both counsel that they had no objection to each individual instruction. R346-57. At the close

of that discussion, the court asked, "*Were there any other instructions that the prosecution or the defense wanted to insert but have not?*" R357. (emphasis added) Defense counsel responded, "*No*." *Id.* (emphasis added).

Finally, before reading the closing instructions to the jury, the court asked whether the prosecution had "any additions" and whether there was "anything else." R631-32. The prosecutor responded, "I believe we're okay with them, Your Honor." R632. When the court asked defense counsel, he said, "I didn't see anything either, Your Honor." *Id.*

Repeatedly throughout trial, then, defense counsel "affirmatively represented to the court" both that counsel had no objection to the instructions given and that no additional instructions were required. *Geukgeuzian*, 2004 UT 16, ¶9. Defendant therefore invited any instructional error by the trial court, and his plain error claim is precluded by the invited error doctrine. *Id.*

B. Defendant's ineffective assistance claim fails because he has not shown either that all other competent counsel would have requested the specific intent instruction or that he was prejudiced by the instruction's absence.

To show that his counsel was ineffective, Defendant must prove both that his counsel performed deficiently and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-89, 694, 697 (1984). "Surmounting

Strickland's high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). Defendant has not overcome that high bar.

1. Defendant cannot show deficient performance—that no competent counsel would have forgone the specific intent instructions.

To prove deficient performance, Defendant must show "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. To meet that burden, Defendant must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *id.* at 689. To do that, Defendant must "persuad[e] the court that there was *no conceivable tactical basis* for counsel's actions." *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (emphasis in original) (quotations and citation omitted).

But a defendant's ability to rebut *Strickland*'s presumption "does not … automatically mean that an attorney's performance was constitutionally inadequate." *Bullock v. Carver*, 297 F.3d 1036, 1051 (10th Cir. 2002). The presumption is "simply [a] tool[] that assist[s] … in analyzing *Strickland*'s deficient performance prong." *Id.* at 1046. And although the presumption can be dispositive, it is dispositive only of a finding of effective performance, not deficient performance.

Consequently, whether counsel's performance has a conceivable strategic basis is only the first step of in evaluating *Strickland's* deficient performance prong. The inquiry must go further. If counsel's performance lacks any conceivable strategic basis, a reviewing court must still ask whether counsel's performance was objectively reasonable. *See Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000); *Bullock*, 297 F.3d at 1048.

This is because the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 U.S. at 481. Moreover, to decide whether counsel's choices were reasonable, the crucial "question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). There is "no expectation that competent counsel will be a flawless strategist or tactician." *Richter*, 562 U.S. at 110. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam); *accord Burt v. Titlow*, 134 S.Ct. 10, 18 (2013); *Strickland*, 466 U.S. at 687.

Counsel, therefore, does not necessarily perform deficiently even if he makes "minor mistakes" during trial. *Dows v. Wood*, 211 F.3d 480, 487 (9th

Cir. 2000). Indeed, "even if an omission is inadvertent, relief is not automatic." *Gentry*, 540 U.S. at 8. "To state the obvious, the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000)) (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)).

The "relevant question under *Strickland*" is whether "no competent attorney" would have done the same. *Premo v. Moore*, 562 U.S. 115, 124 (2011); *see also Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011) (counsel deficient only when "counsel's error is so egregious that no reasonably competent attorney would have acted similarly"); *Chandler v. United States*, 218 F.3d 1305, 1315 & n.17 (11th Cir. 2000) (en banc) (to show deficient performance, defendant "must establish that no competent counsel would have taken the action that his counsel did take"). And even when an attorney errs, "[i]t will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel rendered reasonable professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986). Thus, "'where counsel's

representation is objectively reasonable under all the circumstances of a case and ensured that the defendant received a fair trial overall, it makes no difference that certain decisions may have been unreasonable or made without a full recognition of the consequences.'" *Bullock*, 297 F.3d at 1049 (quoting *United States v. Smith*, 20 F.3d 724, 729 (10th Cir. 1993) (per curiam)).

Here, Defendant has not met his heavy burden of showing that counsel's performance was unreasonable. As stated, Defendant's contention appears to be that defense counsel should have sought a jury instruction defining "intent" for purposes of burglary's "intent to commit … theft" element. Aplt.Br. 38-45.

Defendant, however, nowhere identifies what that instruction should have been. *Id.* Presumably, his contention is that counsel should have sought an instruction on the statutory definition of the intentional mental statute. Thus, presumably, Defendant's contention is that counsel should have sought an instruction that a person acts "[i]ntentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result." Utah Code Ann. § 76-2-103(1) (West 2015).

But this definition matches the plain meaning of "intent": "the design or purpose to commit a wrongful or criminal act" or "a usually clearly

formulated or planned intention," https://www.merriam-webster.com/dictionary/intent (visited September 19, 2017); "intention or purpose," https://en.oxforddictionaries.com/definition/intent (visited September 19, 2017); "something that is intended; purpose; design," http://www.dictionary.com/browse/intent (visited September 19, 2017); "purpose, object, aim," https://www.collinsdictionary.com/us/dictionary/english/intent (visited September 19, 2017). *See also* http://www. dictionary.com/browse/intentionally (defining "intentionally" as "done with intention or on purpose") (visited September 19, 2017); https://en.oxforddictionaries.com/definition/intentionally (defining intentionally as "deliberately; on purpose") (last visited September 19, 2017).

And both the statutory definition and the plain meaning of "intent" are consistent with what the State suggested in its opening statement—that Defendant "went in [the Taylors' home] looking for something, to take something," "for the purposes of retrieving something from that house." R208-09.

Thus, competent counsel could have reasonably concluded that a jury instruction was not necessary because the meaning of "intent" was "within the jury's common knowledge." *People v. Powell*, 512 N.E.2d 1364 (Ill. Ct. App. 1987) (rejecting contention that trial court erred in not defining "intentionally

and knowingly" for jury, concluding that "those terms have a plain meaning within the jury's common knowledge").

Defendant's ineffectiveness claim, then, fails on the deficient performance element alone. But it also fails on the prejudice element.

2. Defendant cannot show prejudice.

To prove prejudice, Defendant must demonstrate "a reasonable probability" that but for counsel's performance, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In other words, "[t]he likelihood of a different result must be *substantial*, not just *conceivable*." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693) (emphasis added).

For the same reason Defendant cannot show deficient performance, he cannot show prejudice. The definitional instruction he claims defense counsel should have sought would, in essence, have provided the jury with nothing more than the plain meaning of "intent." *See* pp. 36-37 *supra*. There is no

reasonable likelihood that the result of Defendant's trial would have been different, therefore, had the instruction been given.[9]

IV

DEFENDANT'S CUMULATIVE ERROR ARGUMENT FAILS BECAUSE DEFENDANT HAS NOT SHOWN ANY ERROR, LET ALONE PREJUDICE THEREFROM.

Finally, Defendant argues that the cumulative error doctrine entitles him to relief. Aplt.Br. 45-46. This Court "will reverse a jury verdict under the cumulative error doctrine only if the cumulative effect of the several errors undermines … confidence that a fair trial was had." *State v. Killpack*, 2008 UT 49, ¶58, 191 P.3d 17 (quotation omitted); *State v. Perea*, 2013 UT 68, ¶107, 322 P.3d 624 (cumulative error applies when a court's "collective errors rise to a level that undermine[s] our confidence in the fairness of the proceedings"). Defendant has not demonstrated that the trial court erred in denying his directed verdict motion or admitting McCulley's "memento" statement. Nor

[9] The State notes that at one point in his argument, Defendant observes that the jury was provided a definition instruction for "knowingly." Aplt.Br. 40; *see also* R122 (Instr. 28). Defendant does not claim, however, either plain error or ineffective assistance related to that instruction. *See id.* In any event, that instruction, combined with the absence of an instruction defining "intent," would only impress upon the jury that it should apply the plain meaning of "intent" in the burglary statute. Alternatively, the "knowingly" instruction was superfluous and, thus, harmless. *See State v. Malaga*, 2006 UT App 103, ¶14, 132 P.3d 703 (because instruction was superfluous, any error in giving it was harmless); *State v. DeAlo*, 748 P.2d 194, 198 (Utah App. 1987) (same).

has Defendant demonstrated that his counsel's performance was deficient in any respect. Because Defendant has not demonstrated any error, the cumulative error doctrine is inapplicable. *See Perea*, 2013 UT 68, ¶107.

CONCLUSION

For the foregoing reasons, the Court should affirm Defendant's burglary conviction.

Respectfully submitted on September 21, 2017.

SEAN D. REYES
Utah Attorney General

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KAREN A. KLUCZNIK
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 8,307 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

_____

KAREN A. KLUCZNIK
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on September 21, 2017, two copies of the Brief of Appellee were ☐ mailed ☐ hand-delivered to:

Scott L. Wiggins
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Salt Lake City, UT 84101

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

☐ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

_____

Addenda

Addendum A

UNITED STATES CONSTITUTION

Amendment VI

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

Utah Code Annotated § 76-6-206 (West Supp 2014)

(1) As used in this section:

(a) "Enter" means intrusion of the entire body or the entire unmanned aircraft.

(b) "Remain unlawfully," as that term relates to an unmanned aircraft, means remaining on or over private property when:

(i) the private property or any portion of the private property is not open to the public; and

(ii) the person operating the unmanned aircraft is not otherwise authorized to fly the unmanned aircraft over the private property or any portion of the private property.

(2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in Section 76-6-202, 76-6-203, or 76-6-204 or a violation of Section 76-10-2402 regarding commercial obstruction:

(a) the person enters or remains unlawfully on or causes an unmanned aircraft to enter and remain unlawfully over property and:

(i) intends to cause annoyance or injury to any person or damage to any property, including the use of graffiti as defined in Section 76-6-107;

(ii) intends to commit any crime, other than theft or a felony; or

(iii) is reckless as to whether the person's or unmanned aircraft's presence will cause fear for the safety of another;

(b) knowing the person's or unmanned aircraft's entry or presence is unlawful, the person enters or remains on or causes an unmanned aircraft to enter or remain unlawfully over property to which notice against entering is given by:

(i) personal communication to the person by the owner or someone with apparent authority to act for the owner;

(ii) fencing or other enclosure obviously designed to exclude intruders; or

(iii) posting of signs reasonably likely to come to the attention of intruders; or

(c) the person enters a condominium unit in violation of Subsection 57-8-7(8).

(3)(a) A violation of Subsection (2)(a) or (b) is a class B misdemeanor unless the violation is committed in a dwelling, in which event the violation is a class A misdemeanor.

(b) A violation of Subsection (2)(c) is an infraction.

(4) It is a defense to prosecution under this section that:
(a) the property was at the time open to the public; and
(b) the actor complied with all lawful conditions imposed on access to or remaining on the property.

Utah Code Annotated § 76-2-202 (West Supp 2014)

(1) An actor is guilty of burglary who enters or remains unlawfully in a building or any portion of a building with intent to commit:

(a) a felony;
(b) theft;
(c) an assault on any person;
(d) lewdness, a violation of Section 76-9-702;
(e) sexual battery, a violation of Section 76-9-702.1;
(f) lewdness involving a child, in violation of Section 76-9-702.5; or
(g) voyeurism under Section 76-9-702.7.

(2) Burglary is a third degree felony unless it was committed in a dwelling, in which event it is a second degree felony.

(3) A violation of this section is a separate offense from any of the offenses listed in Subsections (1)(a) through (g), and which may be committed by the actor while in the building.

Addendum B

IN THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH, **Plaintiff,** **vs.** **CULLEN CHRISTOPHER CARRICK** **Defendant.**	**INSTRUCTIONS TO THE JURY** **CASE NO. 141100418**

INSTRUCTION INDEX

1. INTRODUCTION

Now that we are about to begin the trial, there are some preliminary matters I would like to share with you so that you will better understand what will happen during the trial. In addition, I have some suggestions about your conduct during the trial.

It is your duty to follow these instructions. These instructions are preliminary and may be changed during or at the end of the trial. After you have heard all of the evidence I will read to you the final instructions of law. You will also receive a written copy of them. You must follow the instructions in deciding the case.

2. CHARGE

The Defendant is charged with the following crime:

BURGLARY, a criminal offense, in violation of Utah Code Ann. § 76-6-202, as follows: That on or about May 21, 2014, the defendant did enter or remain unlawfully in a dwelling or any portion of a dwelling with intent to commit:

(a) a felony;

(b) theft.

3. ELEMENTS

3A

Before you can convict the defendant of the crime of BURGLARY, a criminal offense, you must find from the evidence, beyond a reasonable doubt, all of the following elements of the crime;

(1) Said defendant, Cullen Christopher Carrick,

(2) in Box Elder County,

(3) did:

(a) enter or remain unlawfully in a building or any portion of that building, which is a dwelling, with the intent to commit:

(1) a felony; or

(2) theft.

If you find from the evidence all of the elements defined above beyond a reasonable doubt, then you must find the defendant guilty of Burglary. If, however, you are unable to find one or more of the elements beyond a reasonable doubt, then you must find the defendant not guilty.

3B

If you find that the defendant is not guilty of Burglary, then you are to consider whether the defendant is guilty of the crime of CRIMINAL TRESPASS OF A DWELLING. Before you can convict the defendant of this crime, you must find from the evidence, beyond a reasonable doubt, all of the following elements of the crime;

(1) Said defendant, Cullen Christopher Carrick,

(2) in Box Elder County,

(3) did:

(a) enter or remain unlawfully on property that is a dwelling;

(b) and was reckless as to whether his presence would cause fear for the safety of another.

4. INFORMATION NOT EVIDENCE

The information in this case is the formal method of accusing the defendant of a crime. The information is not evidence and the law is that you should not allow yourselves to be influenced against the defendant by reason of the filing of the information. The mere fact that the defendant is charged with the offense outlined is not to be taken by you as any evidence of his guilt.

5. PLEA OF NOT GUILTY

The Defendant has pleaded not guilty. A plea of not guilty puts in issue each element of the crime(s) with which the defendant is charged. A plea of not guilty requires the prosecutor to prove each element of the crime beyond a reasonable doubt.

6. PRESUMPTION OF INNOCENCE

The Defendant is presumed innocent of the crime and the presumption continues until after considering all of the evidence, you are persuaded of his guilt beyond a reasonable doubt. The prosecutor has the burden of presenting the evidence that will persuade you of the guilt of the defendant beyond a reasonable doubt. The defendant must be found not guilty unless the prosecutor produces evidence which persuades you beyond a reasonable doubt of each element of the crime.

7. REASONABLE DOUBT

The State has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crimes charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

8. LEVEL OF PROOF

It is not necessary that the defendant's guilt should be established beyond any doubt or to an absolute certainty, but instead thereof that the defendant's guilt must be established beyond a reasonable doubt as herein defined.

9. EVIDENCE

Two classes of evidence are recognized and admitted in courts of justice upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness, who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question or tending to connect the defendant with the commission of such a crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law as stated in my instructions.

10. FUNCTIONS OF JURY

As jurors, you have two major duties:

First, you must listen to and look at the evidence and decide from the evidence what happened in this case, that is, what the facts are. It is your job and no one else's to decide what the facts are. I intend to preside impartially and not express any opinion concerning the facts. Any views of mine on the facts are totally irrelevant. This includes gestures or frowns or smiles or other body language. Comments to or questions to lawyers or witnesses by me are intended to move the case along or to clarify some evidence.

Second, you must carefully listen to the laws that I instruct you on. It is your duty to follow them in reaching your verdict.

In fulfilling your duties as jurors you must not be influenced by feelings of sympathy, prejudice or by concerns about the possible punishment in the case. In the event of a guilty verdict, the matter of punishment is the sole concern of the trial judge.

11. CREDIBILITY OF WITNESSES

In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony;

- How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- Does the witness have something to gain or lose from this case?
- Does the witness have any connection to the people involved in this case?
- Does the witness have any reason to lie or slant the testimony?
- Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
- How believable was the witness's testimony in light of other evidence presented at trial?
- How believable was the witness's testimony in light of human experience?
- Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether or not to believe a witness, you may also consider anything else you think is important.

You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

12. NOTE-TAKING

Note paper and pencils have been provided for note-taking. No juror is required to take notes. Some of you may feel that note-taking is not helpful because it may interfere with the hearing and evaluation of evidence. For example, you need to watch witnesses during their testimony in order to assess their appearance, behavior, memory and whatever else bears on their believability. Notes are only to help you remember. They should not take the place of your independent memory of the testimony. On the other hand, if you take no notes at all, you run the risk of forgetting important testimony needed for your verdict. Court reporter transcripts of testimony are usually not available during deliberations.

13. CONDUCT OF JURORS

There are a number of important rules governing your own conduct during the trial.

- You should keep an open mind throughout the trial and reach your conclusions only after you have heard all the evidence, the final instructions of law and the closing arguments of counsel and your deliberations have begun.
- Do not discuss the case during the trial, either among yourselves or with anyone else. If you discuss the evidence, you necessarily begin to form an opinion about the case. Keep your minds open and free of such opinions until you have heard all of the evidence. Should anyone happen to discuss the case in your presence, report that fact at once to any member of the staff.
- Though it is entirely natural to talk or visit with people with whom you are thrown incontact, please do not talk with any of the attorneys, defendant, witnesses or spectators either in or out of the courtroom. If you meet in the hallways or elevators, there is nothing wrong with saying a "good morning" or "good afternoon," but your conversation should end there. In no other way can the parties be assured of the absolute fairness they are entitled to expect from you as jurors. If the attorneys, parties and witnesses do not greet you outside the court, or avoid riding in the same elevator with you, they are not being rude. They are just carefully observing this rule forbidding contact.
- Since this case involves events that occurred at a particular location, you may be tempted to visit the scene. Please do not do so. Important changes may have occurred at the location since the original event. In making an unguided visit without the benefit of an explanation, you might get an erroneous or partial impression.
- Do not attempt any research, tests, experiments or other investigation on your own. It would be difficult or impossible to duplicate conditions shown by the evidence, therefore, your results would not be reliable. Nor would the parties or I know of your activities. Your verdict must be based solely upon the evidence produced in this courtroom.

If before any break or recess I do not repeat these admonitions word for word, I will simply say, "Please remember the admonitions." The rules apply at all times during the trial - - 24 hours a day, 7 days a week - - until you return a verdict in open court and are discharged by me.

Jurors have caused serious problems during trials by using computer and electronic communication technology. You may be tempted to use these devices to investigate the case, or to share your thoughts about the trial with others. However, you must not use any of these electronic devices while you are serving as a juror.

You violate your oath as a juror if you conduct your own investigations or communicate about this trial with others, and you may face serious consequences if you do. Let me be clear: do not "Google" the parties, witnesses, issues, or counsel; do not "Tweet" or text about the trial; do not use Blackberries or iPhones to gather or send information on the case; do not post updates about the trial on Facebook pages; do not use Wikipedia or other internet information sources, etc. Even using something as seemingly innocent as "Google Maps" can result in a mistrial.

Please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends on you reaching your decisions based on evidence presented to you in court, and not on other sources of information.

Post-trial investigations are common and can disclose these improper activities. If they are discovered, they will be brought to my attention and the entire case might have to be retried, at substantial cost.

14. FUNCTION OF THE ATTORNEYS

It is the responsibility of an attorney to present evidence, to examine and cross-examine witnesses, and to argue the evidence. No question, statement, or argument of an attorney is evidence, nor is an argument or statement made by a party evidence unless made under oath.

15. OBJECTIONS

From time to time during the trial, objections may be raised. When an objection is made, you should not speculate on the reason why it is made. When an objection is sustained, you should not speculate on what might have occurred or what might have been said had the objection not been sustained. Nor should you infer from any such ruling that I have any opinions on the merits of the case favoring one side or the other.

16. CONFERENCES WITH ATTORNEYS

During the trial it may be necessary for me to confer with the attorneys out of the hearing of the jury in respect to matters of law and other matters that require consideration by the Court alone. It is impossible to predict when such a conference may be required or how long it will last. When such conferences occur they will be conducted so as to consume as little of the jury's time as may be consistent with an orderly and fair disposition of the case.

17. RIGHT OF DEFENDANT NOT TO TESTIFY

The defendant may or may not testify during the trial. At no time is a defendant in a criminal case required to prove his/her innocence or furnish any evidence whatsoever. This right is guaranteed to all defendants by the Constitution and no other right is more thoroughly ingrained in our system of justice. The decision to testify or not testify is theirs alone to make, and a jury cannot draw any inference of guilt whatsoever from the fact that the Defendant did not take the witness stand in his own defense.

18. ORDER OF THE TRIAL

Trials generally proceed in the following order:

- The prosecutor will make an opening statement giving a preview of the case. The defendant's attorney may make an opening statement outlining the defense case immediately after the prosecutor's statement or it may be postponed until after the State's case has been presented. What is said in opening statements is not evidence. Nor is it an argument. The purpose of an opening statement is to help you prepare for anticipated evidence.
- The State will present its evidence. After the prosecutor finishes, the defendant may present evidence. The defendant is not required to produce evidence. If the defendant does produce evidence, the State may present additional, or rebuttal, evidence.

With each witness, there is a direct examination, a cross examination by the opposing side, and finally a redirect examination. This usually ends the testimony of that witness.

- After all the evidence is in, I will read and give you copies of the instructions, the rules of law you must follow in reaching your verdict.
- The attorneys will make closing arguments to tell you what they think the evidence shows and how they think you should decide the case. The prosecutor has the right to open and close the argument since the State has the burden of proof. Just as in the opening statements, what is said in closing arguments is not evidence.
- You will deliberate in the jury room about the evidence and rules of law and decide upon a verdict. Once you agree upon the verdict, it will be read in court with you and the parties present.

19. ADDITIONAL INSTRUCTIONS

At the close of the evidence, the Court will give you additional instructions on the law applicable to the case and the weighing of the evidence which has been introduced in the case to assist you in arriving at your verdict.

Also, in your juror books, you will find "A Guide to Jury Deliberations." The suggestions in this guide are not instructions of law but rather are simply suggestions for you to use if you find them helpful.

A GUIDE TO JURY DELIBERATIONS

You have just been instructed on the law in the trial and you are ready to begin deliberating. Before you begin, please take the time to read this note for some tips on how to organize yourselves, how to consider the evidence, and how to reach a verdict. You are free to deliberate in any way you wish. These are suggestions to help you proceed with the deliberations in a smooth and timely way.

Before you start, it would be useful to think about the following principles:

- Respect each other's opinions and value the different viewpoints each of you brings to this case.
- Be fair and give everyone a chance to speak.
- Do not be afraid to speak up and express your views.
- It is okay to change your mind.
- Listen carefully to one another. Do not let yourself be bullied into changing your opinion, and do not bully anyone else.
- Do not rush into a verdict to save time. The people in this case deserve your complete attention and thoughtful deliberation.
- Follow the judge's instructions about the law, and you will do a good job.

GETTING STARTED

Q. How do we start?

A. At first, you might want to:

- Talk about your feelings and what you think about the case.
- Talk about how to handle deliberations; lay out some rules to guide you.
- Talk about how to handle voting.

SELECTING THE FOREPERSON

Q. What qualities should we consider when choosing the Foreperson?

A. Suggestions include someone who:

- is a good discussion leader.
- is fair.
- is a good listener.
- is a good speaker.
- is organized.

Q. What are the responsibilities of the Foreperson?

A. The Foreperson should:

- Encourage all jurors to join in discussions.
- Keep the discussions focused on the evidence and the law.
- Tell the court when there are any questions or problems.
- Tell the court when you have reached a verdict.

Q. Does that mean the foreperson's opinions are more important than mine?

A. No. The opinions of each juror count equally.

GETTING ORGANIZED

Q. Are there any rules to tell us how to deliberate?

A. No. You could:

➢Go around the table, one by one, to talk about the case.
➢Have jurors speak up anytime, when they have something to say.
➢Encourage everyone to talk. Ask: "Does anyone have anything to add?"
➢Show respect to the other jurors by looking at the person speaking.
➢Take notes so you do not forget important points.
➢Have someone write down key points, perhaps on a chart, for everyone to see them.

DISCUSSING THE EVIDENCE AND THE LAW

Q. What do we do now?

A. First, review the judge's instructions on the law because the instructions tell you what to do.

Q. Is there a set way to examine and weigh the evidence and to apply the law?

A. The judge's instructions will tell you if there are special rules or procedures you should follow. Otherwise, you are free to conduct your deliberations in whatever way is helpful. Here are several suggestions:

➢Read the judge's instructions that define each charge or claim.
➢List each element that makes up that charge or claim.
➢For each element, review the evidence, both the exhibits and witness testimony, to see if each element has been established by the evidence.
➢If there is a lot of evidence, list each piece of evidence next to the element(s) it applies to.
➢Discuss each charge or claim, one at a time.
➢Vote on each charge or claim.
➢Fill out the verdict form(s) given to you by the judge.

Q. What if someone is not following the instructions, refuses to deliberate, or relies on information outside of the evidence?

A. This is a violation of a juror's oath. The presiding juror should tell the court.

VOTING

Q. When should we take the first vote?

A. There is no best time. But, if you spend a reasonable amount of time considering the evidence, the law, and listening to each other's opinions, you will probably feel more confident and satisfied with your verdict than if you rush things.

Q. Is there any correct way to take the vote?

A. No, any way is okay. You might vote by raising your hands, by written ballot, or by a voice ballot. Whatever method you use, you should express your vote openly to the other jurors.

Q. What if we cannot reach a verdict after trying many times to do so?

A. Ask the judge, in writing, for advice on how to proceed.

GETTING ASSISTANCE FROM THE COURT

Q. What if we don't understand or are confused by something in the judge's instructions, such as a legal principle or definition?

A. Send the question to the judge in written form. You must understand the instructions in order to do a good job.

THE VERDICT

A. After we have reached a verdict and signed the verdict form(s), how do we turn our verdict over to the court?

A. The following steps are usually followed:

➢The Foreperson tells the bailiff that you have reached a verdict.
➢The judge calls everyone, including you, back into the courtroom.
➢The judge or the clerk in the courtroom asks the Foreperson for the verdict.
➢The verdict is read into the record in open court by the judge.

Q. Will I be asked for my vote in open court?

A. Possibly. The judge may ask for an individual poll of each of you to see if you agree with the verdict. You need only answer "yes" or "no" OR "not guilty" or "guilty" to the questions asked by the judge.

ONCE JURY DUTY IS OVER

Q. After we deliver the verdict, may we speak with others about the case and the deliberations?

A. The judge will inform you about speaking with others. Generally, you do not have

to talk to anyone about the case. It is entirely up to you.

Q. How do we know we have done the right thing?

A. If you have tried your best, you have done the right thing. Making decisions as jurors about the lives, events, and facts in a trial is always difficult. Regardless of the outcome of this case, you have performed an invaluable service for the people in this case and for the system of justice in your community. Thank you for your time and thoughtful deliberations.

IN THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH **Plaintiff,** **vs.** **CULLEN CHRISTOPHER CARRICK, Defendant.**	INSTRUCTIONS TO THE JURY CASE NO. 141100418 INSTRUCTION NO. 20

MEMBERS OF THE JURY:

Now that you have heard the evidence, we come to that part of the trial where you are instructed on the applicable law.

I am required to read the instructions to you in open court. In addition, you will have these instructions in their written form in the jury room for use during your deliberations.

Whether a Defendant is to be found guilty or not guilty depends upon both the facts and the law.

As jurors, you have two duties to perform. One duty is to determine the facts of the case from the evidence received in the trial and not from any other source. The word "fact" means something that is proven directly or circumstantially by the evidence (or by agreement of counsel).

Your other duty is to apply the rules of law as I state them to you, to the facts as you determine them, and in this way arrive at your verdict.

It is my duty in these instructions to explain to you the rules of law that apply to this case. You must accept and follow the rules of law as I state them to you.

As jurors you must not be influenced by pity for the Defendant or by prejudice against him. You must not be biased against the Defendant because he has been arrested for this offense, or because he has been charged with a crime, or because he has been brought to trial. None of these circumstances is evidence of his guilt and you must not infer or assume from any or all of them that the Defendant is more likely to be guilty than innocent.

You must not be swayed by sympathy, passion, prejudice public opinion or public feeling. Both the State and the Defendant have a right to expect that you will

conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

INSTRUCTION NO. 21

"On or about" includes any day that closely approximates or is near the day alleged in the Information.

INSTRUCTION NO. 22

"Dwelling" means a building which is usually occupied by a person lodging in the building at night, whether or not a person is actually present.

"Enter or remain unlawfully" means a person enters or remains in or on any premises when:

(a) at the time of the entry or remaining, the premises or any portion of the premises are not open to the public; and

(b) the actor is not otherwise licensed or privileged to enter or remain on the premises or any portion of the premises.

"Enter" means:

(a) intrusion of any part of the body; or

(b) intrusion of any physical object under control of the actor.

INSTRUCTION NO. 23

You should not consider as evidence any statement of counsel made during the trial, unless such statement was made as a stipulation conceding the existence of a fact or facts.

INSTRUCTION NO. 24

It is not necessary that the Defendant's guilt should be established beyond any doubt or to an absolute certainty, but instead thereof that the Defendant's guilt must be established beyond a reasonable doubt as hereinafter defined.

INSTRUCTION NO. 25

The State has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

INSTRUCTION NO. 26

To constitute the crime charged in the Information there must be the joint operation of two essential elements: conduct prohibited by law and the appropriate culpable mental state or states with regard to the conduct prohibited by law.

Before a defendant may be found guilty of a crime, the evidence must prove beyond a reasonable doubt that the defendant was prohibited from committing the conduct charged in the information and that the defendant committed such conduct with the culpable mental state required for such offense. The culpable mental state required is intentionally, or knowingly, or recklessly.

"Conduct" means an act or omission.

"Act" means a voluntary bodily movement and includes speech.

"Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.

INSTRUCTION NO. 27

The intent with which an act is done denotes a state of mind and connotes a purpose in so acting. Intent, being a state of mind, is seldom susceptible of proof by direct and positive evidence and may ordinarily be inferred from acts, conduct, statements and circumstances.

INSTRUCTION NO. 28

A person engages in conduct knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

INSTRUCTION NO. 29

While you have a right to use your knowledge and experience as men and women in arriving at a decision as to the weight of the testimony and credibility of witnesses, your finding and decision must rest alone upon the evidence admitted in this trial. You cannot act upon the opinions and statements of counsel as to the truth of any evidence given or as to the guilt or innocence of the defendant.

You must consider all of the evidence in connection with the law as given by the Court, and therefrom reach a verdict; in doing so you must, without favor, bias, prejudice, or sympathy, weigh and consider all the facts and circumstances shown by the evidence with the sole purpose of doing equal and exact justice between the State of Utah and the defendant at the bar.

INSTRUCTION NO. 30

You are instructed that a defendant is a competent witness in his own behalf and his testimony should be received and given the same consideration as you give to that of any other witness. The fact that he stands accused of a crime is not evidence of his guilt and is no reason for rejecting his testimony. However, you should weigh his testimony the same as you weigh the testimony of any other witness.

INSTRUCTION NO. 31

The weight of the evidence is not determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence, regardless of who called that particular witness. You may believe one witness against many or many witnesses against one, as you determine.

INSTRUCTION NO. 32

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not to be concerned. Whether offered evidence is admissible is purely a question of law, and from a ruling on such a question you are not to draw any inference as to what weight should be given the evidence, or as to the credibility of a witness. In admitting evidence, to which an objection is made, the Court does not determine what weight should be given such evidence. As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

INSTRUCTION NO. 33

Upon retiring for deliberation, the Jury may take all papers and other items which have been received in evidence in the case. You also may take with you the written instructions given, and notes of testimony or other proceedings on the trial, taken by yourselves or any of you, but none taken by any other person.

INSTRUCTION NO. 34

The Court instructs the Jury that although the verdict to which each Juror agrees must, of course, be each Jurors own conclusion, and not a mere acquiescence in the conclusion of fellow Jurors, yet, in order to bring eight minds to a unanimous result the Jurors should examine with candor the questions submitted to them, with due regard and deference to the opinions of each other. A dissenting Juror should consider whether their state of mind is a reasonable one, when it makes no impression on the minds of so many Jurors equally honest, equally intelligent, who have heard the same evidence, with an equal desire to arrive at the truth, under the sanction of the same oath. You are not to give up a conscientious conclusion after you have reached such a conclusion finally, but it is your duty to confer with your fellow Jurors carefully and earnestly, and with a desire to do absolute justice both to the State and to the Defendant.

INSTRUCTION NO. 35

When you retire to deliberate, you should appoint one of your number as a foreperson, who will preside over your deliberations. Your verdict must be in writing, signed by your foreperson, and when found, must be returned by you into court.

In this case, it requires a unanimous agreement of all of the Jurors to find a verdict.

A verdict form is attached. Your verdict should be as your deliberations may result.

I have dated and signed these instructions and you may take them with you to the jury room for further considerations, but I request that you return them into Court with your verdict so they may be filed in this case as required by law.

Dated this the 22nd day of January, 2016.

District Court Judge

IN THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH, **Plaintiff,** **vs.** **CULLEN CHRISTOPHER CARRICK,** **Defendant.**	**VERDICT** **Case No. 141100418**

We the Jury, duly impaneled and sworn, find as follows:

X Guilty of BURGLARY, a criminal offense.

____ Not Guilty of BURGLARY, a criminal offense.

If all eight of you cannot find that all of the elements have been satisfied beyond a reasonable doubt, you must find the Defendant "Not Guilty" under this prong of Burglary. If you find the Defendant "Not Guilty of Burglary," you must then consider and return a verdict of:

____ Guilty of CRIMINAL TRESPASS OF A DWELLING, a criminal offense.

____ Not Guilty of CRIMINAL TRESPASS OF A DWELLING, a criminal offense.

Dated this the 22nd day of January, 2016.

JURY FOREPERSON

DISTRICT COURT JUDGE

Addendum C

IN THE FIRST DISTRICT COURT - BOX ELDER

BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 141100418
Plaintiff,	:	Appellate Case No. 20160249
vs.	:	
CULLEN CHRISTOPHER CARRICK,	:	
Defendant.	:	With Keyword Index

JURY TRIAL - DAY 2

JANUARY 22, 2016

HONORABLE BRANDON MAYNARD

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 E. Ellen Way
Sandy, Utah 84092
801-523-1186

MR. DUNCAN: Yes.

Well, we were hoping to get done yesterday, but for those of who you didn't want to work on Friday, we may give you the afternoon off. Depends on how long you take. Wasn't our intentions, but you're welcome.

So this case has been interesting. It's -- it's really not that difficult of a case when you consider the facts in terms of intricate facts. This isn't a corporate theft case where you have to follow the money trails or anything else like this.

What this case -- where this case gets interesting is when you realize that there's two completely different stories. That's really what it comes down to. There's inconsistent stories to the point that one story is going to have to be accepted over another. I'm not -- the State's not suggesting that you can't try to blend them together and that you shouldn't try, but the State suggests that when you try, it's just not going to work.

Either Cullen Carrick was at the house that day and went in the window looking for something, or he wasn't. And he was with his friends from the renaissance faire and had nothing to do with it.

So I'm going to talk a little bit about this. I get the final closing argument so I'm going to tell you a little bit about our side of the story. I'm going to talk to you a

little bit about jury instructions. And then I'm going to let Mr. Bushell get up and explain things and then I'm going to come back and I'm going to talk about some of these inconsistencies.

I want to point something out. Inconsistencies are not a problem until inconsistencies become material and important to the case, unbelievable, and unreconcilable. We can say, well, how long is your driveway? How far away were they, 20, 25 feet? What's the difference between 20, 25 feet? Inconsistencies that come in are the ones where we go, wait a second here. If that's true or not true, wait a second here. You can't have it both ways. And it's something we can't overlook and it's important. And there's some inconsistencies in this case that I will point out later on that you cannot overlook because they are material, they're important, and they cannot be explained away.

But in this particular case, let's take a look at some of the elements. Element 3(a), you can turn there if you want to or you can listen to my beautiful reading voice. Okay. Maybe not.

But the elements of this case, burglary, that said defendant, Cullen Christopher Carrick, in Box Elder County -- there's no question in this case, if you take the State's version of the facts, that it was, in fact, Christopher Cullen Carrick that was at that house in Box Elder County. We know

that it happened down in Willard on Highway 89. That's in Box Elder County.

Entered into unlawfully. We heard the owner of the house, Mr. Zakary Taylor, testify he had no business being in there. He had no permission. And understand -- and nobody testified to this -- that April gave him permission, but April can't give him permission either. I -- that sounds a little bit sad, but she's dead and it's not her house. It's her husband's house. Nobody that had the right to give him permission gave him permission to be in that home.

And it's a dwelling. It's clear when we look at the definition of dwelling -- we'll look at it here in a second. He went in through the garage. The garage was attached to the house. It's a house. He's in a dwelling. That's where he went. He went into a dwelling here in Box Elder County to -- with the intent to commit a felony or a theft. And we'll talk about that theft in a minute. The intent is to commit a theft and we'll talk about that because we don't know what he took.

But you -- as you read through the jury instructions and you heard the judge talk about -- that you can make reasonable inferences. And that you can say, hey, wait a second here. And as the State's looked at this and as you look at this, there is no reasonable explanation. If he went into that house, why was he there? To look around and smile and -- and look in the mirror and see how good he looked? He

was there to find something.

And, in fact, when you think about it, his own testimony was, he didn't know she was married until right before the very end. Can you imagine finding out that the person you'd be dating is married? And you've given her stuff? And now all the sudden it belongs to the husband and it's in the house and he's going to go through her personal effects? A little bit of panic.

He went into that house to retrieve something that the victim didn't know was there. But make no mistake, it didn't belong to Mr. Carrick. And it was a theft. But he went in that house to find something and to retrieve it because he wanted it and he didn't want Mr. Taylor to know he had it.

Now, the second one is an alternative theory. I don't think we have to go there, but I -- I want to go there just in case. Because if you can go into the jury room and you can find a reasonable explanation as to why he wasn't there to take something, that's fine. The State can't think of any reason. It's -- it's abundantly clear from the inferences that he was there to go find something and take it.

Okay. But if not, then it's simply that he went into the house unlawfully. That's clear. That he went into the house unlawfully. He didn't have permission to be there. And was reckless as to whether his presence would cause for the --

fear for the safety of another. It doesn't have to cause fear. He just has to be reckless.

When you go into someone's house, they don't know you're there, and you don't have to be permission -- have permission to be in there, if somebody shows up unannounced and walks into that house, is there fear your safety? It's that simple.

He didn't have to show up. He didn't have to cause the fear. But the mere presence of being in that home was a reckless disregard for someone showing up and saying, what are you doing in my house? You read about it all the time. Someone shows up; someone's in their house. They go for their gun. This is the very kind of thing -- that's why you don't go into someone's house without permission. So you have criminal trespass.

You have criminal trespass if he went in the house unlawfully. You have burglary if he went into the house unlawfully with the intent to commit a theft.

So we go to 25. And I -- I want -- this is -- this is going to be important. Sometimes I think reasonable doubt is this concept and this idea that you have to walk into that jury room and say no other possibilities, none, zero, zip. It's not beyond all doubt.

I want to point out in 25, right there in the middle, proof beyond a reasonable doubt is proof that leaves you

firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainly and criminal case law does not require that proof overcomes every possible doubt.

I urge you to follow this instruction. If you go back in that room and say, well, you know, they could have been telling the truth on the other side. That -- that could have happened. It's still got to be reasonable. And it's still got to shake you from confirmed. It's not all doubts. It's not every possible doubt.

It's a -- you have to be firmly convinced and the State believes -- and when we get done with the closing arguments -- I'm going to ask you to be firmly convinced when you go back there and deliberate that he, in fact, is guilty of burglary in this case.

Now, I want to talk about a couple of other things. We talked about going into the house and the theft. Here's where we go to number 9, and it's simple. This is what we call circumstantial evidence.

All other evidence admitted at trial is circumstantial insofar as it shows any acts, declaration, conditions, other circumstances tending to prove a crime in question or tending to connect the defendant with a commission of a crime, it may be considered upon -- by you as you arrive -- and what circumstantial evidence is in this

particular case is it's the idea that you didn't see it rain, but when you go outside, it's wet everywhere, and you go, well, it must have rained. You can infer from that that it's rained.

You can infer from the fact that when he went into that house -- remember, he didn't have to take something. He only had to intend to take something. Even if he went in that house looking for something and didn't find it, he committed a burglary.

So you can infer from the fact that he went into that house, you can infer from the motives that are likely that, in fact, he was in there to find something, whether he found it or not, and that's burglary. And that's what we call circumstantial evidence.

We don't know what he took. We don't even know whether he took something. We don't know whether he found what he was looking for. But there's no plausible explanation for him to just go in there and just sit down and think. And none was offered because he claims he wasn't even there.

Now, this next one is critically important. Then I'm going to go over the facts of the case a little bit and then I'm going to sit down and stand up after Mr. Bushell gets done.

Credibility of witnesses, number 11. The simple, basic ones, how good was the witness's opportunity to see,

hear, and otherwise observe the witness's test -- what the witnesses testified about. Does the witness have something to gain or to lose from this case? Does the witness have some -- have any connection to the people involved in this case? Does the witness have any reason to lie or slant the testimony? Was the witness's testimony consistent over time? If not, is there a good reason for those inconsistencies? How believable was the witness's testimony in light of evidence at trial and so forth.

In essence, what we do is we take a look at the witness and we say, who are they? What did they say? Does it make sense? And more importantly we ask ourselves, what is their motivation for giving the testimony that they gave during the trial? In other words -- you heard me earlier -- do they have a dog in this fight? Do they have a reason to get up on that stand and say something that isn't true because there's motivation that motivates them to say something that isn't right, something that isn't the facts?

And I submit to you -- and I'll go through and we'll talk in a minute about the defense's witnesses. I'll let him talk first, but I want to go briefly through the facts in this case and I want to talk about the credibility of these witnesses because what we have in this particular case is we have four people all positively identify the defendant as going into the house in broad daylight.

So the reality is -- if these witnesses are credible -- the case is done. It's that simple. The testimony that was presented by the State, if believed, there's no question that it was Mr. Cullick (sic) and there's no question that it was him that went into that house. And you can certainly infer from that that he went into the house to get something. There's no question about that if you believe these witnesses.

So let's talk about who they are. Number one, we heard testimony from -- and I'm going to get these so I don't mess them up -- Kristi (sic) Starkey was our first witness. Defense tried to pin motives and tried to suggest something's going on here. Kristi (sic) Starkey said, I don't know this guy. Never saw him before the funeral. Well, why didn't you put in your written statement that he had a hat?

Remember, I talked about those inconsistencies that don't really matter? Who cares whether she put in a written statement that he was wearing a hat. I asked her on the stand, well, do you remember him? Yeah, I just remember him there. He had the ponytail. Ponytail is in the written statement, but not the hat. So what.

But what is abundantly clear is she says, it was him. I looked at him and -- even in court yesterday when she looked, she -- I said, do you see him here today? Yeah, I see him. So, clearly, Kristi (sic) Starkey's identified him.

Now, this is what's interesting. She testified, I have no idea who this guy was. Never seen him before in my life. The defendant gets on the stand and he testifies, I only met one neighbor. So Kristi (sic) Starkey has absolutely zero personal knowledge and motivation to say anything but the truth. In other words, it has to be a conspiracy, doesn't it. Somebody else had to talk her into doing it because she has no reason to lie about this.

We talked about -- next we heard from Jessica Roberts. Jessica Roberts is the daughter of Kristi (sic) Starkey. And she also testified she has no idea who Cullen Carrick was. Never met him before. And she lived with her mom for a while. And, once again, the defendant testified, I only met this old lady out by the beehives one time when I was there with April. So, clearly, before this event, Jessica Roberts has no idea who Christopher Cullick (sic) does. There's no refuting that testimony.

So what's her -- now, we had two or three witnesses, well, aren't they having -- weren't they having an affair? No. Once again, they want to muddy the water. Not one witness presented any evidence and not one witness said, oh, yeah, they're having an affair. And I asked her about it, I said, are you having an affair with Cullen -- with -- with Zakary Taylor? No. We weren't even really friends. We knew each other and our kids played together, but I started dating

him after his wife died. And that really didn't go anywhere and Zakary Taylor is -- is now married to somebody else.

So they want to suggest all these facts. But, remember, this is still all after the fact. Prior to this there's zero evidence that Jessica Roberts knows who the defendant was prior to that day or on that day. So what's her motivation to lie, unless there's a conspiracy.

You next heard from Stephen Atkinson. Stephen Atkinson -- well, Stephen Atkinson is friends. He's primarily friends with Zakary Taylor through his wife who's friends with April. Zakary Taylor -- I mean, Stephen Atkinson really doesn't have a dog in this fight. He says, I know who it was; I knew they were having an affair. My wife showed me the picture. But he's really kind of on the periphery there.

He clearly hasn't said anything to Zakary Taylor because Zakary Taylor said nobody told him. He figured it out himself. But he's on the periphery. Nothing's happening there. Once again, there's no reason for Stephen Atkinson in his knowledge and his universe of what he knows who Cullen Carrick is -- he knows who he is, but there's nothing in his universe that says, hey, I'm going to say that Cullen Carrick was at the house because I want to get him in trouble. There's nothing about him that says that.

Now, let's talk about his wife, Celeste Atkinson. Very good friends with April. Had met Cullen Carrick. Knew

exactly who he was. They went to the renaissance faires together. But you heard her testimony. Her testimony was, I disapproved of it. I was upset with April. I was upset with him. I don't approve of extramarital affairs. And I told her that, but I didn't tell Zakary because I did not want to hurt Zakary's feelings.

So now she's going to hurt Zakary's feelings by bringing this all out in the open in front of a jury, in front of the police, and say, yeah, this guy was over at the house -- when she's held this secret for months that Cullen Carrick even exists -- except for between her husband and her best friend, April, who is dating Mr. Carrick as a paramour. A secret lover. Why then? What's her motivation? Zero.

Now, let's talk about Zakary Taylor. The State will concede that in theory Zakary Taylor has a motive to frame Mr. Carrick. Here's what his motive is. It's that straight and simple. I'm sure the defense will tell you. The guy's having an affair with my wife. But there's something very interesting about his motivation. And I want to talk about this. Because he found out about the affair shortly before she died, and the funeral was a few days after that.

And if you remember right, it was Matt, a friend, that invited Christopher (sic) to the funeral. Christopher (sic) was probably not even going to go. But he said -- even Christopher (sic) got up and testified and said, he invited me

to the funeral and said, hey, I'll drive you to the funeral. You've got to come.

Okay. I'll go.

Because you got to understand that even if Zakary Taylor wanted to frame Christopher Cullick (sic), there's no reason for Zakary Taylor to believe Christopher Cullick (sic) was even going to be at the funeral because Christopher Cullick (sic) didn't even know he was going to be at the funeral until the last minute. Because nobody knew he was going to be there until he was invited by his friend, Matthew.

So here's where it happens. Even if you believe Zakary Taylor framed him, Zakary Taylor's sitting at the funeral, on the front row. He's, I guess, the living guest of honor. He's -- he's the widower. We've got a roomful of hundreds of people. He's not sitting anywhere close to his co-conspirators. And within a half an hour after the funeral was over, law enforcement is at the house -- or around a half an hour after the funeral is over -- and we've got a burglary.

We hatched a scheme right in the middle of a funeral with the prime person hatching the scheme sitting front and center in front of hundreds of people, I don't know, passing notes, texting, what was he doing. Because he had no reason to believe that this would ever work until Christopher Cullick (sic) showed up at the funeral.

So at the end of the day -- and then you heard

testimony from the officer -- and I think this is important. We'll talk more about the officer's testimony in my final close. When we look at all the witnesses, we can -- we can insinuate affairs. We can insinuate that people were angry -- you heard his own testimony -- well, they just wanted to get back for me having an affair.

We -- we can make all these insinuations, but here comes Officer Fielding. Has he met some of these people before? Yeah, small town. Doesn't know them any other way. And as a police officer he remembers fingerprinting somebody one time for a business license and those kinds of things, he says, but I don't know these people. I think his first time that he interacted with the decedent was he happened to be there when she was stung by the bees and was a part of the emergency crew that got her to the hospital. And that's it.

I'm not asking you to believe this officer -- it's not appropriate for me to ask you to believe this officer because he's a police officer. I'm asking you to believe what this officer has to say because this officer has no motivation to lie. If it's not a burglary, he doesn't have to come to trial. If it is a burglary, he comes to trial. He's there to gather the facts; he's there to listen to witnesses; he's there to observe and to do what he's supposed to do. And the officer did exactly what he was supposed to do and has zero reason to lie.

Now, the defense may attack his police work and they may say he did a poor job. I disagree with that. But he wasn't motivated to lie and nobody has attacked his credibility in this case.

So, ultimately, ladies and gentlemen, at the end of -- end of the day, what I'm telling you -- and I'll get up in a minute and I'll explain it. You have two theories as to what happened in this case. Either Zakary Taylor -- or either Cullen Carrick was there looking for a momento and got it or didn't get it -- don't know for sure -- and committed a burglary, or he was with his friends up at the funeral home until dusk that night when all this was going on.

But, ultimately, at the end of the day the State has proven their case beyond a reasonable doubt with their witnesses. In a minute I will get up after defense is done and we'll talk about why the State's case is believable beyond a reasonable doubt and why the alibi defense doesn't work.

Thank you.

THE COURT: Mr. Bushell.

MR. BUSHELL: Thank you.

Good morning. Like Mr. Duncan, we had grand ideas yesterday of getting this case resolved. I'm not going to apologize though, however, for making you come back because this case is important.

This case presents a difficult dilemma for me in that

I have to in -- in essence, give you two closing arguments. Because of the facts of this case, I have to first argue that my client wasn't there.

You've heard testimony on both sides yesterday and this morning whether or not Cullen Carrick was at the Taylor's home. Because if you look at what Mr. Duncan went over with you, the elements of this crime, the very first element is whether or not Cullen Carrick entered into this dwelling. That issue is the first part of my closing argument.

Now, our defense all the way along has been he was not at that home. You heard testimony from witnesses that he was. You heard testimony that he wasn't. You're in the unenviable position of having to make that determination of whether he was there or not.

The State wants to put the burden on me and my client to show that he wasn't there. And they want to do so by attacking the credibility of our -- our witnesses. And that our witnesses have all these motives to stand under oath before you and lie to you. You heard that oath five, six, seven, eight, nine times during this test -- during this trial. And every time that oath is, do you swear to tell the truth, the whole truth, and nothing but the truth, so help me God.

The State thinks that my witnesses had reasons to lie. But let's -- let's take a look at them just here for a

second.

Matt Bishop, who drove my client to the funeral and drove him home. Do you recall what kind of car he drove? (Unintelligible) it's a white Mazda Protege.

I asked him, how well do you know my client, Cullen Carrick? Didn't know him real well. Knew of him. Met him a couple of times. Weren't buddies, didn't hang out, didn't go to the pool hall, but felt bad for him because April worked with Matt and he kind of knew what was going on. Felt bad for him. Didn't want him to drive up here by himself.

I'll be honest with you. It took me a while to get a hold of Matt. It was difficult for me to track him down. I tried for a number of months before this case went to trial to try to find him. And truth be told, as Matt said, he talked to me, finally, the day the trial started he finally got back ahold of me. Right before we got going, I got a phone call. I said, I need you to come up here. I've been trying to track you down. He said he was sorry, he was busy, he'd been sick.

What motive does he have to lie? I guess I told him I'd issue a subpoena to get him up here, but he -- but he came. He came on his own volition. Told me he would be here. Came up and testified truthfully. He testified truthfully he drove Cullen from Weber County up here, stayed with him the entire time, saw him at the balloon release, saw him after when everyone was hanging around, and then drove him back

home. Or at least back to his salon. He got -- Cullen got in his car and -- and went home.

What motive does a guy have to lie about that? What does he gain? He doesn't know Cullen very well. They're -- they're not friends. This event allegedly happened in May of 2014. He wasn't charged until, I believe, August of 2015. And now we're even past that into 2016 before trial. They don't have a relationship. They're not friends. He has no reason to come and sit here under oath and lie. There's penalties for lying. He's not going to risk that.

Let's look nest -- sorry, next -- I want to make sure I get her name right -- at Tawni Malmberg. Tawni testified she didn't know Cullen very well. She was friends with April. She learned of Cullen a couple of days before April's death. She's April's good friend. She testified to -- to that.

Think about then logically what reason would she have to sit there and defend somebody she barely knew in a lifetime. Does that really make any sense? Under the risk of perjury charges, lying to a jury, in a criminal case? She had no reason to. She told the truth. She told what happened.

She said, he came to the funeral, at the balloon release, stayed around and I saw him leave. At no time did she say he left and came back because that's what really would have had to happen. For Cullen to get to the Taylor's house, he would have had to leave with somebody else, do what they

say, and then come back and be seen again at the funeral home and then leave with Matt. She had no reason to lie. Just there simply isn't one.

I will concede, Celeste and -- and Elias are friends with my client. They're not great friends. He lives in Huntsville; they live in Salt -- Salt Lake. They see each other at the renaissance faires. They don't hang out a whole lot. But they have a closer relationship than the other two witnesses have.

But, again, they're put under oath. They're not gaining anything by it. In fact, they actually lose money by coming up here. I made them sit outside all day long yesterday with the hope that they would done. They're self-employed. They came back to their -- on their own volition this morning, drove to and from Salt Lake. They actually lost out by coming here to testify.

And why did they come to testify? And -- and I ask all my clients -- or all my witnesses that. They came because they wanted to tell the truth. They wanted to let know what had happened here. My client simply wasn't at this home.

The State put on their witnesses and they say their witnesses are more credible than mine and they don't have anything to gain by it. I don't know what the people have to gain. I don't know what Jessica Roberts had. I don't know what her mom, Ms. Starkey, had. I don't know what Stephen

Atkinson had, or his wife Celeste had, what they would gain by it.

You have a balancing act here. You've got our witnesses; you've got their witnesses. Who's telling the truth? You may not be able to decide that. That may be hard. Again, I'm glad I'm not sitting in -- in your position right now. This is a typical he said/she said type of case.

What we do have -- or in this case don't have -- is forensic evidence. Officer Fielding had the ability here to tip the scales with what he found at this alleged crime scene to see whether or not Cullen Carrick was at that house.

But you know what? He didn't do anything other than, as he claims, shine a flashlight around. But remember, they're claiming it's -- it's daytime. So, again, I don't understand why you'd necessarily need a flashlight to see whether or not there were fingerprints.

Didn't want to waste valuable resources. He had a dust kit in his truck, he testified. If somebody is going to take a screen off and step in, there are going to be fingerprints somewhere. There was no witness testimony he was wearing gloves, none -- none of that. Somewhere a fingerprint would have been had.

Let's assume that Mr. Taylor's telling the truth and his testimony was that golf bag in his garage was moved from where he put it. Logic dictates that if an individual breaks

in and moves it, there's going to be proof somewhere on that bag. There's going to be proof somewhere on the siding on the side of the house. As somebody went into the garage, they're going to need to hold on to something.

Somewhere there is a -- a print, or could have been a print. But that police work was not done to find out whether or not somebody was in. All the officer did was take the word of some individuals who said this person is here. And because he called my client and said, get back here, and my client was scared and said no, he's automatically guilty and that's the end of the police work.

Photo lineup. I'm assuming that you're all familiar with what a photo lineup is. A photo lineup was conducted with one individual in that photo lineup. That is not how a photo lineup is done.

Jessica Roberts' witness statement indicates she saw a slender, tall, long-haired individual. Guess whose picture she saw? I don't need you to guess. It was Cullen. They showed his picture on the scene on the 28th of May -- I'm sorry, 21st of May. Nine dater later, Officer Fielding met with Jessica Roberts again and showed the same picture. Nobody else's picture was there.

Put yourself in his shoes for a second. If you're being charged with a serious criminal charge, wouldn't you want the police officer who was investigating that crime to do

everything possible so that you know for a certainty it's him? Or in your case, you? You would want the officer to do a full investigation. You would want the officer to go get his dust print kit out of his truck and come and throw some dust around and look for a print, not just shine a flashlight or look under the naked eye to see whether or not prints were there. What's the point of having a dust kit if you're not going to use it?

They had every opportunity to prove, as the State wants you to believe, beyond a reasonable doubt that he was there. They didn't do it. They just said, well, this is probably him and he didn't want to come back. So that's it.

So we don't even have the police reports or the police actions to tip our scales. They can't prove beyond a reasonable doubt that Cullen was there. And my argument is -- and I believe wholeheartedly -- he was not there.

Now, phase -- or my second closing is if you believe, as the State would have you believe, that he was there, that in and of itself is not enough to convict.

Judge Maynard, yesterday morning, before -- right when we got started read to you a bunch of opening jury instructions. And I'm -- I'm sure you still have all of those. Numbers 3(a) -- pull these up here -- and 3(b) give you the elements of a crime. Now, the first element of that is that he has to be there. He has to go into that dwelling

without permission.

I'm not saying he -- he was there. I'm saying arguing -- if you believe he was there -- arguing then is not enough. There has to be a showing of intent. Okay.

The intent at that point then is to commit a felony or a theft. What showing have we had during this trial that a felony or a theft? I think the State con -- concedes, and Mr. Duncan can tell me if I'm wrong during his rebuttal to this, that a felony didn't occur. There's been no showing of an intent to commit a felony.

The State's grasping now for, okay, there was an intent to commit a theft. What intent did they show? They want you to do it under circumstantial evidence or you can take that great leap of faith that he was there to take something. There's no showing of any of that. Zak Taylor was asked that night, anything gone?

No. I can't tell. I don't see anything missing.

October, five months later, Officer Fielding again called Zak Taylor and asks, hey, I know I'm kind of following up on this case. Now, again, remember it's five months later he's following up on -- on this case. Anything taken?

No, I don't see anything.

Intent is a hard thing to wrap your head -- your head around. There's a jury instruction on what intent entails. I'd like you to take a look at that when you go back in. And

when you're doing that, think about everything we've heard today. The intent to do any of those crimes is a second prong to a burglary charge. And there has not been any showing of any intent to commit a felony or to commit a theft.

If you believe what the State wants you to, they place him in this place. They place him in the garage. They place him walking away. And then somehow -- either through being a real fast runner or getting into a vehicle that has not been followed up on investigative-wise, with additional co-conspirators in it -- left. No showing of anything taken.

What -- what burglar that enters a home takes a screen out, comes back out and puts the screen back in perfectly? Remember, Officer Fielding told us the screen was perfectly intact. There wasn't anything -- any showing of that window being disturbed at all.

The State filed a jury instruction for what's called a lesser included offense because to get to burglary you have to commit a criminal trespass to get to that unlawful entry. And the criminal trespass jury instruction is the lesser included offense. The State's asking if you don't find him guilty of burglary, if you can't show that he wasn't there, or if he was he didn't have the -- the intent, let's next look at criminal trespass.

In a criminal trespass, again, I have two closing arguments. I've got the first argument I already gave you is

he wasn't there, but if you believe that he was, then there's still another prong he has to -- to meet -- the State has to meet. And that is whether or not Cullen Carrick was reckless as to whether his presence would cause fear for the safety of another.

Let's talk about the witnesses who actually saw him there. Jessica Roberts, her mother Ms. Starkey, initially saw him. They claim he was in the back yard and they recognized him from the funeral. They recognized him and wrote witness statements about it. Both of those two indicated that the tell tale feature that Mr. Cullen (sic) had was his Man from Snowy River hat.

And I'll be honest, I've been thinking a long time, how do I describe that hat. She nailed it. The Man from Snowy River. Some of you might be old enough to remember that movie, but that hat, that is exactly the hat. And you think something that distinctive that she can come up with a perfect name for it would be written in the witness statement. It's not.

They got, slender man with long hair. A slender man with long hair who they didn't take any real notice of. They both thought, well, that's kind of weird that he's back there. Yeah, well, let's go inside. I have to pee.

They come back out the exact same moment he's coming out. And then what do they do? Do they say, hey, what are

you doing? Hey, get out of here. Zak send -- send you? What are you doing? No. They wave to him.

Mr. Duncan wants you to think, oh, no, he's in there. Better pull a gun. That -- that's what could happen. Anything could happen. But what really happened? If you believe their story there was just a wave. There was no cause for alarm. There wasn't -- as the statute requires -- a causing of fear for the safety of another.

In fact, Ms. Starkey says she started following him after. If you're fearful of someone, aren't you going to run in immediately and call the police? There was no fear there. There was no cause for alarm. There was no harm.

Stephen Atkinson thought it was weird there was a car sitting out front. He just barely -- I guess he looked over his shoulder and saw an individual walk past.

This case, ladies and gentlemen, really boils down to two things. One, which witnesses do you believe the -- the most on whether or not Cullen Carrick was at that home or whether he stayed with his friends?

Our contention is that he was with his friends the entire time, came up to Box Elder County to mourn the passing of someone he loved, and then leave. And that's exactly what he did. Now, I want you to believe that. I want you to believe that as I want you to.

The State wants you to believe that we're lying and

that he actually went to that house. If you believe that, you still have to get to those second prongs of both of those offenses. And, frankly, the State didn't prove that. They have to prove beyond a reasonable doubt that he had those intents, or that he was reckless for criminal trespass. They didn't do that. They put on a lot of evidence about him being there. They didn't put on anything to show the intent or the cause -- or that -- that he was reckless and would cause fear of harm.

I asked you for a couple of things at the very beginning. And it might have been a bit presumptuous of me to ask somebody who got called to jury duty and probably wasn't real happy about it to do, but I'm going to remind you what I asked you for. Okay.

I asked you to do what nobody else in this case would have done and that's to protect Cullen Carrick. Protect him from warrantless and baseless charges. Protect him from poor police work. I'm asking you to put yourself in his shoes and how you would feel if you were charged with a crime knowing, (a), you didn't do it; and (b), the police work done during the investigation was so poor.

I'm going to ask you to believe as I believe that my witnesses for -- on Cullen's behalf told the truth, that he was with them the entire time. He didn't go to that house. He didn't have an opportunity to go to that house.

I'm going to ask you as the jury to believe as I do that Cullen Carrick is not guilty of that offense. I'm going to ask you to find that the State has not met their burden and that burden is to prove my client guilty beyond a reasonable doubt. And he has not done so.

I, again, would like to thank you for time. I appreciate it. I notice everyone's been very attentive. And I thank you.

THE COURT: Thank you, Mr. Bushell.

Mr. Duncan.

MR. DUNCAN: Yes.

Well, let's talk a little bit about the two versions of the story. They clearly don't coincide.

And I -- I want to briefly go back to what he was talking about in terms of the elements not having been met, even if you assume our facts are correct.

I also want to talk briefly about motivation and when he talked about motivation of witnesses. I thought that was very interesting. Another word for that is credibility. What are they motivated to do or are they motivated to lie?

Let's first talk about the elements real briefly. First on the criminal trespass. It does not require anybody to be scared. Let's be clear. What it requires is a reck -- that they are reckless as to whether his presence would cause fear for safety in another.

When you go into somebody else's house and you're not supposed to be there, isn't it reckless to assume that if they come home -- they don't have to come home and be scared, but isn't reckless to assume that if they come home that they won't be scared?

If Mr. Zakary Taylor had walked into his home and found the man who was having an affair with his wife standing in his home, isn't it reckless for him to assume that going into that home would not cause fear for the safety of another? What good do we have a statute that says stay out of other people's houses if the excuse is always going to be, why should you be afraid if I'm in your house and I'm not supposed to be.

Let's not twist that. It's a no-brainer. Don't go into someone's house that you're not supposed to be in. Because guess what? Human nature is if somebody walks in and they find you there -- whether they do or they don't, human nature is if you walk in there and you find somebody in your house that's not supposed to be there and it's not your mother -- of course, I guess if it's your mother and she's not supposed to be there, you might be even more frightened. I don't know.

But somebody that's not supposed to be there, that's a reckless disregard as to whether it will cause fear. If we can excuse everybody else's entry into someone else's house

simply because, well, nobody was afraid or would they really be afraid if he walked in, then what purpose do we have a criminal trespass statute for?

The whole concept is, don't go into someone's house when you're not supposed to be there because there's an assumption, a human nature assumption, that that's going to freak someone out if they walk in on you. And he recklessly disregarded that fear that any normal person would have finding a stranger or somebody that's not supposed to be in their house in their house when they're not supposed to be there. So it has been met, according to the State's evidence.

The other one is the burglary. Let me read the intent that he wanted you to read. Twenty-seven. The intent with which an act is done denotes a state of mind and connotes a purpose in so acting. Intent being a state of mind is seldom susceptible to proof of direct or positive evidence and may ordinarily be inferred from acts, conducts, statements, and circumstances.

Exactly. Exactly. I can't read his mind. Nobody can read his mind. But what we can do is look at the facts surrounding the circumstances that causes this intent. He's in someone else's home. He's in someone else's home. He's in his ex-lover's home. What is he doing there.

From the facts we infer intent. And from the facts we look at it and say, what other purpose -- did you notice

something? You know something? I set this up in my -- in initial closing arguments I said, you're right. I said, but there's no other reason to believe he -- why he was in his home.

Why didn't defense counsel get up and give you a plausible reason, a plausible other explanation as to why he was in that home? If it's so easy to say, well, you can't form that intent. He could have been there for a myriad of reasons. What is it, defense? What is the other reason for being in that home if it's not to take something? And why go into someone else's house when you know that they're going to be gone?

And he says, you know, it's interesting. They put the screen back. What burglar does that. That's exactly the point. He wanted to go into that house, find something. He (unintelligible) that's a married man. Holy cow. I didn't know I was dating a married woman.

He wanted to go into that house. He wanted to get something out. He wanted to leave. He wanted to shut the screen. And he wanted nobody to know that he was there. That's exactly why he put the screen back. He was hoping -- because remember, he didn't know anybody was there until he turned around and lo and behold there's the neighbors standing there looking at him. And he waves at them -- or they waved at him and he waves. He walks off trying to act like

nothing's wrong here. Nothing's wrong here.

But remember, the screen was put back because that's exactly what he wanted people to not know -- that he'd been there and that he'd taken something because he didn't want anybody to know. He certainly didn't want the victim to know because at this point in time he doesn't know that Zakary knows. He wants to get in there, hide evidence, take the stuff that says that he was having an affair with his wife, and leave as if though he was never there. That's the intent. That's the reason why the screen was put back.

Now, I think it's interesting. I talked to you a lot about credibility of witnesses. I think this is interesting. He talked about these witnesses -- and it's interesting because there's really kind of two theories as to why the defense's case doesn't work in terms of the identification.

And the defense went with this whole idea of, well, maybe they were mistaken because, you know, here's this -- this one picture. But remember something. That's not a viable theory. That's not a viable theory. He went with that theory. And this is what he said about the plaintiff's -- or about the State's witnesses. I don't know what they had to gain.

In other words, they're credible. They didn't have a reason to lie. He went right through them and says, I don't know why Kris Starkey would want to lie. I can't give you a

reason. I don't know why Jessica Roberts would want to lie. Can't give you a reason. I don't know why the Atkinsons would want to lie. Can't give you a reason. But it must have been that picture.

Well, there's a problem with that. There's a real problem with that. Two of the eyewitnesses that saw him there knew him. Forget the picture. They knew him. In fact, one, Ms. Atkinson, knew him well. She knew about the affair. She'd met him several times. There was no question in any of their minds who this guy was. This is not mistaken identification.

Now, let's talk a little bit about the credibility of -- let's talk about the credibility of their witnesses. And I agree with the defense to a certain degree that -- that credibility and measuring credibility is a difficult decision for you. But let's be real. At least two of the witnesses were a part of the renaissance faire. And I asked, is this a tight circle?

Oh, yeah.

Do you all know each other?

Yeah, this is a tight circle.

Do they have a motivation? Let's talk about that. Let's talk about that. You have a burglary that happened shortly after the funeral. If this is a conspiracy, which the defense doesn't even argue that it is, but this all has to

happen relatively quickly for it set forth.

Now here stands Cullen Carrick accused of burglary. And the only way he's going to get out of this is if he says, I wasn't there and they'll tell you I wasn't there.

There's a motive right there. There's a motive right there and two of these people are really good friends with Cullen Carrick. And they're all friends with the lady he was having an affair with. And he needed a favor. He needed help.

Because, you see, you have a year and a half. I'm going to talk about that alibi defense because, you know, it's interesting, he said in his closing argument, the officer had the chance to tip the scales with the fingerprints. The officer had the chance to tip the scales with a lot of things. He did. And until this trial started, we didn't even know the officer had tipped the scales with something he did. An innocuous part of this investigation becomes a key piece of evidence in this case.

But nevertheless, do they have motive to lie? Of course they do. Do they? I told you at the beginning of my closing arguments one of the things we look for is we look for inconsistencies in testimonies, inconsistencies that are material and important to this case and inconsistencies that cannot be explained away.

And here's what it is. All four alibi witnesses and

the defense -- now, mind you, these people were called -- in fact, Matt was called -- we didn't know who these people were. They never talked to investigators, they never knew anything -- we didn't know their stories until they walked into the courtroom today.

All four witnesses testified that they were at the funeral with Cullen Carrick. And they probably were. And all four witnesses testified along with Cullen Carrick that they stayed at the funeral until it started to get dark. And then they left, including Mr. Carrick. He left after it started to get dark.

Now, that's interesting because all of the State's witnesses testified that this entire thing happened in broad daylight. The officer got up and he testified and he said, when I left my investigation a little bit before 7 o'clock -- remember, this is May. June 21st is the lightest day of the year. It's going to be 10 o'clock in -- in June before it's dark. May, 7, 8 o'clock. He leaves at 7 o'clock -- he leaves the crime scene at 7 o'clock and it's broad daylight.

Now, here's the key piece of evidence the officer gathered, but until they testified, we did not know how important it would be. And that's why we get this key piece of evidence in because remember, nobody attacked his credibility.

Now, assuming arguendo he did a lousy job. And I'm

not going to agree with that. Let's assume he could have gotten fingerprints and he didn't. This is not CSI. You don't find fingerprints. And let's assume that he just -- he'd do his job right. He did do this right. And that's undisputed. And nobody is arguing that he ever lied. Nobody is arguing that he had any bias. Nobody is arguing that anything he did was motivated by anything other than being an officer of the law and doing the right thing.

Gets him on the telephone, in broad daylight. Mr. Carrick, this is Officer Fielding from the Willard Police Department. I need to talk to you.

And what does the defendant say to the officer? I am on my way to Salt Lake City.

Well, two people saw you break into the house. I've got eyewitnesses that say that it's you, Mr. Carrick.

I'm busy. I got to go. Click.

Not really anymore. We have cell phones. For those of us old enough, we remember the click.

That's crucial because every single last witness for the defense put him at the funeral home at the time that telephone call was made.

He cleared the scene at 7 o'clock. We were done at 7 o'clock. It's not dark until after 7 o'clock, and yet every single one who them testified that he stayed late at the funeral home. Remember, we've got a five, 10-minute visit in

the parking lot after the balloon launch. We then go home, a 15-minute drive to Willard. Immediately we recognize the problem after about five minutes. They went in the house, they said, oh, about three, four, five minutes. They come back out; they see him leaving. And within a minute or so, they call the police. That's 30 minutes.

And the police officer showed up about 10 minutes later. We're less than an hour after the funeral -- in broad daylight. And all of their witnesses testified that he was at the funeral home.

Now, here's what's interesting. And I want this to be important because they talked about the conspiracy before and I'm not really worried about that other than -- and they didn't attach themselves to the conspiracy theory.

One of the important things about evidence is what does somebody say in the moment. Not a year and a half later at trial. What do they say in the moment and why is that so important? What does somebody say when they get on the phone and an officer says, I want to talk to you.

If they don't know what to say, they hang up. If they figure that it's not damning, they tell them. And at the time when he told the officer he was on his way to Salt Lake, it was an innocuous, unimportant detail. Because guess what? He was on his way to Salt Lake. Why lie about it? Officer's on the phone with him. Now, when we start talking about the

burglary, that's when he gets nervous and that's when he hangs up the phone.

I contend with you that the alibi witnesses all talked about him being at the funeral home -- and here's the other thing that's important. When we talk about in the moment? Telling the truth? Let's go with their story that he's at the funeral home and let's replay that phone call.

This is Officer Fielding from the Willard Police Department. I need to talk to you.

I'm busy right now. I'm at a funeral.

Well, I have two people here that say that you've just broke into a house and they say that it's you, Mr. Carrick.

Well, I'm up here at the funeral home with a whole lot of people. I have alibis -- now, he's not going to say alibis. That's a pretty big word we don't use everyday. But I got a whole bunch of people that say I was here the whole time. Why don't you come and talk to them.

That's that spontaneity of being caught on the phone. He would have had an alibi defense if he'd actually been at the funeral home. If he actually had something good to say to the police officer, that's how the phone call would have went. We'd have known about the fact that he was at the funeral home a year and a half ago because guess what? It would have exonerated him and it would have shown that he wasn't guilty.

But he didn't say that a year and a half ago because he wasn't at the funeral home. And he didn't have an alibi defense a year and a half ago. He said the truth. He was on his way to Salt Lake City. Why was he on his way to Salt Lake City? Because he'd already been to Willard. He'd already broke into the home. He'd already retrieved what he wanted to retrieve and now he was on his way to Salt Lake City.

And that's where the defense breaks down. Inconsistencies in their own evidence. Inconsistencies in the statements that they made.

Did he lie to the officer that day about being on his way to Salt Lake? Or did all of these witnesses come in and say he was with us at the funeral, and is that wrong?

I submit to you, he was on his way to Salt Lake City. He didn't lie to you about that. But a year and a half later, now, they're telling you he wasn't on his way to Salt Lake City. He was at the funeral home. And that's an inconsistency that's important. It's material and it can't be explained. The defendant is guilty of burglary.

Thank you very much.

THE COURT: Thank you, Mr. Duncan. I will give the bailiff the instructions. If you'll swear him.

(Clerk administers the oath to the bailiff.)

THE COURT: All right. I will now excuse the jury. I will need to see juror Jennifer Kohl in my office.