No. 20151017-CA

IN THE
UTAH COURT OF APPEALS

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STATE OF UTAH,
*Plaintiff and Appellee*,
v.
JOHNNY BRICKMAN WALL,
*Defendant and Appellant*.

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# BRIEF OF APPELLANT

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On appeal from the Third Judicial District Court, Salt Lake County,
Honorable James T. Blanch, District Court No. 131903972

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Johnny Wall is incarcerated.

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Oral Argument Requested

## Current and Former Parties

**Appellant**

Johnny Brickman Wall

Represented by:
Troy L. Booher and Freyja R. Johnson of Zimmerman Booher

**Appellee**

State of Utah

Represented by:
Tera J. Peterson of the Utah Attorney General's Office

**Parties Below Not Parties to the Appeal**

Other party: Pelle Von Schwedler Wall

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## Introduction

Uta Von Schwedler was found dead in her bathtub with a treasured photo album floating at her feet. She had drowned. She had a near-fatal dose of Xanax in her system and cuts on her wrist and leg. Bloody handprints on the window sill and sink showed how she had steadied and lowered herself into the tub. Her shirt was dry, neatly folded, and draped over the side of the tub.

The medical examiner believed it could have been a suicide. He certified the manner of death as "could not determine," a certification he uses when he considers at least two manners of death to be "equally compelling." (R.13834.)

The State charged Dr. Johnny Wall, Uta's ex-husband, with murder. But no evidence placed Johnny in the home at the time of Uta's death, and the evidence fell well short of excluding reasonable doubt that Uta's death was a suicide.

At trial, the parties drew competing inferences from largely uncontested evidence. The defense argued that Uta killed herself, either intentionally or accidentally. Pills strewn on the closet floor reflected her anxious search for hidden medication, and items knocked over indicated her intoxication as the Xanax took effect. The cuts on her body were in places and at angles consistent with being self-inflicted. And bloody handprints on the sink and windowsill showed that she steadied herself into the tub.

The State had a less likely theory: Johnny killed Uta. This theory had two fatal flaws: (i) no evidence connected Johnny to Uta's home; and (ii) the inference of suicide was more reasonable than the inference of homicide. The homicide

theory hinged on the fact that Johnny and Uta had, like many divorced couples, a bitter custody dispute. The State's experts struggled to describe how Johnny might have attacked Uta, restrained her, injected her with Xanax, and forced her into the tub. But the State could not explain how Johnny left no physical evidence—not a mark on Uta, or a fingerprint at the scene, or DNA in her home.

Without physical evidence placing Johnny in Uta's home, the State misconstrued four DNA tests results on Uta's fingernails and bedding. Johnny moved to exclude this evidence because it was unreliable and could mislead or confuse the jury. The trial court admitted the evidence but cautioned the State to present the evidence accurately and not to misconstrue the results.

But the State did just that. It misrepresented that Johnny contributed DNA to a stain on Uta's pillowcase, based on a test that could not differentiate between Johnny and his sons *who lived in Uta's home*. Worse, a more informative test on the same sample indicated Johnny's son was the source of the DNA. The State also misrepresented two test results from Uta's pillowcase and comforter as proving that Johnny had been in Uta's bedroom. But the items tested contained the DNA from several people, including Johnny's children, and his children collectively share with Johnny the DNA found on these items. Again, because the children lived with Uta, the presence of their DNA would be expected.

Finally, the State misrepresented that three cells of male DNA under Uta's fingernails came from Johnny even though the lab could reach "no meaningful

conclusion." The State urged the jury to convict based on this unidentified male DNA: "I would submit to you it was as if Uta was standing in this courtroom and pointing to the defendant as her killer." (R.10141-42.) The State's mischaracterizations of the DNA tests were misleading, confusing, and false.

The jury convicted Johnny. Without any evidence placing him at the scene, the conviction is explainable only by the jury's confusion stemming from the State's misconstruing the DNA results. The court should have excluded the unreliable DNA evidence, and trial counsel should have objected when the State misconstrued the DNA test results.

Viewed accurately, the evidence falls well short of excluding reasonable doubt. Because the suicide theory is more plausible, the homicide verdict is based on speculation. Under Utah law, a verdict is based on speculation if the evidence supports two equally plausible inferences. Here, the inferences are, at best, equally plausible. This court should vacate the conviction.

Alternatively, the court should order a new trial. "Just as [courts] are more ready to view errors as harmless when confronted with overwhelming evidence of a defendant's guilt, [courts] are more willing to reverse [or grant a new trial] when a conviction is based on comparatively thin evidence." *State v. Charles*, 2011 UT App 291, ¶ 37 n. 14, 263 P.3d 469. Where evidence is thin, "almost any error has the potential to be prejudicial." *Id.* This court should order a new trial.

## Statement of the Issues

**Issue 1 – Sufficiency of the Evidence:** Whether the trial court erred in denying the motion to arrest judgment where the evidence does not exclude reasonable doubt of Johnny's innocence.

**Standard of Review:** This court determines whether inferences from circumstantial evidence have "a basis in logic and reasonable human experience sufficient to prove each legal element of the offense beyond a reasonable doubt." *State v. Workman*, 852 P.2d 981, 985 (Utah 1993). This court reverses where "reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." *State v. Van Dyke*, 2009 UT App 369, ¶ 19, 223 P.3d 465.

**Preservation:** This issue was preserved at R.2024-44.

**Issue 2 – DNA Evidence**: Whether the court violated rule 702 in admitting misleading DNA test results.

**Standard of Review**: A court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Lowther*, 2017 UT 34, ¶ 17, 398 P.3d 1032.

**Preservation:** Defense counsel moved to exclude the evidence at R.766-67,968-69, and the court admitted it at R.1712-19.

**Issue 3 – Ineffective Assistance of Counsel:** Whether counsel was ineffective for failing to object when the State mischaracterized the DNA results.

**Standard of Review/Preservation:** Claims for ineffective assistance of counsel present questions of law, *State v. Ott*, 2010 UT 1, ¶ 16, 247 P.3d 344, and need not be preserved. *State v. Johnson*, 2017 UT 76, ¶ 22, 416 P.3d 443.

## Statement of the Case

### 1. Uta Is Found Dead

On the evening of September 27, 2011, Uta's boyfriend arrived at her home and found her dead in her bathtub. (R.6651.) She had drowned. (R.13833.)

Cold water was running in the tub, and a "much loved" photo album floated at her feet. (R.6651-55,9428.) Uta had a near-fatal dose of Xanax in her system. (R.13842.) She had cuts on her wrist and one on her leg. (R.7139.) Her kitchen knife lay under her body in the tub. (R.6890.) She was found around 8 p.m., and no one had heard from her since the night before. (R.6651,13604.)

### 2. The Evidence Points to Suicide

The evidence suggests a suicide. Uta overdosed on Xanax, cut herself, and then, while intoxicated, lowered herself into the bathtub, and drowned.

**The scene –** Uta's shirt was "apparently dry," folded, and neatly draped over the side of the tub the same way as other clothing was draped over her rocking chair. (R.9433,9428.) Blood stains on the front of her shirt suggested she had pressed her cut wrist against her chest as a compress. (R.9428,13505-07.)

Uta had intoxicating levels of Xanax (alprazolam) in her system. (R.13919.) Xanax is a prescription drug that treats anxiety. (R.13840.) Uta may have taken Xanax twice. She had metabolite in her liver and one milligram of Xanax in her stomach, but no pill fragments in her stomach. (R.7164,13906-07.) Gastric content in her lungs and white residue in the bathtub reveals that she vomited the pills and then aspirated. (R.9441-44.)

Pills were scattered on the floor of her bedroom closet. (R.9441.) A chair was in the closet and clothes were spilling from the upper shelves, suggesting Uta stood on the chair to reach pills stored behind them. (R.9441.)

Side effects of Xanax include lack of coordination and loss of motor skills. (R.13896.) Her bedroom was in disarray—a lamp tipped over, and a vase and books knocked from her nightstand. (R.6935.) Her rug was kinked. (R.6935.)

Side effects also include disinhibition and self-mutilation. (R.9427,13923.) The evidence suggested she cut herself. The knife in the tub was the same brand as the knives she owned. (R.8803,8818.) Uta's DNA was on the handle and the blade. (R.9427.) Each cut was consistent with self-cutting. (R.13856-61.)

The evidence also suggests she cut herself in her bedroom, where there were spots of blood on her bedding, on her rug and in the hallway leading to the bathroom. (R.13629,13632.) In the bathroom, bloody handprints on the window sill and sink "line[d] up exactly" to where she would have steadied herself while lowering into the tub. (R.9428-29,9434-35.) The shower curtain and shampoo bottles were undisturbed. (R.9433-34.) And a towel by the tub had blood spots as if someone stood there while bleeding. (R.13630.)

**Uta's history of medicating herself -** Evidence also suggested Uta's death was a suicide. She suffered from anxiety and depression and took several medications. (R.14020,14186-87,14215-17,14189.) She self-medicated or sought professional treatment for sleeping, inflammation, back pain, asthma, allergies,

infections, menopause, depression, and anxiety. (R.13311,13670-72,14186-87,14189,14198,14194-95.) She had taken antidepressants. (R.14189-90.)

She also took medications that had not been prescribed to her and had medications from foreign countries. She had pills and inhalers obtained in Germany. (R.9515-16,14195.) The pills scattered on her closet floor were from Costa Rica. (R.6713.) She also used her sister's medications. (R.14174,14217.) She did not always follow prescription dosages. (R.14198.)

She did not have a prescription for Xanax, but Xanax is available online and widely shared. (R.13841,9320-21.)

Uta relabeled the pills she took. She took them out of their packaging and put them in test tubes or film canisters, in her handbag, in the bathroom, and in drawers and cabinets. (R.8854,13313,13352-53,13383,13665-67.) She took so many pills that she logged some of her doses on a calendar. (R.9537-38.) It is not clear whether she documented all the different pills she took. (R.9538.)

**Uta's personal life –** The problems in Uta's personal life may explain her state of mind. She had limited visitation with her four children. (R. 14412.) At one point, even that limited visitation had been restricted because DCFS found she had abused her son. (R.14293-94,14378-79,14406.)

Since she and Johnny divorced in 2006, they frequently argued about the children and photo albums—one of which was found floating in the tub with her. (R.8084,9194-95,14316,14321-22,14329-30,14470-71.)

In the months leading up to Uta's death, the custody dispute intensified, and with it, the resentment. (R.14333.) She told her sister she was at the end of her "tether." (R.7011-12.) Her home was more cluttered and disorganized than usual, a sign of depression or feeling overwhelmed. (R.13344-48.)

The night before Uta was found, a neighbor saw her shaking her head during a phone call and pounding hard on her keyboard sometime around 10:00 p.m. (R.13604-05.) She appeared to be upset. (R.13617.)

**3. The Medical Examiner Agrees It Could Have Been Suicide**

The medical examiner believed Uta's death was an accidental suicide or homicide, but the evidence made homicide unlikely. (R.13833-34.) As he put it, "if you tie it all together as a homicide and say that she sustained all of her injuries in the setting of homicide, as well as was homicidally poisoned, that's also a very, very rare beast and that's not something I've ever seen." (R.13835.)

He opined that each injury could have been self-inflicted or accidental. (R.13786.) He characterized the cuts on Uta's writs and leg as superficial and agreed they could have been self-inflicted. (13794,13856-61,13869-71.) The marking on Uta's lip was "nonspecific" and not an actual injury. (R.13789,13839.)

He identified small internal hemorrhages in Uta's neck, which may have occurred after her death (R.13804-05.) Uta's injuries were consistent with losing her balance or falling against a sink or other surface. (R.13789-90,13792,13887-89 (injuries may have occurred before or after death), 14212-13 (Uta bruises easily).)

He found no injuries or marks to suggest Uta had been attacked. (R.13848-49.) He stated that if Uta had been involved in a "homicidal fight for her life," he would "expect her to have more injuries." (R.13835-36.) He certified the cause of death as drowning and the manner as "undetermined." (R.13833-36.) He said the evidence supporting suicide was "equally compelling." (R.13834.)

The lead investigator considered Uta's death to be an accident or suicide and ordered police to close the case. (R.8837.) Police nonetheless "kind of dragged [their] feet and kept it open." (R.8837.)

### 4. The State Argues It Was Murder

With the case still open, Uta's boyfriend "push[ed] to have Johnny Wall investigated." (R.8848.) Police eventually charged Johnny with murder. (R.1,8848,9154-56.) They identified the following circumstantial evidence that the State relied upon to support its homicide theory.

#### 4.1 The State Identifies Circumstantial Evidence

**Uta's injuries –** Uta had cuts on her wrist and leg. (R.13786.) She had small hemorrhages in her neck, which could have occurred after death. (R.13804-05.) And she had "nonspecific" markings on her face and lip. (R.13789.)

**Xanax –** When she died, Uta had intoxicating and nearly fatal levels of Xanax in her system, but no remnants of pills in her stomach, something usually found in overdoses. (R.7164,7196,7302-03,13906-07.) Instead, white residue at the bottom of the tub and gastric material in Uta's lungs indicated she had aspirated

while she was drowning in the tub, vomiting whatever pill remnants had been in her stomach. (R.9441-44,13906-07.)

She did not have a prescription for Xanax. (R.1879.) She had not written "Xanax" or "alprazolam" on any of her pill bottles when she relabeled them, and she had not noted using Xanax on her calendar. (R.13669,13375.)

Johnny had access to prescription medications, including Xanax, as a pediatrician. (R.1879,1883.) He wrote prescriptions for Xanax for himself and his mother. (R.1879.)

**The knife –** A kitchen knife was found under Uta's body. (R.8803.) The knife was the same brand as those in Uta's house. (R.8818.) Uta's DNA was on the knife's handle and blade. (R.9427.)

**Blood in the bedroom and bathroom –** Investigators found spots of blood on her bedding, on her bedroom rug, in the hallway leading to the bathroom, and on a towel near the tub where she was found. (R.6887,13632,13629.)

**Shoeprints in the kitchen –** As first responders were leaving, investigators found three partial bloody shoeprints in the kitchen. (R.6889,6986;St.Ex.80.) First responders had not noticed them when they arrived, but did as they were leaving. (R.13403-04,13418,13631.) By that time, responders and police had met in the kitchen after walking through the bloody areas. (R.13628-29,9691-92.) Months later, investigators collected shoes from some of the responders, but they did not find a match. (R.8404.)

**Latent protein stains –** Investigators used amido black testing to look for traces of blood. (R.8415-16,8443.) Amido black is a chemical that identifies protein remaining on a surface that has been cleaned. (R.8415.) It can detect protein, including blood, that is several years old. (R.8843.)

Investigators performed the testing weeks after the family had cleaned the home. (R.14727-28,13673-74.) Protein had been cleaned up in the bedroom and bathroom, and there had been a spot on the bedroom wall. (R.8824.) The State's expert testified that the protein could have been left by "anything," including "[a] rag dropping on the floor," or "a transfer from any of the individuals in the house potentially that might have done the cleanup." (R.14731-32.)

**Cold water –** When Uta was found, cold water was running in the tub. (R.6654.) Uta had Raynaud's disease, a condition where she could not control temperature in her fingers. (R.7560-61.) People with Raynaud's disease would "[n]ot typically" take a cold bath because it would be painful. (R.7583.)

**A noise –** A neighbor heard a voice around 3 a.m. the day Uta was found. (R.8029.) The neighbor "couldn't make out what they were saying," but said it sounded like someone was "calling out." (R.8029.)

**Not a burglary –** There were no signs of forced entry and (months later) the spare key was missing from its usual hiding spot. (R.6648,8824-25,9255.)

**Custody dispute –** Johnny and Uta's relationship had been difficult since their divorce. (R.7817,8146-48.) They argued for years about their children,

visitation, and money. (R.7858.) While going through the divorce, Johnny joked with a friend who was also divorcing about what life would be like without Uta and "what if [they] both hired hitmen to get rid of their ex-spouses," and at the time Johnny was thinking about moving out of state with the children, he asked a friend if it would "be bad if Uta wasn't here anymore" or "there anymore." (R.7827-29,7870-71.) By the summer of 2011, Johnny had decided to move back to California. (R.7666-69,7680.)

**Uta's mood –** There was evidence Uta had been in a good mood the day before she was found. (R.1886,1888.)

**Alibi –** Johnny had no alibi for part of the morning of September 27. He went to a store for eggs sometime before 6:00 a.m. (R.14483-84,14903-04.) A witness saw him driving at 7:05. (R.14575.) His children saw him at home shortly after that and noticed his scratched eye from the night before. (R.14564,14567.) He had an alibi for the remainder of the day. (R.10169-70.)

**Johnny's scratches –** The day Uta was found, Johnny had a scratch on his eye. (R.7948.) Johnny explained his dog had scratched him the night before, when he was sleeping outside on the porch with the dog as he often did. (R.14859,14904-08.)

Johnny also showed investigators scratches on his arms. Johnny explained they were from roses in his garden. (R.14923-24.)

**Johnny's appearance –** The day Uta was found, Johnny looked "disheveled" at work. (R.1883.) It appeared he had not bathed and was wearing the clothes he had worn the previous day. (R.1883.) But coworkers testified that in the summer of 2011, on multiple occasions Johnny came to work disheveled and wearing the same clothes as he had the previous day. (R.7860-61,7942-43.)

**Car –** Johnny had his car detailed that morning. (R.14594-98.)

**Conflicting stories –** When police interviewed Johnny, he said that he had last seen Uta the night before when he picked up his kids at her home. (R.144873-74.) He stayed in the car in the driveway and did not go inside. (R.14874,14926.) Months later, when Johnny was deposed in a civil case, he said Uta came to his house that night. (St.Ex.321:6.)

### 4.2 State Experts Provide Explanations

In the absence of evidence of homicide, the State presented experts who theorized about how the evidence could be construed to show a murder.

**Xanax theories -** The State theorized that, because Uta did not have a prescription for Xanax nor any personal record of taking it, she did not have Xanax or take it voluntarily before she drowned. (R.10121.)

To support that theory, the State's experts presented several theories about how Xanax might have gotten into her system. Because there was no evidence Uta had been restrained, the theories were creative.

One expert, Marcella Fierro, theorized the killer might have crushed some Xanax pills to make a slurry, then used a syringe to squirt the slurry under her tongue, leaving a bruise on her lip. (R.10010.) When asked about what happened, she said, "I'm a fan of simplicity. I think just making that slurry and sticking it in her mouth, giving her the bruise would work just fine for me," because, of all the possible theories, "[t]hat's the most rapid acting and one that would disable her so you could cut her wrists." (R.10010.)

John Denton opined that the killer restrained Uta (without leaving a mark) and injected Xanax into the cut on her wrist where it would not leave a needle mark (while struggling with Uta, and somehow without breaking the needle). (R.13940-41,14013-15.) But Uta's lungs did not have particulate material from the crushed pills blocking the blood vessels, as would be expected from Xanax administered by injection. (R.9445-46.)

The State theorized that, after forcing Uta to consume Xanax, the killer scattered pills on the floor to make it look like a suicide. (R.10175-76.)

**Attack theories -** The experts presented similarly creative and conflicting theories about what happened next.

Rod Englert opined that the Xanax would have rendered Uta unconscious while her killer dragged her into the bathtub, although he agreed the bathroom was too small to carry Uta to the tub. (R.13577;St.Ex.146.) He speculated Uta then "rall[ied]" when she hit the water and fought an attacker. (R.13539.)

Englert opined that Uta's injuries were defensive wounds from a "significant" or "violent" struggle. (R.13518,13523-24,13539-40.) He explained that the blood on Uta's top came from her cut wrist as she held it to her chest. (R.13505-07.) Englert theorized that the attacker pulled Uta's top off but could not explain why the attacker then folded it, and draped it over the side of the tub, where it remained dry as Uta was forced into the tub. (R.13539-40.)

Denton speculated that a struggle started in the bedroom, pointing to disarray in both the bedroom and bathroom. (R.13948.) His theory contradicted Englert's testimony that nothing was disturbed in the bathroom to indicate an altercation (R.13576-77.) And Denton theorized that Uta had been assaulted even though he observed no fingerprints, grab contusions, or bruises to suggest Uta was restrained. (R.13962,13988,13984.)

Fierro opined that the Xanax would have disabled Uta. (R.9993.) She said the killer cut Uta's wrist in the bedroom, after Uta was unconscious. (R.10010.) This contradicted Englert's theory that Uta held her bleeding wrist to her shirt. (R.13505-07.) Fierro opined that Uta did not cut herself because people who do are "almost always…young, young teen women." (R.10043.)

Under Fierro's theory, the killer dragged Uta to the bathroom and submerged her in cold water. (R.10010,10013.) Fierro testified that Uta had four fingertip bruises on the arm in mottled skin, as though someone had grabbed Uta from behind. (R.10001-02.) Fierro was the only expert who claimed to have

been able to see these injuries. She was also the only expert who reported seeing washer-woman changes on Uta's hands and feet. (R.10016-20.)

**Time of death theories –** Two of the State's experts agreed that Uta died before 6:30 a.m., when Johnny did not have an alibi. (R.10029,10130,13961.)

Under this theory, Uta was submerged for at least fourteen hours. Washer woman changes appear on a body submerged for more than an hour. (R.9462.) After ten hours of submersion, the changes become permanent. (R.9463.)

Neither the medical examiner nor the defense expert identified any washer woman changes on Uta. (R.10101-02,9471.) A lack of washer woman changes suggests Uta died closer to 8:00 p.m., when her boyfriend found her.

Only one of the State's experts, Fierro, claimed to have seen washer woman changes in Uta's autopsy photos. (R.10016-18.)

### 4.3 The State Misconstrues the DNA Evidence

In an effort to place Johnny at the scene, the State sought to introduce DNA test results from three sources: (i) a swabbing of Uta's pillow, (ii) vacuum samples from Uta's pillow and comforter, and (iii) scraping Uta's fingernails. The evidence was inconclusive, but misconstrued by the State to implicate Johnny.

**Pillowcase -** There was DNA found in two places on Uta's pillowcase. The first, a stain, was tested twice. (R.9023-24.) The first testing (Y-STR testing) included the Wall paternal line (Johnny and his sons), but the second, more specific testing (STR testing) excluded Johnny as a contributor of the DNA in the

sample. (R.9023-24.) Johnny moved to exclude the evidence of the Y-STR testing, since subsequent testing had made it irrelevant and misleading. (R.1702-03,1710-11.) The court denied the motion, but cautioned that the evidence would not be prejudicial if the Y-STR and STR test results were "explained and reported accurately to the jury…especially when reported together." (R.1711.)

In violation of that order, the State's experts refused to explain the test results together, insisting they were separate tests and did not inform one another. (R.9023-24,9074,9075.) Without mentioning the subsequent STR results excluding Johnny, the State's expert repeatedly testified that the Y-STR results showed that the DNA "matched Johnny" and that "[h]e was the minor…profile." (R.9023-24,9074,9075.)

The second DNA found on Uta's pillowcase was obtained with a vacuum collection process (M-VAC). The results were inconclusive and did not identify Johnny. (R.9025.) But Sorenson included Johnny based upon unreliable activity below the lab's analytical threshold, meaning the data "might be noise" from the equipment. (R.9915,9956.) Johnny filed a motion to exclude the results because they would confuse the jury, but the court denied the motion. (R.968,1712-19.) The court ruled the problems with the testing could be brought to the jury's attention during cross-examination. (R.1715.)

The State's expert nonetheless testified that Johnny's unique DNA profile was "included as a possible contributor" to the sample, even though Johnny's

alleles were not recorded at reliable levels. (R.5406,5420-21,9099.) Moreover, while Johnny is included, his children were also included, and because he shares all his alleles with his children, there is nothing "unique" about Johnny's inclusion in the sample. (R.9050-51,9060-61,9914.) Yet the State reiterated its misrepresentation in closing and urged the jury to convict based on Johnny's "unique" DNA profile being found on Uta's pillowcase. (R.10140,10162.)

**Fingernails -** Investigators also found trace amounts of DNA under Uta's fingernails—3 cells of male DNA for which there was "no meaningful comparison" between the sample and Johnny or the Wall paternal line. (R.1703,9011,9042-43.)

Johnny filed a motion to exclude the evidence, but the court denied the motion. (R.1707.) The court cautioned, however, that if the State did not present the evidence neutrally and accurately, it would be "unreliable under rule 702 and significantly prejudicial under rule 403 because it may be misleading and confusing to the jury." (R.1707.) The court warned that the evidence could be used only "for exclusionary purposes," and not as evidence of Johnny's guilt. (R.1707-08.)

Despite the court's order, the State urged the jury to treat Johnny as included as a contributor to the sample (which he was not) and convict him of Uta's murder based on this sample: "Then we have male DNA being found under Uta's right-hand fingernail clippings. I would submit to you it was as if

Uta was standing in this courtroom and pointing to the defendant as her killer." (R.10141-42.) And yet, trial counsel failed to object.

**5. Johnny Argues It Was Suicide**

At the close of the State's case, Johnny moved for directed verdict for insufficient evidence. (R.9357-61.) The court denied the motion. (R.9361-63.)

The defense experts testified Uta's death was a suicide, not a murder. The experts, Judy Melinek and Anita Zannin, presented their own explanation of how the scene unfolded.

Melenik explained that the photo album corroborates the suicide explanation. (R.9428.) She testified that "people who self-injure or commit suicide, either one, will often have mementos next to them, things that comfort them or make them feel good, or things that they want to see as the last thing they see before they die. So the placement of that in the bathtub with her is significant." (R.9428.)

The placement of the shirt on the side of the tub also corroborates the suicide explanation. "You also have the apparently dry, not torn, not cut through, folded tank top, which suggests that it was folded and removed before she entered the tub." (R.9428.)

She further explained that the spilled pills suggested Uta had been looking for medication: "There is a chair in the closet with spilled pills, and the clothing is draping down from the upper shelves. And that suggests that the pills she

took were probably stored in the upper places of her closet….it's a sign of a person who's looking for their medications, is desperate to some degree, and is not in complete emotional control so they're spilling stuff as they're looking for their medications." (R.9441.)

Melinek theorized that, after Uta ingested the Xanax, she may have become disoriented and disinhibited. (R.9428.) She explained that "when medications are in your system that alter your mental status, they can put you in a situation where you're more likely to do things that you wouldn't normally do." (R.9427-28.)

Melinek concluded Uta was intoxicated when she committed a self-destructive act. (R.9429.) Because Uta's injuries were superficial and in easily accessible places, Melinek concluded Uta's injuries were self-inflicted, but that she did not intend to kill herself. (R.9402-05,9416-18,9421-23;St.Ex.59,169.)

Neither expert saw signs of an attack or struggle. The shower curtain was still on the rod, and the soap and bottles in the tub area were undisturbed. (R.9434.) There was no evidence more than one person was in the house. (R.9694.) Like the medical examiner, Melinek concluded all of Uta's other injuries were consistent with an accidental suicide. (R.9429-32,9446-47.)

Melinek opined that Uta got into her bathtub by herself. (R.9428-29,9433-35.) Specifically, bloody handprints on the window sill and sink "line[d] up exactly" to where a person would have steadied herself while lowering into the

tub. (R.9428-29,9433-35.) And "you don't see smearing all over the place as if someone is struggling or fighting off somebody." (R.9435.)

Melinek theorized that Uta might have been anxious or stressed, and she "enter[ed] the tub to relax or revive herself," but then drowned as the medication rendered her unconscious. (R.9467-68.) Based on the absence of washer-woman changes on Uta's skin, Melinek opined that Uta's death occurred closer in time to when her boyfriend found her at 8:00 p.m. (R.9461,9471.)

**6. Johnny is Convicted**

Despite the absence of evidence placing Johnny at the scene, the jury convicted him of murder. (R.1969.) Johnny filed a motion to arrest judgment, arguing that the evidence was insufficient to support the verdict. (R.2024-44.) Specifically, Johnny argued the evidence supported two explanations that were equally likely—suicide and homicide. (R.2024-44.) Because the State did not present any evidence that made the homicide theory more plausible, the State had failed to prove guilt beyond a reasonable doubt. (R.2044.)

The court denied the motion, citing the "large quantum of evidence" presented during the four-week trial. (R.3472.) The court noted there was "strong circumstantial evidence" that the death was a homicide, and the jury was entitled to believe the testimony of "several expert witnesses" who theorized about how the Xanax could have been introduced into Uta's system. (R.3472-73.)

## Summary of the Argument

Johnny's conviction was based on the State's misconstruing circumstantial and DNA evidence. The State's theory was that Uta was attacked, restrained, and injected with Xanax, all without leaving a mark on her body or any DNA evidence. The fatal flaw in the State's theory is that no evidence places Johnny in Uta's home on the day she died, and the circumstantial evidence is more consistent with suicide, leaving it insufficient to support homicide beyond a reasonable doubt.

The only evidence the State identifies that purports to connect Johnny to the home is DNA evidence. But the DNA collected is that of Johnny's sons, who lived with Uta. Johnny's DNA is consistent with that collected only to the extent Johnny shares DNA with his sons. Some of the DNA evidence was inadmissible under rule 702 and all of the DNA evidence used to create a tenuous link between Johnny and the scene was misconstrued by the State in order to mislead and confuse the jury.

The evidence is insufficient to support that verdict because the inference that Johnny killed Uta is less likely than the inference that Uta killed herself, whether accidentally or intentionally. This court should reverse the conviction. At the very least, because the trial court erred in admitting some of the DNA evidence and trial counsel was constitutionally ineffective in failing to object to the State's mischaracterization of it, Johnny should get a new trial.

## Argument

### 1. The Evidence Is Insufficient to Exclude Reasonable Doubt

Johnny's conviction was based on the State's construal of circumstantial evidence. That construal—that Uta was attacked, restrained, and injected with Xanax, all without leaving restraint marks on her body or any DNA evidence—was physically possible. But it is not the most reasonable explanation. The circumstantial evidence, including the lack of Johnny's DNA, is more consistent with suicide, leaving it insufficient to support homicide beyond a reasonable doubt. The State could place Johnny at the scene only by mischaracterizing DNA evidence whose source is almost certainly Johnny's children, not Johnny. The evidence is insufficient to support the verdict.

Under Utah law, appellate courts vacate convictions for insufficient evidence. *State v. Holgate*, 2000 UT 74, ¶ 18, 10 P.3d 346. To determine whether the evidence is sufficient, this court "review[s] the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict," and will reverse "when the evidence, so viewed, is sufficiently inconclusive that reasonable minds must have entertained a reasonable doubt." *State v. Pullman*, 2013 UT App 168, ¶4, 306 P.3d 827 (citations simplified).

When all of the evidence is circumstantial, it is more likely that reasonable minds entertained reasonable doubt. *State v. Workman*, 852 P.2d 981, 985 (Utah 1993). Courts review circumstantial evidence with more scrutiny: where "the

evidence consists solely of undisputed, circumstantial evidence, the role of the reviewing court is to determine…whether the inferences that can be drawn from that evidence have a basis in logic and reasonable human experience sufficient to prove each legal element of the offense beyond a reasonable doubt." *Id.*

Speculative inferences do not constitute proof beyond a reasonable doubt. *Workman*, 852 P.2d at 987. Thus, "[a] guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt." *Id.* at 985.

The question, then, is whether the verdict was based upon reasonable inferences or speculation. This court has explained the difference as follows: "A reasonable inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Conversely, speculation is defined as the act or practice of theorizing about matters over which there is no certain knowledge." *Id.* ¶16 (citation simplified.)

The distinction turns on whether there are equally likely interpretations of the evidence: "when the evidence supports more than one possible conclusion, none more likely than the other, the choice of one possibility over another can be no more than speculation." *Id.* (citation simplified). This court will therefore reverse if "the evidence is so insubstantial or inconclusive that the evidence and inferences did not preclude the reasonable alternative hypothesis presented by the defense." *State v. Cardona-Gueton*, 2012 UT App 336, ¶11, 291 P.3d 847.

Applying these principles, the Utah Supreme Court held that the evidence was insufficient to support the verdict in *Workman*. 852 P.2d at 987. In that case, parents were convicted of sexual exploitation of their minor daughter. *Id.* at 983. A family friend had taken a photo of the daughter with her buttocks exposed. *Id.* The elements of the crime required that the parents knew the photo was being taken and it was going to be used for sexual arousal. *Id.* at 985.

The State argued that the parents were guilty. *Id.* at 986-87. The parents appeared in the photo, but it is unclear whether they could see that the photo was being taken or that their daughter was exposed. *Id.* at 983-84. The State also cited evidence that the parents knew of several instances that the friend had behaved improperly toward the daughter, and they had reacted angrily when he took the photo. *Id.* at 987. The State argued the jury could reasonably infer from the circumstantial evidence that the parents had the requisite knowledge. *Id.*

The court disagreed: "Taken together, these events establish no probative inference" of the parents' guilt. *Id.* at 987. The court explained that "[c]riminal convictions cannot rest on conjecture or supposition; they must be established by proof beyond a reasonable doubt. Arguing, as the State does, that speculative inferences can constitute proof beyond a reasonable doubt is to attack one of the most sacred constitutional safeguards at its core." *Id.*

This court reached the same conclusion in *Cristobal*, where the defendant was caught spray painting graffiti with another juvenile. *State v. Cristobal*, 2010

UT App 228, ¶ 4, 238 P.3d 1096. His conviction was enhanced under the statutory enhancement "for having acted in concert with two or more persons." *Id.* ¶ 5 (citation simplified). The State articulated a plausible theory, consistent with the circumstantial evidence, that a third juvenile had participated in the crime. *Id.* ¶ 10. Indeed, a third juvenile fled the scene when a security officer arrived, and a spray paint can lid was found where he had been standing. *Id.* The State argued that the third juvenile's running away supported a reasonable inference that he had participated in the crime. *Id.* ¶ 17.

This court disagreed. *Id.* The State's theory was possible, but no more probable than the alternative theory. *Id.* As the court explained, "there are at least two equally reasonable explanations" for why he fled—either he was participating, or he was merely present. *Id.* "[H]is presence and flight do not make it more probable that he was an active participant in the crime than the equally reasonable possibility that he was merely present during the crime." *Id.*

Thus, the evidence supported speculation, but not a reasonable inference, that the third juvenile participated in the crime. *Id.* When two explanations are equally reasonable, the evidence is "too weak and too speculative to support a conclusion beyond a reasonable doubt." *Id.* ¶¶ 17,20 (citation simplified).

The same is true here. The evidence, at best, supports two reasonable inferences. As discussed below, most of the evidence is consistent with both suicide and homicide. None of the evidence makes homicide more probable, but

some of it makes suicide much more probable—e.g., the State cannot explain why Uta neatly folded her shirt and draped it over the side of the tub as she was being attacked, or why her handprints line up "exactly" to where she would place them if she lowered herself into the tub, or how Johnny left no injury on Uta or any DNA or fingerprints in her home.

In short, the evidence does not make homicide more likely, let alone extinguish reasonable doubt. The evidence is insufficient to support the verdict.

### 1.1 Uncontested Evidence Supports Both Explanations

The State relied on the following uncontested circumstantial evidence. But none of the evidence makes homicide more likely than suicide.

**Uta's injuries –** Uta had cuts on her wrist and leg, small hemorrhages in her neck, and "nonspecific" markings on her face and lip. (R.13786,13789,13805.)

The injuries are consistent with homicide. One of the State's experts testified Uta's injuries were defensive wounds (R.13536 (Englert). Another State expert theorized that a killer restrained Uta and cut her after she was unconscious. (R.9993,10000-02 (Fierro).) Although the State's theories required a killer to force Uta into the bathtub, the State's expert acknowledged that the bathroom was too small for a person to carry Uta to the tub. (R.13577;St.Ex.146.)

The injuries are more consistent with suicide, especially given the size of the bathroom. The medical examiner listed the manner of death as "could not determine." (R.13833.) As he explained, he "reserves" an undetermined manner

of death "for a case in which the findings supporting one or another manner of death are sort of equally compelling." (R.13834.) This is best indication that suicide and homicide are at least equally probable, requiring reversal.

Contrary to the State's theory, the medical examiner found no injuries or marks to suggest Uta had been attacked or restrained. (R.13848-49.) He believed the injuries were consistent with suicide or an accident. (R.13789,13833-36.) He agreed Uta could have sustained the injuries by herself, by losing her balance or falling against a sink or other surface. (R.13789-90,13792.) Alternatively, the injuries could have occurred after death. (R.13804-05.) He stated that if Uta had been involved in a "homicidal fight for her life," he would "expect her to have more injuries." (R.13835-36.)

**Xanax –** Uta had severely intoxicating and nearly fatal levels of Xanax in her system when she died. (R.13919.) Although she had one milligram of Xanax in her stomach, she did not have pill remnants in her stomach, an indication of overdose. (R.7164,7196,7302-03,13906-07.)

She did not have a prescription for Xanax. (R.1879.) She had not written "Xanax" or "alprazolam" on any of her pill bottles when she relabeled them, and she had not noted using Xanax on her calendar. (R.13669,13375.)

Johnny had access to prescription medications, including Xanax, because he is a pediatrician. (R.1879.) He had written prescriptions for Xanax for both

himself and his mother. (R.1879.) And he had personally filled the prescription for his mother and mailed it to her. (R.1893-94.)

The Xanax evidence is consistent with homicide. As a physician, Johnny had access to Xanax and the syringes the State's experts believed were used to get Xanax into Uta's system. Based on the evidence that Uta did not have a prescription for Xanax or any personal notes of taking Xanax, one reasonable inference is that she did not have Xanax. And based on the evidence that she did not have pill remnants in her stomach, one plausible explanation is that the Xanax entered her system through an injection.

But the evidence is equally consistent with suicide. An equally plausible interpretation of the evidence is that Uta had and took Xanax pills that she hid from others, something one about to commit suicide would do.

The evidence suggests Uta would have wanted Xanax. She experienced anxiety and depression, and had taken antidepressants. (R.14186-90.) It is also plausible that Uta obtained Xanax even though she did not have a prescription. She had pills from other people and from other countries. (R.9515-16,13352, 14195,14218,14245,14271.)

And it is plausible her Xanax was in a bottle she relabeled with a different name. Indeed, the State offered no explanation for why Uta repackaged all of her pills, and one reasonable explanation is that she did so to disguise their contents. This is consistent with the evidence suggesting she hid some of her pills on the

top shelf of her closet. (R.94414.) Indeed, the chair pulled into her closet and the clothes spilled from the top shelf suggest she stood on the chair to reach pills hidden behind her clothes. (R.9441.) One reasonable explanation for the spilled pills on the closet floor is that Uta dumped them out while looking for her Xanax, not that someone brought the Xanax to the home. (R.9441.)

The evidence also suggests Uta vomited some of the pills she took, explaining why there was Xanax in her stomach but no pill fragments. This was the defense expert's conclusion based on white residue at the bottom of the tub and gastric material in Uta's lungs. (R.9441-44,13906-07.)

**The knife –** A kitchen knife was found under Uta's body in the bathtub. (R.8803.) The brand of the knife was Zwilling J.A. Henckels, the brand of the knife set Uta and Johnny divided when they divorced. (R.8818.)

The knife is consistent with homicide. If Johnny killed Uta, he could have brought the knife from his home, or retrieved it from Uta's kitchen. (R.8818.)

The knife is equally consistent with suicide. Because Uta kept half the knife set in the divorce, it is equally probable she retrieved the knife from her own kitchen and used it to inflict injuries on herself. This explains why her DNA—not Johnny's—was on the knife handle and blade. (R.9427.)

**Blood in the bedroom and bathroom –** Investigators found spots of blood on her bedding, on her bedroom rug, in the hallway leading to the bathroom, and on a towel near the tub where she was found. (R.6887,13632,13629.)

The blood evidence is consistent with homicide. One of the State's experts opined that the blood spots indicated that more than one person was involved in a "significant" or "violent" struggle. (R.13518-19,13522-24.)

The blood evidence is consistent with suicide. A defense expert opined that the spots are consistent with self-cutting. (R.9416-18,9421-23,169.) As expert explained, "what's notably absent are grab marks on the wrist. So if this was being done to her against her will, she's not going to leave her wrist there and let someone stab her and slice her all in line trying different orientations." (R.9422.)

Blood spots down the hall traced her path to the bathroom. (R.13629.) The blood on the towel near the tub suggested she stood in front of the tub for a while before getting in. (R.13630.)

**Shoeprints in the kitchen –** Investigators found three partial bloody shoeprints in the kitchen. (R.6889,6986;St.Ex.80.) First responders had not noticed them when they arrived, but noted them only as they were leaving. (R.13403-04,13418,13631.) By that time, responders and police had met in the kitchen after walking through the bloody areas of the house. (R.13628-29,9691-92.) Months later, investigators collected shoes from some of the responders, but they did not find a match. (R.8404,14740-42.)

The footprint evidence is consistent with homicide. If a killer was in Uta's home, the killer could have stepped in the blood on the bedroom floor and left bloody footprints as he left her house. The footprint was not matched to Johnny.

The shoeprint evidence is equally consistent with suicide even though there is no evidence Uta returned to the kitchen after cutting herself. The evidence suggests the shoeprints were made by one of the first responders whose shoes were not collected for comparison—not a killer.

**Latent protein stains –** Investigators used amido black testing to look for blood that had been cleaned up. (R.8415-16,8443.) They conducted their test weeks after authorities released the home to family, who cleaned it. (R.14727-28,13673-74.) The test revealed that protein had been cleaned up in the bedroom and bathroom. (R.8824.)

The latent protein evidence is consistent with homicide. If a killer was in Uta's home, he could have stepped in blood, left shoeprints, and then cleaned the shoeprints and wall before leaving. But the State did not explain why a killer would clean up some blood while leaving other blood untouched and visible.

The latent protein evidence is equally consistent with suicide. The protein identified by the testing was not necessarily blood and could have been left years ago. (R.8415,8843.) And even if it was blood, it was equally possible Uta's family created the latent blood spots as they cleaned her home. (R.14731-32.) Indeed, the State's expert conceded the protein could have been left by "anything," including "[a] rag dropping on the floor," or "a transfer from any of the individuals in the house potentially that might have done the cleanup." (R.14731-32.)

**Cold water –** When Uta was found, cold water was running in the tub. (R.6654.) Uta had Raynaud's disease, a condition in which her fingers would be cold. (R.7560-61.) People with Raynaud's disease would "[n]ot typically" want to put themselves in a cold bathtub because it probably would be painful. (R.7583.)

This evidence is consistent with homicide because Uta likely would not have wanted to submerge herself in cold water.

But this evidence is equally consistent with suicide. The amount of Xanax in Uta's system would have caused her to become quite sedated. (R.13212.) It is plausible she would have attempted to revive herself with cold water, but drowned as the medication rendered her unconscious. (R.9467-68.) It is also plausible that she prepared an overly warm bath, turned on the cold tap after lowering herself into the tub, then drowned as the Xanax took effect. (R.13212.)

**A noise –** A neighbor heard a voice around 3 a.m.; she "couldn't make out what they were saying," but it sounded like someone was "calling out." (R.8029.)

This evidence is consistent with homicide and suicide. It is no more probable that Uta called out while being attacked than while committing suicide.

**Not a burglary –** There were no signs of forced entry and (months later) the spare key was missing from its usual hiding spot. (R.6648,8824-25,9255.)

This evidence is consistent with homicide. Uta might have opened the door for Johnny. It is also possible one of his children told him where to find the spare key, although there is no evidence they did so. (R.8824,14561.)

This evidence is equally consistent with suicide. If Uta killed herself, no one would have entered the home.

**Custody dispute** – Johnny and Uta's relationship had been difficult since their divorce. (R.7817,8146-48.) They argued for years about their children, visitation, and money. (R.7858.) During the divorce, Johnny joked with a friend who was also divorcing about what life would be like without Uta and "what if [they] both hired hitmen to get rid of their ex-spouses," and when Johnny was thinking about moving out of state with the children, he asked a friend if it would "be bad if Uta wasn't here anymore" or "there anymore." (R.7827-29,7870-71.) By 2011, Johnny decided to move to California. (R.7666-69,7680.)

This evidence is consistent with homicide; it explains a motive for Johnny to kill Uta. But this evidence is equally consistent with suicide; it explains why Uta became depressed or anxious and overdosed on Xanax.

**Uta's mood –** There was evidence Uta had been in a good mood the previous day. (R.1886,1888.)

This evidence is consistent with homicide because if Uta had been in a good mood the previous day, she may not have voluntarily taken Xanax.

But the evidence was also consistent with suicide. Even if Uta had been a good mood earlier in the day, the disputes with Johnny were a significant source of ongoing stress. (R.14333,7011-12.) When Jonny picked up the children that evening, he rolled up the car window and ignored Uta when she tried to speak to

him about taking the children out of town. (R.9205.) Later that night, a neighbor saw Uta shaking her head during a phone call and pounding hard on her keyboard. (R.13604,13617-18.) Uta appeared upset. (R.13617.) When her body was discovered the next day, Uta's house was cluttered and disorganized, and it appeared that Uta had not done her routine tasks, which is a sign of depression. (R.13342-47.) (R.13344-48.) The evidence is consistent with Uta becoming anxious or depressed and taking Xanax.

**Alibi –** Johnny had no alibi for part of the morning of September 27. He went to a store for eggs sometime before 6:00 a.m. (R.14483-85,14903-04.) A witness saw him driving at 7:05. (R.14575.) His children saw him at home shortly after that and noticed his scratched eye from the night before. (R.14564,14567.) He had an alibi for the remainder of the day. (R.10169-70.)

The State argued that Uta died before 6:30 a.m., precisely when Johnny did not have an alibi. (R.10029,10130,13961.) The defense argued that Uta's death occurred closer in time when she was found at 8:00 p.m. (R.9461,9471.)

This evidence is consistent with homicide. If Uta died before 6:30 a.m., then Johnny had an opportunity to kill her. But if Uta died before 6:30 a.m., she should have had permanent washer woman changes. (R.9463.) Neither the medical examiner nor the defense expert observed any washer woman changes, even though one of the State's experts claimed to have been able to see very faint

changes. (R.9463,9471,10101-02,10016-18.) It was therefore more reasonable to believe Uta died closer to 8:00 p.m., when her boyfriend found her.

**Johnny's scratches –** The day Uta was found, Johnny had a scratch on his eye. (R.7948.) Johnny explained his dog had scratched him the night before, when he was sleeping on the porch with her as he often did. (R.14904-08.)

Johnny also showed investigators scratches on his arms. Johnny explained they were from roses in his garden. (R.14923-24.)

This evidence is consistent with homicide. If Johnny attacked Uta, she might have scratched him on his eye and arms. But if Uta scratched Johnny hard enough to leave marks, his DNA should have been under her nails (it was not).

This evidence is consistent with suicide. The scratches may have come from his dog and rose bushes. Indeed, the optometrist who examined Johnny said the injury was consistent with a scratch from a dog's claw. (R.14646.) And Johnny's coworker testified the scratches on Johnny's arm looked "like a pinprick or a needle kind of, not—not like a fingernail scratch but a thinner scratch." (R.14463.)

**Johnny's appearance –** The day Uta was found, Johnny looked "disheveled" when he came to work. (R.1883.) It appeared he had not bathed, and he seemed to be wearing the clothes he had worn the previous day. (R.1883.)

This evidence is consistent with homicide. If Johnny killed Uta, he may have been running late in the morning, and failed to get ready for work.

But this explanation seems unlikely. The State theorized Johnny violently attacked Uta with a knife and then dragged her into the bathroom, leaving a trail of blood. (R.13518,13577,13308,13948,13962.) In this scenario, it seems likely that at least some blood would have ended up on Johnny's clothes. It therefore seems unlikely that Johnny would fail to change his clothes upon returning home—especially if he were trying to cover up the murder as the State theorized.

This evidence is therefore equally—if not more—consistent with suicide in light of the lack of blood on Johnny's clothes. It is reasonable to believe Johnny failed to get ready for the day and came to work disheveled and wearing the same clothes, as he had on other occasions. (R.7860-61,7942-43.)

**Car –** Johnny had his car detailed that morning. (R.14594-98.)

This evidence is consistent with homicide and suicide, but not probative of either. Even under the State's theory, there was no blood on the clothes Johnny still wore from the day before, so there is no basis for believing Johnny needed to have blood cleaned from his car. (R.1883.)

**Conflicting stories –** When police interviewed Johnny, he said he last saw Uta the night before when he picked up his kids at her home. (R.144873-74.) He stayed in the car in the driveway. (R.14874,14926.) Months later, when deposed in a civil case, Johnny said Uta came to his house that night. (St.Ex.321:6.)

This evidence is consistent with homicide and suicide. Neither version of Johnny's story put him in Uta's house.

### 1.2 Evidence That Makes Suicide More Plausible

The following additional evidence makes suicide more plausible.

**Uta's shirt –** The placement of Uta's shirt is more plausibly explained by suicide than by homicide. Her shirt was dry, folded, and neatly draped over the side of the tub. (R.9428,9433.) The placement of the shirt suggests Uta did it herself. Specifically, it was folded and draped the same way as Uta had draped other clothing over her rocking chair. (R.9433.)

None of the State's theories provide a plausible explanation for why the killer or Uta would have neatly folded and draped her shirt before she was forced into the bathtub. Nor do they explain how the shirt could have remained neatly draped and dry during a struggle. Suicide is the more likely explanation.

**Uta's handprints –** Uta's bloody handprints in the bathroom are also more plausibly explained by suicide than by homicide. As the defense expert testified, "[t]hey all line up exactly as the movements she would have needed to make with blood-stained hands as she lowered herself in the tub without another person's involvement." (R.9429.) And "you don't see smearing all over the place as if someone is struggling or fighting off somebody." (R.9435.)

The State's explanation is that this is where Uta placed her hands when she "rallied and was fighting back." (R.13539.) That scenario would explain blood splatter on the walls (there was none), defensive wounds (there were none), or bathroom items in disarray (they were not). But that scenario is inconsistent with

Uta standing in the tub with both arms extended, as she must have done to leave the prints. Suicide is the more likely explanation.

**Lack of DNA or prints –** The lack of Johnny's DNA or fingerprints in Uta's home is more plausibly explained by suicide. It is difficult to understand how Johnny—or anyone—could have entered the home, attacked Uta, forced her to consume Xanax, cut her repeatedly, dragged her to the bathroom, fought her off, and forced her into the tub without leaving a single fingerprint or trace of DNA.

Recognizing that problem, the State misconstrued the DNA evidence to tell the jury that it "pointed" to Johnny, even though it did not, in violation of the court's order. As discussed below, that misconduct warrants a new trial because, in fact, the DNA evidence reveals that Johnny was not there.

### 1.3 No Evidence Places Johnny in Uta's Home

Suicide is more likely given all of the circumstantial evidence. But there is an even more striking evidentiary issue that reveals the insufficiency of the evidence: no evidence places Johnny at the scene.

Johnny denied being at Uta's home at the time in question. (R.14903-04,14982-83,10224.) No one observed Johnny or his car at Uta's home. (R.10223-24.). His fingerprints were not found in her bedroom, in her bathroom, on the pillboxes, or on the knife. And neither her blood nor her DNA were found in his home, in his car, or on his clothing. (R.8985-87.) Although the prosecution conveyed to the jury that Johnny's DNA was found under Uta's fingernails, that

was false: the testing was inconclusive, neither including nor excluding Johnny. (R.1703,9011.)

That leaves only the DNA on Uta's pillow and comforter. The more informative and comprehensive STR test excluded Johnny as a contributor to the pillowcase stain. (R.9024,15270.) And while Sorenson included Johnny as a possible contributor to the M-VAC pillowcase sample, it did so based on data so unreliable that could not exclude equipment noise. (R.5406,5420-21,9025,9048.) More important, Johnny's children share all his alleles, making it impossible to distinguish Johnny from his children, who lived at the home. (R.9025,9050-51,9914.) The same is true for his inclusion in the sample from the comforter, which included Johnny, his children, Uta, Nils, and one in twenty Caucasians. As demonstrated below, it is much more likely that the DNA came from the children (who lived in the home, laid on the bed, and did laundry together), than from Johnny. (9020,9050-51,9914.)

In sum, "the evidence is so insubstantial or inconclusive that the evidence and inferences did not preclude the reasonable alternative hypothesis presented by the defense." *Cardona-Gueton*, 2012 UT App 336, ¶ 11 (citation simplified). This court should vacate the conviction and enter judgment in favor of Johnny.

## 2. The DNA Evidence Was Inadmissible and the State Mischaracterized It

With no witnesses or fingerprints placing Johnny at the scene, the jury likely based its verdict on four DNA tests—one of which should have been excluded under rule 702 because it was unreliable and all of which were mischaracterized by the State. The trial court should have excluded the inadmissible evidence, and trial counsel was ineffective in failing to object to the State's mischaracterizations of the evidence and prosecutorial misconduct.

The defense moved to exclude the four DNA tests prior to trial. (R.1702-03.) The court admitted the evidence while warnings to the State to present the evidence accurately, in accordance with *State v. Jones*, 2015 UT 19, ¶¶ 30, 33, 35, 345 P.3d 1195. (R.1707-09,1711.) The State disregarded the court's warnings and misrepresented the DNA evidence to confuse and mislead the jury.

**Pillowcase Stain (Item 5.3) -**The State represented that Johnny's DNA was found in a sample collected from a stain on Uta's pillowcase. The State's expert testified Johnny was a possible contributor to a stain, even though more specific testing on the *same* item *excluded* Johnny. (R.9023-24.)

**M-VAC of Pillowcase (Item 25.1) and Comforter (Item 13.4) -** The State misrepresented evidence concerning the M-VAC samples from the pillowcase and comforter. As for the pillowcase, the State's expert claimed the results included Johnny, but they based the inclusion on admittedly unreliable data that might have been equipment noise. (R.1712,9069.)

Johnny shares alleles (genetic sequences that make up DNA) with his children, who lived with Uta. The M-VAC process collected numerous alleles from all the DNA in the pillowcase and comforter. If the alleles of Johnny's children were present, then Johnny's alleles were too, but only because he shares his alleles with his children. (R.9050-51,9060-61.) Nonetheless, the State urged the jury to convict based on Johnny's "unique" STR profile being found on the pillowcase and comforter. (R.10140.)

Because the M-VAC process collects DNA from deep in the layers of the fabric, it is very likely that these samples contained accumulated DNA from all household members, including the children. (R.9018,9054.) But the State misrepresented the testimony in closing and argued that the DNA must be from Johnny rather than the children because the DNA was found at a "pinpoint location." (R.10162.) This was false.

**Fingernails -** The State told the jury that Johnny's DNA was found under Uta's fingernails. But there was so little male DNA found under Uta's fingernails that the expert reached "no meaningful conclusion" about whether Johnny was a possible contributor. (R.1703,9011.) And yet the State misrepresented the evidence to the jury: "I would submit to you it was as if Uta was standing in this courtroom and pointing to the defendant as her killer." (R.10142.)

In short, none of the DNA evidence implicates Johnny, even though on the State's theory of the crime, his DNA should have littered the crime scene. The

trial court should have excluded the evidence under rule 702, and trial counsel should have objected when the State mischaracterized the evidence at trial. Both the evidentiary error and counsel's ineffective assistance require reversal.

### 2.1 Background About STR and Y-STR DNA Testing

Sorenson Forensics conducted two types of DNA tests on the evidence at issue: Y-STR testing on the fingernail scrapings (Item 2) and the pillowcase stain (Item 5.3) (R.1703,1710,9022.), and PCR short-tandem-repeat (STR) testing on the pillowcase stain (Item 5.3) and on the vacuum samples from the pillowcase (Item 25.1) and the comforter (Item 13.4) (R.9022,9097,9099).

**Y-STR Testing -** Every person has 23 chromosomes inherited from each parent, which form 23 pairs. (R.8970-71.) The 23rd pair determines sex and contains an XY combination for males or an XX combination for females. (R.8970-71.) Y-STR testing examines only the male Y-chromosome. (R.8976-77,9078.) All males in a paternal line (fathers and sons) share the same Y-STR profile. (R.8977,9042,9088-89.) Y-STR testing cannot differentiate between males in a paternal line. (R.8978-79,9088-89.) In this case, that means that Y-STR testing cannot differentiate between Johnny and his two sons.

**STR Testing -** Short tandem repeat (STR) testing looks at alleles (genetic sequences) on the first 22 pairs of chromosomes. (R.8971,8974.) A person's STR profile is the sequence of alleles. No two people (except identical twins) share the exact same STR-DNA profile.

But although a person's STR profile is unique, individual *alleles* are *not* unique. (R.9046.) Indeed, alleles are inherited from the mother or the father, meaning children share alleles with their parents. (R.8974.) Significantly here, Johnny's children together share *all* his alleles, meaning *every allele* Johnny possesses is also possessed by his four children. (R.9061.) Therefore, a sample containing DNA from all of Johnny's children, but not Johnny, will contain Johnny's STR profile (all of Johnny's alleles). (R.9051-52,9060-61.)

A STR sample may have DNA from one person or from many people. (R.8975,9043-44.) According to Sorenson, analysts can draw three conclusions from mixtures: (i) a statistical likelihood that a person is a possible contributor, (ii) an exclusion (if any of a person's alleles are missing where they would be expected to appear), or (iii) the test is inconclusive. (R.8978,9046,9069,9003.)

Importantly, Sorenson can conclude only there is a statistical likelihood that a person is a possible contributor based on the person's alleles being present in the mixture—*not whether the person actually contributed DNA*. (R.9052-53.) Thus, a person can be included as a *possible* contributor, without being an *actual* contributor. (R.9061-63.) The higher the inclusion statistic, the more likely that a certain person actually contributed DNA. (R.8999-90.) If the statistic is above 1 in 298 billion, Sorenson can testify "with a reasonable degree of scientific certainty" that the DNA comes from a specific person. (R.8999-90.)

### 2.2 Expert Testimony About the DNA Extracted from the Pillowcase Violated Rule 702

Johnny filed a motion in limine to exclude the testimony that he was a possible contributor to the sample extracted from the pillowcase by M-VAC (Item 25.1). (R.968,1712-19.) Because Johnny's alleles were not observed above the threshold for reliability, Johnny should have been *excluded*. (R.9046-47,9069.) But the court allowed the evidence. (R.1715,1717-19.)

Trial courts are gatekeepers that ensure "a minimal threshold of reliability for the knowledge that serves as the basis of an expert's opinion." *State v. Jones*, 2015 UT 19, ¶26, 345 P.3d 1195 (citation simplified). The State had the burden of establishing reliability. *State v. Guard*, 2015 UT 96, ¶ 65, 371 P.3d 1.

Scientific evidence must be based on the "inherent reliability of the underlying principles and techniques." *State v. Butterfield*, 2001 UT 59, ¶ 29, 27 P.3d 1133. Because the State did not establish that Sorenson's method was widely accepted in the community, it had to make a threshold showing of reliability under rule 702(b). (R.1714.) Under rule 702(b), the underlying principles and methods must be (i) reliable, (ii) based on sufficient facts or data, and (iii) reliably applied to the facts. Utah R. Evid. 702 adv. comm. note; *Jones*, 2015 UT 19, ¶ 21.

Here, the State failed to make a threshold showing that Sorenson's methodology was reliable or reliably applied. (R.1714-15.) On the contrary, Sorenson's director, Dan Hellwig, testified that Sorenson's method of including Johnny as a possible contributor was *unreliable*. (R.1713.)

Based on the capabilities of its methodologies and equipment, Sorenson has established a threshold, called the "analytical threshold," which Sorenson set at 50 RFU. (R.5337-38,5391-92.) This threshold "defines the minimum height requirement at and above which detected peaks can be reliably distinguished from background noise." (R.5406.) In other words, for activity below this threshold, Sorenson has no confidence the material is DNA rather than equipment noise or an artifact. (R.5406,5420,9915.)

Where Johnny otherwise would have been excluded because his alleles were not recorded at reliable levels, Hellwig testified Sorenson observed activity below the analytical threshold, which it noted with an asterisk, meaning "Inconclusive for the presence of additional alleles." (R.5420.) Regarding this "[i]nconclusive" activity, Hellwig testified, "*It's not reliable*….I'm uncertain if [sic] whether it's truly DNA, but it gives me enough of a question or it is information I will use in my interpretation." (R.5420-21 (emphasis added).)

Hellwig acknowledged Johnny's inclusion was based on questionable, inconclusive, and unreliable data below the threshold at which Sorenson's equipment and methodologies are capable of distinguishing DNA from background noise. (R.5406,5420-21.) The State did not demonstrate that (despite Hellwig's testimony to the contrary) Sorenson's methods were reliable and reliably applied to include Johnny as a possible contributor. The admission of the evidence therefore violated rule 702, and the court abused its discretion.

### 2.3 Trial Counsel Was Constitutionally Ineffective in Failing to Object When the State Misconstrued the DNA Evidence

Prior to trial, the defense argued that the four DNA tests at issue here should be excluded as irrelevant and unduly prejudicial under rules 402 and 403. (R.1702-03,1707-08,1710-11,1718-19.) In denying the motions, the trial court cautioned the State to provide neutral and accurate testimony on the DNA evidence to avoid encouraging the jury to draw improper inferences. (R.1707-11, 1718-19.) Contrary to the court's order and in violation of Utah law, the State mischaracterized the DNA evidence to mislead the jury. Inexplicably, trial counsel failed to object. Counsel was ineffective.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and "there is a reasonable probability that the outcome of the trial would have been different" but for counsel's deficient performance. *State v. Montoya*, 2004 UT 5, ¶23, 84 P.3d 1183 (quotation omitted). Both are present here.

#### 2.3.1 Trial Counsel's Failure to Object Was Deficient

At trial, the State repeatedly mischaracterized the DNA test results, in violation of the trial court's order in limine and Utah law. The State conveyed to the jury that Johnny's DNA was found in Uta's home and under her fingernails, even though it was not. The mischaracterizations are particularly egregious—and prejudicial—given the lack of *any* evidence placing Johnny at the scene. Trial counsel was constitutionally deficient in failing to object to the State's

mischaracterizations, especially where the trial court had previously warned the State not to mischaracterize the DNA evidence. (R.1707-11,1718-19.)

In assessing the reasonableness of counsel's performance, courts "look to prevailing professional norms." *State v. Lenkart*, 2011 UT 27, ¶ 27, 262 P.3d 1. Prevailing professional norms require trial counsel to object to prejudicial mischaracterizations of the evidence and prosecutorial misconduct. *See, e.g.,* ABA Standards for Criminal Justice: Prosecution and Defense Function ("ABA Stds."), Standards 4-1.5, 4-4.4(e), 4-7.6(e) (4th ed. 2015).

A prosecutor commits misconduct when he "call[s] to the attention of the jury a matter it would not be justified in considering in determining its verdict." *State v. King*, 2010 UT App 396, ¶ 21, 248 P.3d 984. Defense counsel's failure to object is prejudicial where "there is a reasonable likelihood that, in its absence, there would have been a more favorable result." *Id.*

As the Utah Supreme Court has explained, unless "expert testimony is presented accurately" and "the evidence's scientific limitations are properly described to the jury," it may be unfairly prejudicial and confuse the jury. *Jones*, 2015 UT 19, ¶ 30. The court has also cautioned prosecutors to "properly and accurately present Y-STR DNA evidence" in particular, and has emphasized "the duty of defense counsel to counter any errant or incomplete testimony." *Id.* ¶ 35. Defense counsel had an obligation to ensure the DNA evidence was presented accurately and was ineffective for failing to do so.

Set forth below are the DNA test results the State mischaracterized, followed by a discussion of prejudice.

**Fingernail scrapings (Item 2)** - The State conveyed to the jury that Johnny's DNA was found under Uta's fingernails even though Sorenson concluded there was "no meaningful comparison" to Johnny and his sons—they could not be excluded or included. (R.1703,9011,9042-43.)

Johnny filed a motion to exclude the evidence. The court denied the motion, but cautioned that if the State did not present the evidence neutrally and accurately, it would be "unreliable under rule 702 and significantly prejudicial under rule 403 because it may be misleading and confusing to the jury." (R.1707.) Specifically, the evidence could confuse or mislead the jury into thinking Johnny was *included* as a potential contributor. (R. 1707-08.) The court cautioned "the State to ensure its expert provides neutral testimony on this subject so as not to encourage the jury to draw an improper inference from the evidence" and warned that the evidence "may only be used for exclusionary purposes and the jury is not to use the test results as evidence of Defendant's guilt." (R.1707-08.)

At trial, Jeskie testified that Johnny "could not be excluded, could not be included. There were no conclusions that could be drawn." (R.9011.) Jeskie then contrasted Johnny with nine other individuals who *were* excluded. (R.9012-13.)

In closing, the prosecution argued that "Nils' DNA was excluded from her fingernail cuttings," and that the small amount of DNA "was enough to exclude

every other individual that was in that crime scene and to exclude Jack and Nils, but it wasn't enough to say anything about the defendant." (R.10163.) The State said Johnny made up a story to "account for that DNA under the fingernails that he's being accused will be there, but because the water is washed away we really won't know the answer. We had so little DNA left to test." (R.10163.)

The State reminded the jury Johnny had a scratch on his eye, and urged the jury to assume the DNA under Uta's fingers was Johnny's:

> Then we have male DNA being found under Uta's right-hand fingernail clippings. *I would submit to you it was as if Uta was standing in this courtroom and pointing to the defendant as her killer.*

(R.10141-42 (emphasis added).)

The State used the fact that no meaningful comparison could be drawn to Johnny's Y-STR profile to mislead the jury into thinking it was Johnny's DNA under Uta's fingernails. Despite the court's warnings, the State asserted Sorenson's conclusion of "no meaningful comparison" was evidence of Johnny's guilt. (R.10141-42.) In so doing, the State mischaracterized the evidence and violated the court's order. Defense counsel was deficient in failing to object.

**Pillowcase stain (Item 5.3) -** The State misled the jury into thinking that Johnny was a possible contributor to the sample from the pillowcase stain, even though more comprehensive DNA testing *excluded* him.

Sorenson conducted Y-STR testing on the pillowcase stain sample, which included Johnny and his sons as possible contributors. (R.9023,9075.) The Y-STR

test cannot differentiate between Johnny and his sons. But Sorenson also conducted STR testing on the same sample, which is more comprehensive and informative, and it *excluded* Johnny as a possible contributor. (R.9024,15270.) Because Johnny is excluded as a contributor, the DNA observed in the Y-STR test must have come from one of Johnny's sons.

Johnny filed a motion to exclude the Y-STR testing, arguing it would confuse and mislead the jury, but the court denied the motion. The court ruled that "[t]he results of both of these tests [Y-STR and STR], if explained and reported accurately to the jury, are not substantially prejudicial to the Defendant—especially when reported together." (R.1711.)

The State nonetheless focused on the Y-STR test results, which could not exclude Johnny. Without mentioning the STR results excluding Johnny from the sample, Jeskie repeatedly testified that the Y-STR results showed the DNA "matched Johnny" and "[h]e was the minor… Y-STR profile." (R.9023-04,9074,9075.) Only on cross-examination did Jeskie acknowledge that the Y-STR results were not specific to Johnny, and the Wall sons were likewise included as possible contributors. (R.9075.)

Moreover, far from "report[ing] together" the results of the Y-STR and STR tests, the State's experts indicated it was *improper* to consider the tests together and infer anything about the Y-STR testing from the STR testing on the same sample. Jeskie testified the tests were "different chemistries" and Johnny "is not a

contributor to that STR mixture," implying Johnny's DNA might be contained in the Y-STR mixture but not the STR mixture—even though the two tests were done on the *same sample*. (R.9024,9078-79,9092.) Likewise, in the State's case in rebuttal, Hellwig explicitly *disagreed* that Johnny's exclusion on the STR test indicated the Wall DNA observed in the Y-STR test most likely came from one of Johnny's sons. (R.9923.) Hellwig argued that it would be improper to infer this because the "STRs and Y-STRs are separate events….I won't conclude that these two are linked, we treat these as separate entities." (R.9923-24.)

In sum, the testimony was inaccurate, misleading, and confusing. It violates the requirement under *Jones* that Y-STR results must be presented in a fair and accurate manner in light of the limitations of Y-STR testing. *Jones*, 2015 UT 19, ¶ 35. It also violated the court's order that the results of the two tests should be fairly and accurately reported together. (R.1711.) In failing to object, defense counsel's performance was deficient.

**M-VAC of pillowcase (Item 25.1) and comforter (Item 13.4) -** As discussed above, Johnny should have been excluded as a contributor to the M-VAC pillowcase sample because his alleles were not present at reliable levels. (R.5406,5420-21.) Based on unreliable activity that might have been equipment noise, Jeskie testified that Johnny was included as a "possible contributor[]" to this sample, along with Uta and Nils. (R.9025,9048.)

The State mischaracterized the inconclusive results for this sample as if they conclusively implicated Johnny. The prosecution stated:

> Q. With regards to this profile, you found the defendant's STR DNA profile in that mixture on [the pillowcase]; is that correct?
>
> A. Johnny Wall is included as a possible contributor to the mixture that we got from [the pillowcase].
>
> Q. Making him unique to it as opposed to anyone else?
>
> A. I'm not sure what you mean by that question.
>
> Q. That profile…the STR profile is unique to him alone?
>
> A. His…STR profile is unique to him alone.
>
> Q. And it's found here in this mixture on [the pillowcase]?
>
> A. He's included as a possible contributor to the mixture from [the pillowcase].

(R.9099.) Of course, Johnny's "unique" STR profile was *not* found in this sample—his alleles were not observed at reliable levels at four loci, meaning he was excluded. (R.9025,15275-77.)

But even if Johnny is included as a possible contributor to the M-VAC pillowcase sample, his children are likewise included as possible contributors. The same is true for the M-VAC of the comforter (Item 13.4), where Sorenson found a mixture of at least four contributors, including Uta, Johnny, Nils, the Wall children, and 1 in 20 Caucasians as possible contributors. (R.9020,9063-

64,9914.) But the State mischaracterized the results of both M-VAC samples as being unique to Johnny. (R.9020,9025.)

The State repeated its misrepresentation in closing when it urged the jury to convict based on Johnny's "unique" DNA profile:

> There was DNA on the bedroom comforter in which the defendant was included as a possible contributor, and there was DNA on the bed pillow on Uta's bed on the white pillow case. *And the STR profile belonging to Johnny Wall is unique.*

(R.10140 (emphasis added).)

But the samples did not contain a profile "unique" to Johnny. Sorenson included both Johnny and Uta, so all of the children are likewise included as possible contributors. (R.9914.) Because the children together share all of Johnny's alleles, the test results show that his children had been in the home, not anything "unique" to Johnny. (R.9050-51,9060-61.)

Indeed, the DNA is most likely from Johnny's children, not Johnny. The children were in Uta's room and on her bed, and their clothes and bedding had been washed together, allowing their DNA mingled. (R.3036-37,9038,9248,14514-16,14524,14561-62.) Because this sample was collected by the M-VAC process, which collects old DNA deep in the fabric, it is very likely the mixture included DNA from all of the Wall children living in the home. (R.9018,9913.)

In closing, however, the State misrepresented the evidence and insisted the DNA must be from Johnny rather than the Wall children because:

> *[the DNA is] at a very pinpoint location. The very locations where this man had contact;* the place where the gl[ov]e swipe was and the place where he took that pillow to suffocate her and get that bruise on the lip, right?

(R.10162 (emphasis added).) This is false and contrary to the testimony of the State's experts. These samples were collected by the M-VAC process, which gathers from deep layers in areas of the fabric, not from a pinpoint location. (R.9018,9025.) Because the M-VAC process was used on the pillowcase and comforter, it is very likely that the mixtures collected accumulated DNA from the household members, including the children. But the State misrepresented the evidence to imply the DNA could not have come from the Wall children.

In sum, the testimony was confusing, misleading, and unfairly prejudicial, particularly where the State misrepresented the evidence to urge the jury to find that Johnny had been in Uta's home. In failing to object, defense counsel's performance was constitutionally deficient.

#### 2.3.2 Trial Counsel's Failure to Object Was Prejudicial

The State relied heavily on the challenged DNA evidence at trial. But the testimony regarding the four challenged pieces of DNA evidence was unreliable, irrelevant, and unfairly prejudicial to Johnny. If the evidence had been excluded, or trial counsel had objected to the State's mischaracterizations, there is a reasonable likelihood Johnny would not have been convicted.

Evidentiary errors under rule 702 are prejudicial "if there is a reasonable likelihood" the verdict would have been different absent the error. *State v.*

*Clopten*, 2009 UT 84, ¶ 39, 223 P.3d 1103 (quotation simplified). The same standard applies for ineffective assistance of counsel: "but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." A reasonable probability exists when the errors undermine "confidence in the outcome." *State v. Larrabee*, 2013 UT 70, ¶ 34, 321 P.3d 1136.

Here, the admission of the unreliable evidence and counsel's failure to object to the State's mischaracterizations undermine confidence in the verdict. The DNA evidence involved three experts, covering three days of trial, likely because the biggest hole in the State's theory was the absence of evidence placing Johnny in Uta's home. The State's mischaracterizations of the DNA results are the only explanation of how the jury concluded Johnny was there. In closing, the state repeatedly referenced the DNA and mischaracterized the evidence.

The State referred to DNA at least six times in closing and twenty-two times in rebuttal. (R.10150,10182.) To overcome the medical examiner's view that suicide and homicide were equally likely, the State pointed out that the medical examiner "didn't know about all the DNA work." (R.10159.) The State also referred to the DNA evidence when asserting that Johnny's injuries, words, and actions showed that he killed Uta. (R.10142-43,10144-45,10163-66,10171,10179.) In the end, the mischaracterization of the DNA evidence is the only thing that placed Johnny at the scene. (R.10126,10140,10162-63.)

The DNA evidence was therefore central to the State's theory, and it was repeatedly mischaracterized by the State in closing. Below are some of the mischaracterizations the jury heard just before deliberations.

Despite the fact that the sample under Uta's fingernail showed only that it came from a male, the State told the jury: "I would submit to you that it was as if Uta was standing in this courtroom and pointing to the defendant as her killer." (R.10142.) As to the bedding, the State said that Johnny's DNA "was found there. In two spots it was found there." (R.10166.) With regard to the blood stain on the comforter the testing of which excluded Johnny, the State told the jury that "Defendant's unique DNA STR profile was found at that location." (R.10126.)

Even though the DNA extracted from the pillowcase and comforter was consistent with its coming from the children, the State told the jury in discussing that evidence: "the STR profile belonging to Johnny Wall is unique." (R.10140.) Despite the fact that the M-VAC does not collect from a pinpoint location, the State falsely told the jury that the DNA is "at a very pinpoint location. The very locations where this man had contact." (R.10162-63.) This is important because the State then told the jury that the DNA could not have come from the children "because you need to have all four children to be on that same spot," and then that "[t]hat's ridiculous. The more likely and the real and reasonable is that one person touched it, and it's that man right there." (R.10162-63.)

These statements were false. And trial counsel's deficient performance in allowing the State's mischaracterizations was prejudicial, as it was the only way the jury concluded that Johnny was in the home.

Absent the misleading characterizations of the DNA evidence, there is a reasonable likelihood of a different outcome. As this court has stated, "[j]ust as [courts] are more ready to view errors as harmless when confronted with overwhelming evidence of a defendant's guilt, [courts] are more willing to reverse [or grant a new trial] when a conviction is based on comparatively thin evidence." *State v. Charles*, 2011 UT App 291, ¶ 37 n.14, 263 P.3d 469. Where evidence is thin, "almost any error has the potential to be prejudicial." *Id.*

The evidence here was insufficient, and at best thin. The errors were therefore prejudicial. This court should order a new trial.

**Conclusion**

The court should vacate the verdict because it was based upon speculation. Alternatively, the court should order a new trial without the inadmissible DNA evidence or the State's mischaracterization of that evidence.

DATED this 28th day of June, 2018.

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**Certificate of Compliance With Rule 24(f)(1)**

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 24(g)(1) because this brief contains 13,889 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 28th day of June, 2018.

/s/ Troy L. Booher

**Certificate of Service**

This is to certify that on the 28th day of June, 2018, I caused two true and correct copies of the Brief of Appellant to be served via first-class mail, postage prepaid, with a copy by email, on:

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