

2015

State of Utah, Plaintiff and Appellee, v. Johnny Brickman Wall, Defendant and Appellant : Reply Brief

Utah Court of Appeals

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IN THE
UTAH COURT OF APPEALS

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

REPLY BRIEF OF APPELLANT

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

Johnny Wall is incarcerated.

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Introduction

Where undisputed evidence is more consistent with suicide than homicide, the evidence is insufficient as a matter of law to support a homicide conviction. [*State v. Cardona-Gueton*, 2012 UT App 336, ¶ 11, 291 P.3d 847](#). The evidence here is not just as consistent, but is more consistent, with accidental suicide. It does not show that anyone killed Uta, let alone that Johnny killed Uta. On this ground, as shown in the opening brief, Johnny was entitled to a directed verdict.

With insufficient evidence that anyone killed Uta, the jury could find that Johnny killed her only by finding that he was in Uta's home. And the jury could find that Johnny was in her home only because it was confused about what the evidence showed. The jury was confused because the State claimed DNA evidence showed Johnny's presence in the home, even though in fact the DNA showed only the presence of his children who lived there. The State's misleading the jury about the DNA evidence was prejudicial, particularly in light of the absence of evidence that a homicide occurred. On this ground, as shown in the opening brief, Johnny is entitled to a new trial.

The State's brief largely responds to arguments Johnny did not make and repeats the misleading assertions concerning the DNA evidence made by the prosecutor with no evidentiary support. For example, Johnny did not argue that the evidence conclusively disproves homicide. Instead, in the opening brief, Johnny identified every scrap of evidence – physical and circumstantial – and explained that none of it made homicide more likely than accidental suicide.

Indeed, the medical examiner – after noting the absence of wounds, bruises, or other indications of homicide – could not determine whether the death was a suicide or a homicide. He considered the cause of death to be undetermined.

The State asserts otherwise, not by showing that homicide is more likely than suicide, but by explaining how the evidence can be explained in a way that is consistent with homicide. But that misses the point. The State’s burden was not to show that homicide was a physical possibility. The State had to provide – and on appeal, cite – evidence that makes homicide more likely. Again, it is not enough for the State to assert that the evidence is consistent with homicide. The State must show how the evidence makes homicide more likely than suicide.

For example, the State asserts that “Uta was not alone the night she died. Someone entered her bedroom, drugged her, cut her with a knife, and held her under bathwater until she drowned.” (Resp. Br. at 1.) Of course, if there were evidence showing that Uta was killed, then that evidence would support the State’s assertion, and the verdict. But no such evidence exists. And the State’s repeatedly asserting otherwise does not make it so.

This is dispositive because, under Utah law appellate courts will vacate a jury verdict where “the evidence and inferences did not preclude the reasonable alternative hypothesis presented by the defense.” [*Cardona-Gueton*, 2012 UT App 336, ¶ 11 \(quotation simplified\)](#). The State has not shown how the evidence precludes accidental suicide as a reasonable (and indeed more likely) alternative

hypothesis. This court should reverse with instructions to enter a directed verdict in favor of Johnny.

But even if the evidence were sufficient as a matter of law, it would barely satisfy that standard. And as this court has observed, “[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 (citations omitted). Where evidence is thin, “almost any error has the potential to be prejudicial.” *Id.* ¶ 37.

On this record, the jury found guilt beyond a reasonable doubt based on the State’s mischaracterization of the DNA evidence. The prosecutor essentially conceded this point in closing. In explaining why the jury should disregard the medical examiner’s refusal to state the cause of death, the prosecutor said that the jury was in “a better position” than the medical examiner to determine the cause of death because “[h]e didn’t know about all the DNA work.” (R.10159.)

It was the State’s representations about the DNA work that explain the verdict. And to be clear, no evidence shows that Johnny’s DNA was anywhere at Uta’s home – and in fact, one DNA test *excluded* Johnny. Counsel’s failure to object to the State’s mischaracterization of the evidence was objectively deficient and prejudicial on this record. This court should order a new trial.

Argument

1. Homicide Was Less Likely Than Accidental Suicide

In the opening brief, Johnny listed all of the evidence – physical and circumstantial – and explained how none of it showed that a homicide occurred, let alone that Johnny committed it. (Op. Br. at 23-40.) This court will reverse “when the evidence supports more than one possible conclusion, none more likely than the other.” *State v. Cristobal*, 2010 UT App 228, ¶ 18, 238 P.3d 1096. That is the case here. Indeed, the medical examiner certified the manner of Uta’s death as “undetermined” because a self-inflicted death and a homicide appeared to him to be “equally compelling” explanations. (R.13834-36.)

Eighteen pages of Johnny’s opening brief identify – with citations to the record – every piece of physical and circumstantial evidence and explain how none of it made homicide more plausible. (Op. Br. at 23-37.) And Johnny highlighted the evidence that makes accidental suicide the more likely cause of Uta’s death. (Op. Br. at 38-40.) Most notably, neither the State nor any of its experts could explain why, if Uta was being killed, (i) her shirt remained dry, folded, and neatly draped over the side of the tub; (ii) her handprints are exactly where she would have placed her hands to lower herself into the tub, with no smearing or other signs of a struggle; and (iii) no DNA or handprints place Johnny at the scene. (Op. Br. at 38-39.)

The State fails to address this argument. Instead, the State asserts that Johnny “never addresses the trial court’s ruling or challenges its reasoning” and that the opening brief is “insufficient to meet his burden on appeal.” (Resp. Br. at 29-30.) The State’s failure is dispositive, and its assertions are perplexing.

To the extent the State believes that Johnny failed to identify and address the circumstantial evidence presented at trial, the State ignores Johnny’s detailed description of that evidence. Johnny dedicated the majority of his brief to identifying that evidence and challenging the view that it proves homicide. The State does not identify a single piece of evidence that Johnny did not address in the opening brief. (*Compare* Resp. Br. at 28-31, *with* Op. Br. at 9-16, 27-37.)

The State’s assertion that Johnny failed to address a trial court ruling is no less confusing. Johnny targeted the trial court’s ruling in his first issue statement. (Op. Br. at 4.) And his brief explained how the evidence supported two interpretations – homicide and suicide – and did not make homicide more likely. This is precisely the argument that the trial court rejected when it denied Johnny’s motion to arrest judgment. (R.3471-73.)

In denying the motion, the trial court ruled that the evidence was sufficient to establish guilt beyond a reasonable doubt. On appeal, the question is how, if essentially uncontested evidence supports two inferences, a jury could not be left with a reasonable doubt. Johnny’s argument therefore directly challenges the trial court’s reasoning.

Otherwise, in support of its assertion to the contrary, the State cites four opinions, but all of them hold (unremarkably) that an appellant must recognize the rulings and evidence against him — as Johnny did. (Resp. Br. at 30.¹) It is difficult to understand what more the State believes Johnny needed to do.

The remainder of this section of the State’s brief repeats the various (speculative) theories presented at trial about how the remaining evidence could be construed to support a homicide. (Resp. Br. at 31-34.) The State dedicates only four pages to these theories and does not provide any citations to the record in support. (Resp. Br. at 31-34.) This response is therefore inadequately briefed.

The State’s response is also incorrect. The State asserts that “suicide cannot account for all of the evidence here.” (Resp. Br. at 32.) But to support its homicide theory, the State lists three points, none of which are *evidence*, and each of which is ultimately consistent with accidental suicide. (Resp. Br. at 32.)

Johnny will address each of these three points in turn. When one attends to the evidence, it becomes clear that it better supports an inference that Uta committed suicide. It does not make homicide more likely, let alone show beyond a reasonable doubt that Johnny killed Uta.

¹ Citing [Allen v. Friel](#), 2008 UT 56, ¶ 14, 194 P.3d 903 (appellant must explain why district court should be overturned); [State v. Newton](#), 2018 UT App 194, ¶ 20 ___ P.3d ___ (appellant must acknowledge district court’s decision); [Gollaher v. State](#), 2017 UT App 168, ¶ 13, 405 P.3d 831 (appellant must show error); [Ellis v. State](#), 2014 UT App 50, ¶ 5, 321 P.3d 1174 (appellant must acknowledge contrary factual findings).

Blood & Shoeprints - First, the State asserts that “[s]omeone left bloody shoeprints in the bedroom, bathroom, and kitchen and then cleaned them from the bedroom and bathroom before Nils and first responders arrived.” (Resp. Br. at 32.) Given Uta’s cuts, the blood spots in her bedroom and bathroom are consistent with suicide. And the State is incorrect about the footprints.

As to the bedroom, there were no bloody shoeprints. There was a blood spot on the rug at the foot of the bed, but as the State’s expert explained, “when you first look at it, it looks like the bottom of a cane, I mean a walking cane. . . . I do not know what that is.” (R.13563-64.) He speculated that it could be a shoeprint, but he could not be sure. (R.13563-64.)

Johnny has attached an exhibit that shows the blood spot on the bedroom rug. (State’s Ex. 91, attached at Addendum G). The photo depicts a scene consistent with accidental suicide, not the brutal attack described by the State.

As to the bathroom, there also were no bloody shoeprints. (Resp. Br. at 32.) Nothing in the record or the State’s brief supports this assertion.

And while blood was found in two places in the bathroom, the locations make suicide more likely. Indeed, neither of the blood spots are explained by homicide.

First, there were “smear marks on the bathroom wall and sink,” which “line up exactly as the movements she would have needed to make with blood-stained hands as she lowered herself into the tub.” (R.9428-29.) But in each of the

State's homicide theories, Uta was forced into the tub against her will. (Op. Br. at 14-16.) None of the State's theories can account for evidence showing that Uta lowered herself, unattended. Accidental suicide is the more likely explanation for the handprints.

Second, there was blood smudged on the left corner of the bathroom sink. (R.9434.) And on Uta's left wrist were three "exactly perpendicular" cuts, consistent with self-cutting — "testing," as the defense expert explained. (R.9421.) "It's typical of someone who is testing to see, 'Can I tolerate it this way? . . . Let me try this way.'" (R.9421-22.) A person standing in front of the sink with cuts on her left wrist would have dripped blood exactly where it was found, on the left corner of the sink.

But in none of the State's speculative homicide scenarios did the attacker allow Uta to stand at the sink after cutting her but before forcing her into the tub. (Op. Br. at 14-16.) The State cannot account for the evidence that Uta stood in front of the sink after her wrist was cut. Self-mutilation is more likely.

Next, the State is correct that there were bloody shoeprints in the kitchen. (Resp. Br. at 32.) But again, the most likely explanation is that the shoeprints were left by first responders. Police did not notice the prints when they first arrived at the house and entered the kitchen. (R.13631.) But after the medical first responders entered and exited Uta's home through the kitchen, they noticed the

shoeprints, but only as they were leaving – after they had walked through the bloody areas of the house and returned to kitchen. (R.13628-29,9691-92.)

Johnny has attached an exhibit that shows the bloody shoeprints on the kitchen floor. (State's Ex. 80, attached at Addendum H). The photo does not depict the bloody crime scene the State implies.

Finally, no one cleaned up any blood. (Resp. Br. at 32.) What the amido black testing revealed was protein – protein that could have been left on her floor *years* before her death, and protein that was not necessarily blood. (R.8415,8843.) And as the State's expert explained, the protein "could be a transfer from any of the individuals in the house potentially that might have done the cleanup. . . [A]nything could have made this. . . . It could be made by anything. A rag dropping on the floor. It can be anything. Sock." (R.14731-32.)

This case does not present a factual contest. The question was not who the jury believed. The evidence was essentially uncontested. The question is whether this uncontested evidence so clearly established the State's theory of homicide as to render the defense theory unreasonable. On the contrary, accidental suicide is not only a reasonable explanation, but is the most reasonable explanation.

And under the State's homicide theory, the killer meticulously cleaned several spots of blood while leaving many more obvious blood spots undisturbed. The killer was careful to leave no DNA, print, or other evidence that he had been in the home, yet left bloody footprints in the kitchen.

The problems with the State's theory about Johnny's involvement are even more striking. Under the State's theory, Johnny left Uta's home covered in so much blood that, after driving in his car, he had to have his car professionally detailed to remove the traces. (R.14594-98, 10164, 10140, 13199.) Yet Johnny showed up to work shortly after that, unshowered, and wearing the same clothes he had worn the day before – the clothes that, under the State's theory, he wore during the bloody murder. (R.1883,7969,14648,10140,13200.) It is difficult to understand why, after committing a bloody murder, Johnny would go to work unshowered and wearing clothes that were so covered in blood that they caused his car to require professional cleaning.

The homicide scenario is not reasonable. Accidental suicide is more consistent with the evidence.

Xanax - Second, the State asserts that "[s]omeone injected Uta with a near-lethal dose of Xanax and then took the pill bottle with him; the pill bottle was never found in Uta's home." (Resp. Br. at 32.) But this is not evidence. It is instead the State's explanation for the *lack* of evidence. Indeed, it is difficult to explain how someone could have forced Uta to ingest Xanax against her will. An injection is the only conceivable way to explain that scenario.

But no witness identified an injection site on Uta's body. (R.13811.) The medical examiner found no marks or bruising to suggest that she had been restrained. (R.13848-49, 13984.) And although an injection of crushed pills will

leave “particulate material” in a person’s lungs, none was found in Uta’s lungs. (R.9444-46.) There was, in fact, “no evidence” of an injection. (*E.g.*, 9445-46.)

Yet one of the State’s experts theorized (and the State asserts now) that a killer restrained Uta and injected Xanax into the cut on her wrist where it would not leave a needle mark – all while struggling with Uta, without breaking the needle, without leaving particulate material in her lungs, and without leaving DNA or a bruise or handprint on her body. (R. 14013-15; Resp. Br at 32.)

While this theory is physically possible, it is not more likely – or even as likely – as accidental suicide. It is more likely that Uta obtained and ingested the Xanax herself. She used drugs without a prescription – drugs she obtained from other people and other countries. (R.6713 (Costa Rica) 9515-16,14195-96 (Germany), 14174,14217 (her sister).)

Uta also repackaged drugs in different containers, such as test tubes or film canisters, and kept them in various places in her home. (R.13352-53,13383-84 (film canisters), 13313 (medicine cabinet), 13352-53,13666 (drawers in hallway), 13665-66 (test tubes, handbag).)

Indeed, the pills scattered on the floor of her bedroom closet that day were repackaged Costa Rican versions of antihistamine pills, which – even in the potency available in the U.S. – cause drowsiness. (R.6713, 6735,6740-41,7344-45,9440-41.) Yet police did not collect or test them. (R.13665-66.)

Thus, the most reasonable inference from these uncontested facts is that Uta obtained the Xanax on her own (as she did with many other drugs) and threw the pill bottle away when she repackaged the pills (as she did with many other drugs). Accidental suicide accounts for all this evidence.

Injuries - Third, the State asserts that “[s]omeone strangled Uta causing hemorrhages in her neck and petechia in her eye.” (Resp. Br. at 32.) But again, there is no evidence.

While the medical examiner identified a “small area of hemorrhage” inside Uta’s neck, he conceded that the hemorrhaging may have occurred after death, and it did not lead him to believe that Uta had been strangled. (R.13803-05,13833.) As he put it, if Uta had been involved in a “homicidal fight for her life,” he would “expect her to have more injuries.” (R.13836.)

And as to petechia — “little spot hemorrhages” — the medical examiner testified (contrary to the State’s assertion here) that there was no petechia in Uta’s eye. (R.13885-86.) One investigator nonetheless did note petechia in her eyes, but petechia does not prove strangulation. (R.13885,13900-01.) Petechia “can occur if you cough real hard, it can occur if you sneeze. It can occur under lots of situations. Straining really hard, any of those things that can cause back up of pressure in your head.” (R.13885-86.)

No witness identified any marks on Uta’s neck to suggest that she had been strangled. (R.13804-05.) No witness identified any marks to suggest that Uta

had been attacked or restrained. (R.13848-49 (medical examiner), 13962,13987-88,13983-84 (State's expert). None of this evidence makes homicide as likely as suicide, let alone more likely than suicide.

"The most likely someone" – Lacking persuasive evidence that Uta was killed, the State attempts to plug the gap by pointing to Johnny as "the most likely" killer. (Resp. Br. at 33.)

But that is a bit like trying to prove that humans can live under water by asserting that Michael Phelps is the human most likely to do it. The evidence that Michael Phelps is the most likely human to live under water does not show that humans can live under water any more than the evidence that Johnny is the most likely person to have killed Uta shows that she was killed. Juries must base their verdict on evidence, not assumptions.

Specifically, in support of its flawed theory, the State points to Johnny's medical knowledge, the Xanax prescription he had written for his mother months earlier, his disheveled appearance and broken glasses, his conflicting statements, his lack of alibi, the fact that he got his car detailed, and his and Uta's bitter custody dispute. (Resp. Br. at 33.)

But none of the uncontested facts prove that Uta died by homicide. The fact that Johnny was "the most likely" person to have killed Uta does not prove that she was killed. The circumstantial evidence makes suicide and homicide

equally likely, at best. The evidence is insufficient as a matter of law. This court should order the trial court to enter a directed verdict.

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

In light of the paucity of evidence of homicide, Johnny's conviction can be explained only by the State's misconstrual of the DNA evidence in violation of the district court's orders. The State's misrepresentations led the jury to believe there was evidence that Johnny was at the scene even though there was, in fact, no such evidence. Thus, if this court does not conclude that there is insufficient evidence as a matter of law, it should order a new trial.

In the opening brief, Johnny explained how several of the State's statements and tactics served to mislead the jury and allowed – or even urged – the jury to believe that Johnny's DNA was found at the scene. The State responds that “the State views the evidence differently.” (Resp. Br. at 70.) But the State is not entitled to view the evidence differently from what the evidence actually shows, let alone to tell the jury to do so.

There is no evidence that Johnny's DNA was found anywhere at Uta's home. It was therefore improper for the State to lead the jury to believe that his DNA was found there. This is particularly problematic in the context of a murder trial with insufficient evidence of homicide. Obviously, without evidence that Johnny was even in the home, no jury could possibly convict him of murdering

Uta there. Only by improperly leading the jury to believe that Johnny was in the home could the prosecution sell its homicide theory.

As discussed below, each of the prosecutor's statements was improper, and trial counsel was objectively deficient in failing to object.

2.1 The Court Erred in Admitting the M-VAC Testimony (Item 25.1)

In the opening brief, Johnny demonstrated that the trial court erred in admitting expert testimony about one of the M-VAC test results – the material that investigators vacuumed from the pillowcase. (Op. Br. at 45-46.) The State's expert testified that Johnny was a "possible" contributor. (Resp. Br. at 54 (citing R.9025-26, 9066).)

But the test results were unreliable – i.e., they were based on activity below the "analytical threshold." (R.5420-21,9945.) This means that Sorenson could not conclude that the results showed DNA at all, let alone whose it might be. (R.5406,5420,9915.) Indeed, results below the analytical threshold might be "instrument noise," background signals from the machine. (R.5263,5269,9048, 9067.) Instrument noise reflected on the results is "easy to confuse" with DNA. (R.5269,5391-92.)

At times, the State concedes these points. The State acknowledges that, when Sorensen tested the M-VAC samples, Sorenson "put an asterisk" on the results because they detected data below the analytical threshold. (Resp. Br. at 54.) And the State recognizes that the asterisk means that the test results were

“inconclusive” and that the analyst could not be “‘confident’ that it is DNA and not instrument noise.” (Resp. Br. at 43.) Under rule 702, this makes the evidence unreliable and inadmissible.

Yet the court ruled that the problems “are matters for the jury to weigh at trial.” (R.1717.) And the State asserts that the problems with the evidence go to its weight, not admissibility. (Resp. Br. at 35.) Specifically, the State characterizes the problem as a “disagreement between the State and defense experts over the conclusion to be drawn from the underlying DNA evidence.” (Resp. Br. at 67.)

The State misses the point. There is no disagreement. The test results were “unreliable” according to the State’s own expert. (R.1713,5420-21.) That expert – the director of Sorenson – could not have been more clear: “[I]t’s not reliable I’m uncertain if [sic] whether it’s truly DNA.” (R.5420-21.) Where experts testify that a method does not produce reliable results, juries are not allowed to speculate otherwise. If this does not make the test results unreliable under rule 702(b), it is difficult to understand what would.

In response, the State asserts that Sorenson conducted “confirmatory replication amplifications” (repeat testing) that gave it “more confidence” that the sample contained DNA. (Resp. Br. at 46-47.) But these confirmatory amplifications *again* produced unreliable activity below the threshold. (R.9093-96,9104.) Whatever additional confidence Sorenson had, it was not enough to change its conclusion. Sorenson *still* could not conclude that the results showed

DNA rather than instrument noise. (R.9104.) This explains why Sorenson did not delete the asterisk. (R.5420-21; Resp. Br. at 54.)

Otherwise, the State suggests that the unreliability should be forgiven because Johnny's "entire autosomal STR profile was present" in the sample. (Resp. Br. at 66.) But of course his entire STR profile was not present — parts of the "profile" reflected in the results were just as likely to be equipment noise. The State's representation to this court is just as misleading as its mischaracterization of the evidence at trial and in closing argument, where the State told the jury that Johnny's "unique" DNA profile was found in the sample. (R.9099,10140.)

But even assuming the test results showed DNA and not instrument noise, nothing about the results was unique to Johnny. Indeed, even if Johnny's "entire autosomal STR profile was present" in the sample as the State contends, there is no part of that profile that Johnny does not share with his children, who lived in Uta's home. (R.9050-51,9061-62,9914.) Indeed, together, Johnny's children share all of his alleles. Those alleles (together, the "entire autosomal STR profile") would almost certainly be in the home. (R.9050-51,9061-62,9914.) For the State to tell the jury that the test results pointed to Johnny as opposed to his children — and then repeat it to this court — was misleading, bordering on misconduct.

But regardless of how the prosecutor later misconstrued this evidence, the jury never should have heard about the evidence in the first place. The court abused its discretion in admitting the evidence. And this error, alone, requires

reversal. E.g., *State v. Miranda*, 2017 UT App 203, ¶ 32, 407 P.3d 1033. While the M-VAC evidence points to Johnny's children, not Johnny, it nonetheless was the strongest DNA "evidence" the State had.

Indeed, the State had only three other pieces of DNA "evidence": (i) the M-VAC sample vacuumed from the comforter, which showed DNA from the children who lived in the home (R.9020,9050-51,9061-69,9914); (ii) the pillowcase stain, on which Johnny was conclusively excluded as a possible contributor (R.9024,15270); and (iii) the male DNA under Uta's fingernails, which the State concluded "did not scientifically point to Defendant" (R.1108). In fact, that evidence did not point to Johnny or even his paternal line. Without the admission and misconstrual of the M-VAC evidence, any juror would have harbored a reasonable doubt that anyone, let alone Johnny, killed Uta. *Miranda*, 2017 UT App 203, ¶ 32.

2.2 The State Mischaracterized the DNA Evidence and Counsel Failed to Object

2.2.1 M-VAC of Pillowcase and Comforter (Items 25.1 and 13.4)

For the reasons discussed above, the trial court erred in allowing the State's expert to testify that the material that investigators vacuumed from the pillowcase was DNA, let alone that the DNA belonged to Johnny. Even if there was DNA, and the DNA contained Johnny's entire autosomal STR profile, that would show only that Johnny's children were in the house they lived in, as

Johnny shares with his children all of the alleles that make up his autosomal STR profile. (R.9050-51,9061-62,9914 (pillowcase); 9020,9063-69,9914 (comforter).

Yet the State not only elicited testimony that the material was DNA, and that the DNA profile “is unique to [Johnny] alone,” the State told the jury in closing that “[t]here was DNA on the bedroom comforter, and . . . on the white pillow case. *And the STR profile belonging to Johnny Wall is unique.*” (R.10140 (emphasis added).) The State also told the jury that the DNA was found “at a very pinpoint location. The very locations where this man had contact.” (R.10162.) But the sample was vacuumed from a pillowcase and gathered from deep layers in the fabric, not a “pinpoint location,” or any place that anyone necessarily “had contact.” (R.9018,9025.) The State’s statements were incorrect.

In response, the State asserts that these statements were proper because they were “reasonable interpretations” of the evidence. (Resp. Br. at 79, 82.) The State casts the problem as a dispute about the “contrary conclusions to be drawn from the evidence” — a “difference of opinion.” (Resp. Br. at 79, 82.) And the State asserts that, in allowing the evidence, the trial court “explicitly permitted the State to present this theory to the jury.” (Resp. Br. at 79.)

But the trial court did no such thing. The trial court allowed the State to present evidence, not to misconstrue evidence. (R.1717-18.) The trial court did not, and could not, allow the State to misrepresent the DNA evidence and tell the jury that Johnny’s “unique” DNA profile was on the pillowcase and comforter,

when the evidence showed nothing “unique” to him at all. (R.9099,10140,10162; Resp. Br. at 79, 82.) No competent attorney could choose not to object to the State’s repeated misconstrual of evidence that trial counsel had sought to exclude for being unreliable. Counsel was ineffective in failing to do so.

2.2.2 Fingernails

The State also mischaracterized the DNA evidence that was found under Uta’s fingernails. Investigators found three cells of male DNA there, but they did not implicate Johnny. And as the State’s expert explained, “[i]t’s actually fairly common to find, find [sic] male DNA under fingernails in most circumstances.” (R.9926.) Even doing laundry can transfer DNA. (R.9037-38,15258.) And in the days before her death, Uta had been camping with her sons and done their laundry. (R.9035-38,9207,13251,14524.) It was therefore unremarkable that male DNA was under her fingernails.

Regardless, the State’s expert could reach no meaningful conclusion about whether it could be Johnny’s. (R.1703,9011.) She explained that Johnny “could not be excluded, could not be included. There were no conclusions that could be drawn.” (R.1703,9011,9042-43.) This testimony reads like a paraphrasing of the definition of irrelevant evidence – the test results had no tendency to make the presence of Johnny’s DNA either “more or less probable.” [Utah R. Evid. 401\(a\)](#).

Johnny sought to exclude the irrelevant and unreliable evidence so the jury could not be misled. (R.840-44.) The State argued that the evidence was

admissible, but conceded that “this DNA evidence did not scientifically point to Defendant.” (R.1108.) The State argued that the jury nonetheless “should still be able to know” that there was male DNA found, even though Johnny could not be excluded (or included) due to the small sample size and degradation. (R.1108.)

The trial court recognized the potential problem. The court noted that Johnny’s “concern that the jury may infer the test results indicate the DNA belongs to [him] is well-taken.” (R.1709.) The court therefore ruled that the State “should not be allowed to indicate Defendant’s DNA profile was ‘not excluded’ from the sample without further explanation,” because “the phrase ‘not excluded’ necessarily implies a DNA sample is *included*, which does not accurately reflect the test results.” (R.1707 (emphasis added).) The court ruled that, “without further explanation, [the testimony] is unreliable under rule 702 and significantly prejudicial under rule 403 because it may be misleading and confusing to the jury.” (R.1707.)

The court therefore “caution[ed] 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.” (R.1707.) Yet in closing, despite the court’s admonition — *and despite the State’s prior concession that the evidence did not “point” to Johnny* — the State told the jury that, with regard to the DNA under the fingernails, “I would submit to you it was as if Uta was standing in this courtroom and pointing to the defendant as her killer.” (R.10143 (emphasis added).)

And the State made numerous other improper statements. First, the State invited the jury to conclude that Johnny's DNA was found under the fingernails when it stated that Johnny made up a story to "account for that DNA under the fingernails." (R.10163.)

Although Johnny raised that improper statement in the opening brief, the State does not mention it in the response brief, so Johnny does not discuss it further here. [Utah R. App. P. 24\(b\)](#) (reply brief is limited to responding to arguments in response brief). The statement was improper and warrants reversal for the reasons discussed in the opening brief. (Op. Br. at 49-50); [Broderick v. Apartment Mgmt. Consultants, L.L.C., 2012 UT 17, ¶¶ 19-20, 279 P.3d 391](#) (appellate court will grant the relief requested in the opening brief when the response brief leaves the argument "unrebutted").

But more critically, as mentioned above, the State invited the jury to make the improper inference when it told the jury that "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.10142 (emphasis added).) This statement contradicted the evidence and violated the court's order. In response, the State makes three arguments, none of which justify its violation of the court's order.

First, the State asserts that the statement did not violate the court's order because the order limited what the *witnesses* could say about the fingernail

evidence, not what the *State* could say about it. (Resp. Br. at 71-72.) The State argues that it had “considerable latitude” – and even “the right” – to decide how to characterize the evidence in closing argument. (Resp. Br. at 72, 74.) The State therefore asserts that it would have been improper for the expert, or any witness for that matter, to suggest that the test results implicated Johnny, but that it was appropriate for the State to tell the jury that the evidence did that exact thing. (Resp. Br. at 72, 74.)

The State’s position is remarkable. The court was clear that it would mislead and confuse the jury to hear even an *implication* that Johnny’s DNA was found in the sample. (R.1707.) It is difficult to understand how the State believes it could expressly tell the jury that the evidence showed the very thing the court prohibited a witness from implying. The prosecutor disregarded the court’s order and the serious risk that the jury would misunderstand the evidence. (R.10142.)

The case law undermines the State’s position. Whatever “latitude” a prosecutor has in characterizing the evidence, it does not include the right to mischaracterize evidence. *State v. King*, 2010 UT App 396, ¶¶ 22, 25, 248 P.3d 984. Indeed, this court has been clear that, “[w]hile it is true that an attorney may posit interpretations of, and inferences arising from, the evidence,” a prosecutor may *not* “‘spin[]’ the evidence to suit his purposes” where there is “no basis in the evidence” for characterizing it the way the prosecutor did. *Id.* ¶ 25 (quotation

simplified). Nor may a prosecutor speculate about what a victim would have told the jury. *State v. Todd*, 2007 UT App 349, ¶ 21, 173 P.3d 170. And such improper comments are particularly prejudicial where, like here, they were made in rebuttal closing argument, when the defendant “has no opportunity for rebuttal.” *State v. Akok*, 2015 UT App 89, ¶ 22, 348 P.3d 377 (quotation simplified).

Such comments in a trial with thin evidence require a new trial. As this court has observed, “[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 (citations omitted). Where evidence is thin, “almost any error has the potential to be prejudicial.” *Id.* ¶ 37.

Here, there was no basis in the evidence for characterizing the fingernail evidence as “pointing to the Defendant as [Uta’s] killer” as the prosecutor did. The State knew that the statement was false, as it acknowledged pretrial that “this DNA evidence did not scientifically point to Defendant.” (R.1108.) The prosecutor had no “latitude” to lie to the jury.

Second, the State asserts that its remark did not contradict the evidence or violate the order in limine because it did not infer that the DNA belonged to Johnny, but only “drew the supportable inference that the evidence *viewed globally* pointed the finger at Defendant.” (Resp. Br. at 74 (emphasis added).)

Based on this characterization, the State asserts that “[t]he jury was thus free to infer that the cells under Uta’s fingernails were Defendant’s from facts *other than* the results of the DNA testing.” (Resp. Br. at 73 (emphasis added).)

But the comment referred neither to “the evidence viewed globally” nor to the “facts other than the results of the DNA testing.” (Resp. Br. at 73-74.) It instead specifically referenced the male DNA under the fingernails. (R.10142.) It invited the jury to conclude that the test results showed that Johnny was there: “[W]e 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.10142.)

And third, the State asserts that counsel was not ineffective when he failed to object to the improper statement because the comment was not “*so improper*” that the only reasonable choice would have been to object. (Resp. Br. at 74-75.)

But the court’s order shows the opposite. (R.1707-08.) The court recognized that the State’s handling of the fingernail testimony might “raise concerns for the court or the parties.” (R.1707.) And the court ruled that, under those circumstances, “in order to cure the prejudicial effect of the testimony, the court may consider offering an instruction to the jury that the DNA test results for [the fingernail 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 (emphasis added).)

Given the court's express recognition that the evidence could mislead the jury – and the court's willingness to provide a curative instruction – it is difficult to identify *any* reason that competent counsel would decline to object. The State has not identified one. No competent attorney would have forgone objecting. The remarks were “so improper that counsel's only defensible choice was to interrupt [them] with an objection.” *State v. Houston*, 2015 UT 40, ¶ 76, 353 P.3d 55. Counsel was ineffective in failing to do so.

2.2.3 Pillowcase stain (Item 5.3)

The State's mischaracterization of the bloodstain evidence was perhaps even more egregious. STR testing on the sample expressly excluded Johnny as a possible contributor. (R.9023-24,15270-71.) Yet the State elicited testimony that Johnny *was* a possible contributor, based on the results of preliminary – and subsequently rebutted – Y-STR testing. (R.9023.)

Before trial, Johnny sought to exclude the evidence of the first (Y-STR) DNA test because it would mislead and prejudice the jury. (R.1710.) Specifically, because the subsequent STR testing conclusively excluded him, it would confuse the jury to hear that a prior Y-STR test did *not* exclude his paternal line, and would thereby cause prejudice. (R.1710.)

The court denied Johnny's motion but recognized the potential problem (R.1711.) The court ruled that the evidence was admissible to show that investigators “did a thorough investigation,” and that the test results showed

two DNA profiles: one was Uta's boyfriend, and the other was someone in Johnny's paternal line (though not Johnny). (R.1710-11.) The court cautioned that the evidence would not prejudice the jury as long as it was "explained accurately," and the test results were "reported together." (R.1711.)

But the State did the opposite. The State elicited testimony about the initial Y-STR test results *alone*, as independent from the subsequent STR testing. This strategy allowed the jury to hear, repeatedly, that the DNA "matched Johnny." (R.9023-04,9074,9075.)

And far from ensuring the test results were "reported together," the State's experts insisted that it was *improper* to consider the tests results together. (R.9078-79,9090-92,9923-24.) The experts refused to acknowledge that anything could be inferred from the subsequent (dispositive) test.

Most troubling, the State's expert explicitly *disagreed* that Johnny's exclusion on the STR test indicated that the Wall DNA observed in the Y-STR test most likely came from one of Johnny's sons. (R.9923.) He 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.) This implied to the jury that there were two samples and Johnny was included in one but excluded in the other. This, of course, is false — there was one sample, and the second DNA test conclusively excluded Johnny as a contributor.

In response, the State agrees that the subsequent STR test conclusively established that Johnny's DNA was not in the sample — i.e., that Johnny "was excluded" in the subsequent STR test. (Resp. Br. at 52.) And it also acknowledges that "[e]xclusion is 'absolute' because the forensic analyst can 'say for certainty' that the person's DNA and the crime scene DNA are not the same." (Resp. Br. at 39.) Thus, when the analyst determined that the STR test "excluded" Johnny, the analyst determined, conclusively, that the sample did not contain Johnny's DNA. But this is not what the analyst and the State told the jury.

Recognizing this problem, the State does not defend its improper statements. Instead, it asserts that Johnny's argument is procedurally barred for two reasons, neither of which is correct.

First, the State asserts that Johnny "has not challenged the trial court's reasons for rejecting it below." (Resp. Br. at 75.) The State notes that, after the trial, Johnny filed a motion to arrest judgment based on the mischaracterization of evidence. (Resp. Br. at 76.) The court ruled that Johnny waived the objection when he failed to make it at trial, and the State did not violate the order. (R.3478.)

But that ruling is not dispositive here. The question is whether counsel was ineffective in failing to object to the State's mischaracterization. If anything, the fact that counsel filed a post-trial motion on this basis confirms that competent counsel would have objected in the first place.

Second, the State asserts that counsel “had no reason to object” to the testimony because the court had already overruled the objection. (Resp. Br. at 77.) Specifically, the State asserts that the court’s denial of the post-trial motion confirms that there was no problem, and trial counsel need not make “objections that have already been overruled.” (Resp. Br. at 77-78.)

But of course, the objection had not been made, let alone “already been overruled,” at the time of the testimony. Competent counsel would have timely objected. And to the extent there is any doubt, counsel’s subsequent post-trial motion based upon that very ground confirms that counsel recognized his mistake, although too late.

2.2.4 Prejudice

The State’s final argument is that all of these errors were harmless because Johnny “cannot show prejudice.” (Resp. Br. at 83.) Contrary to what the prosecutor told the jury, the State asserts to this court that the DNA evidence played a “relatively small probative role” in the trial. The State now asserts that the circumstantial evidence “proved” not only that Uta was killed, but that Johnny did it, and that the same verdict would result even if *none* of the DNA evidence were introduced. (Resp. Br. at 83-86.) And the State asserts that any prejudice was cured by Johnny’s cross-examination and Johnny’s own experts. (Resp. Br. at 85-86.)

But the problem is not that Johnny had no opportunity to present evidence that he was absent from the home. He did present that evidence. The problem is that the State repeatedly misled the jury when it affirmatively told the jury that the DNA evidence placed Johnny at the scene. And the jury believed the State.

As discussed above and in the opening brief, the misconstrual of the DNA evidence is the *only* explanation for the jury's verdict. As misconstrued by the prosecutor, the DNA evidence was the only evidence that Johnny was in the house where Uta died. Without it, any reasonable juror would have harbored a reasonable doubt that anyone, let alone Johnny, killed her.

As this court has observed, “[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.” [Charles, 2011 UT App 291, ¶ 37 n.14](#) (citations omitted). Where evidence is thin, “almost any error has the potential to be prejudicial.” *Id.* ¶ 37.

Here, the evidence of guilt is more than thin. It is insufficient as a matter of law. The State’s brief confirms this in the pages where the State lists the evidence that “proved” Johnny’s guilt. (Resp. Br. at 84-85.) That evidence is the same evidence that Johnny identified in the opening brief and explained how none of it showed that a homicide occurred, let alone that Johnny committed it. (Op. Br. at 23-40.) The medical examiner similarly concluded that the evidence did not

make homicide more likely. He listed the manner of death as “undetermined” because a self-inflicted death and a homicide appeared to him to be “equally compelling” explanations. (R.13834.)

If the medical examiner was unable to conclude that a homicide occurred, it is difficult to understand how the evidentiary errors here were not what tipped the scales in favor of a guilty verdict. In fact, the State expressly invited the jury to use the DNA evidence to do so. In closing, the State urged the jury to disagree with the medical examiner, telling the jury that it was in “a better position” than the medical examiner to evaluate the cause of death because “[h]e didn’t know about all the DNA work.” (R.10159.) The misrepresentations of the DNA evidence were dispositive, not harmless.

There is therefore ample reason to believe that, without the errors, the verdict would have been different. [State v. Clopten, 2009 UT 84, ¶ 39, 223 P.3d 1103](#). If this court does not reverse with an order to enter a directed verdict in favor of Johnny, it should order a new trial.

Conclusion

The court should vacate the conviction because the evidence is insufficient as a matter of law to support a conviction for murder. Alternatively, the court should order a new trial without the inadmissible DNA evidence or the State’s mischaracterization of evidence.

DATED this 27th day of February, 2019.

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/s/ Troy L. Booher

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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 7,711 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 27th day of February, 2019.

/s/ Troy L. Booher

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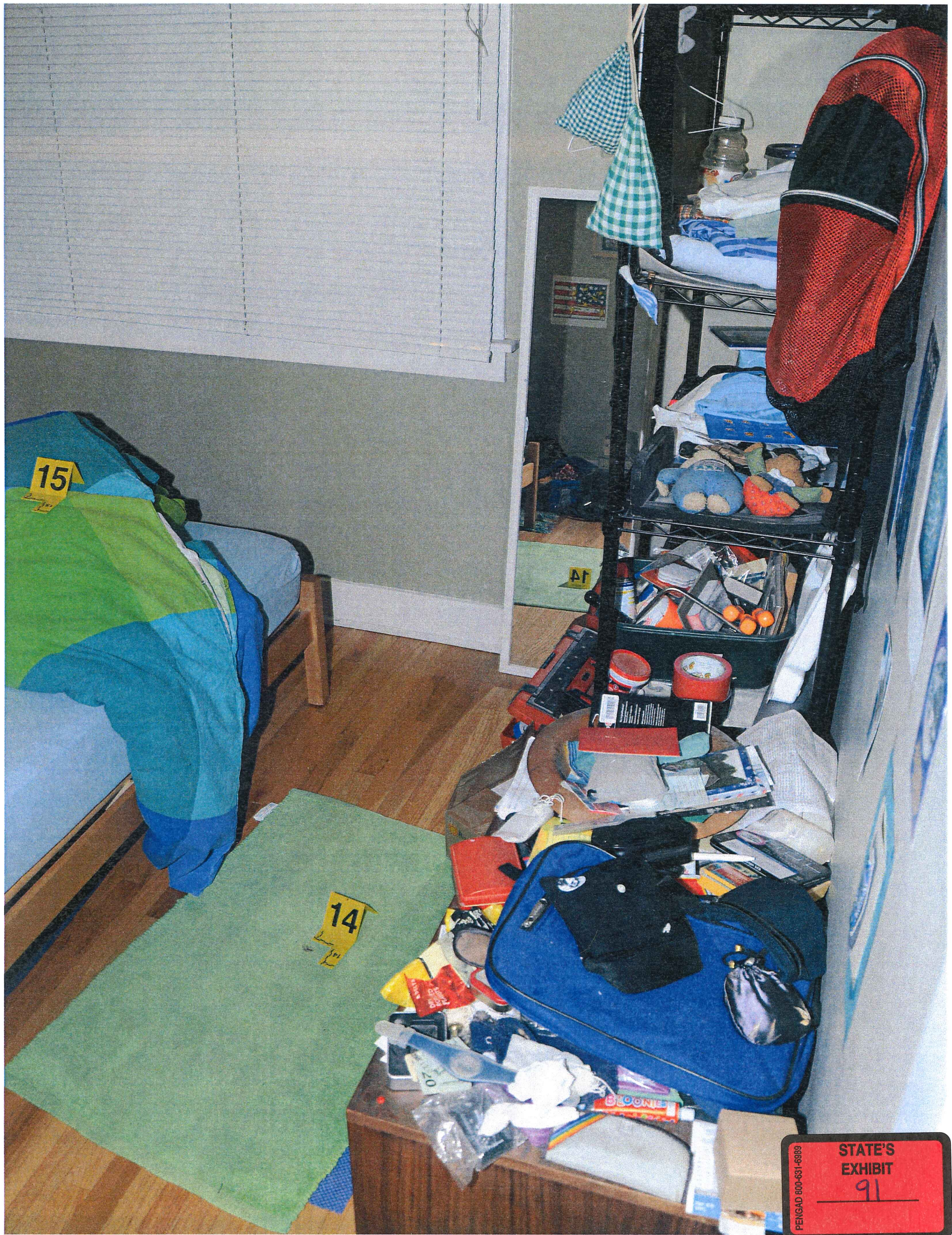
This is to certify that on the 27th day of February, 2019, I caused two true and correct copies of the Reply Brief of Appellant to be served via first-class mail, postage prepaid, with a copy by email, on:

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Addendum G



Addendum H



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