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# STATE OF UTAH, Plaintiff/Appellee, v. CULLEN CHRISTOPHER CARRICK, Defendant/Appellant. : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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| STATE OF UTAH, | ) | |
| | ) | |
| Plaintiff / Appellee, | ) | Case No. 20160249-CA |
| | ) | |
| v. | ) | |
| | ) | |
| CULLEN CHRISTOPHER CARRICK, | ) | |
| | ) | |
| Defendant / Appellant. | ) | |

# REPLY BRIEF OF APPELLANT

Appeal from Sentence, Judgment, Commitment entered on March 1, 2016, in the First District Court, Box Elder County, the Honorable Brandon J. Maynard, presiding

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**ORAL ARGUMENT REQUESTED**

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## ARGUMENTS

### I. THE RECORD INDICATES THAT THE TRIAL COURT – DUE TO INSUFFICIENT EVIDENCE – ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

The State claims that the trial court "properly denied" Defendant's motion for a directed verdict because the evidence was sufficient to support the guilty verdicts. *See* Brief of Appellee, p. 13. According to the State, "the intent as to each charge could be inferred from the evidence." *See id.* The record demonstrates that the State's argument is without merit.

Once a motion for directed verdict is made, the trial court's inquiry is to be guided by the elements of the crime as defined by the applicable statutory provisions establishing and defining the offense. *See State v. Bossert*, 2015 UT App 275, ¶ 18, 362 P.3d 1258. In reviewing the challenge to a denial of a motion for a directed verdict, the reviewing court accordingly examines the evidence introduced at trial and compares it to the statutory elements of the applicable offense. *Id.* at ¶ 19.

#### A. The Burglary Charge Insufficiency

The Burglary statute provides, in relevant part, that "[a]n actor is guilty of burglary who enters or remains unlawfully in a building or any portion of a building with intent to commit . . . a felony [or] . . . theft . . . ." Utah Code Ann. § 76-6-202(1)(a) & (b).[1] As

[1] A true and correct copy of Utah Code Ann. § 76-6-202 is attached to the Brief of Appellant as Addendum F.

pertaining to this case, the elements of Burglary are: (1) the act of entering the building, and (2) the specific intent to commit a felony or theft therein. *See id.* "The act of entering alone does not give rise to an inference that the actor entered with the requisite intent to constitute burglary." *State v. Brooks*, 631 P.2d 878, 881 (Utah 1981). The intent to commit a felony or theft must be proved or shown from circumstances by which the intent may reasonably be inferred. *See Peck v. Dunn*, 574 P.2d 367, 370 (Utah 1978). Moreover, it is the intent to commit a theft, not the actual theft, which is material. *See Brooks*, 631 P.2d at 881.[2]

"Since the intent to commit a theft is a state of mind, which is rarely susceptible of direct proof, it can be inferred from conduct and attendant circumstances in the light of human behavior and experience." *Brooks*, 631 P.2d at 881; *see also State v. Hopkins*, 11 Utah 2d 363, 359 P.2d 486, 487 (1961). An "inference" is defined as:

> a logical and reasonable conclusion of the existence of a fact in a case, not presented by direct evidence as to the existence of the fact itself, but inferred from the establishment of other facts from which, by a process of logic and reason, based upon common experience, the existence of the assumed fact may be concluded by the trier of the fact.

*Wyatt v. Baughman*, 121 Utah 98, 109, 239 P.2d 193 (1951).

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[2]In cases where there may be an actual stealing, the intention may be more readily apparent, however, the failure to commit a theft, after entry with the intent, is no defense to the crime of burglary. *See State v. Baldwin*, 29 Utah 2d 318, 509 P.2d 350, 351 (1973).

The surrounding circumstances, such as the manner of entry, the odd hour, and the sudden flight upon being discovered, supports the inference that the required intent to commit theft or a felony was present. *See Brooks*, 631 P.2d at 881. In other words, the intent to commit theft may be sufficiently established by circumstances such as "the manner of entry, the time of day, the character and contents of the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation." *State v. Porter*, 705 P.2d 1174, 1177 (Utah 1985).

In the instant case, the record demonstrates a lack of evidence that shows, or even supports a reasonable inference that Mr. Carrick – assuming he had unlawfully entered or remained in the house – intended to commit theft. The testimony of the State's witnesses indicates a lack of furtive behavior in the course entering and exiting the house (*see, e.g.*, R. 329-30; R. 409). The evidence and surrounding circumstances also included, among other things, the following: (1) the person approaching and entering the house did so in a nonfurtive manner (*see e.g.*, R. 327-28); (2) the entry took place in the afternoon after April's funeral (*see, e.g.*, R. 323-24); (3) the manner of entry – and exit – were done with a lack of burglarious intent (*see, e.g.*, R. 324; R. 365-66; R. 387; R. 334; R. 377); and (4) Mr. Carrick did not attempt to hide or conceal himself at or during the funeral (*see, e.g.*, R. 319; R. 363). In addition – none of the witnesses provided any testimony that the person had been seen carrying anything from the house. In fact, Mr. Taylor testified that he – after reviewing the contents of the house on the day of the incident – did not notice anything

missing (R. 444:19-24). Approximately five months later – he again told the investigating officer that he "couldn't find anything missing from [the] home" (R. 453:2-6).

Viewing the evidence in a light most favorable to the State, the evidence was sufficiently inconclusive so that reasonable minds would have entertained a reasonable doubt that Mr. Carrick intended to commit theft. *See & cf.* Utah Code Ann. § 76-2-103(1).[3] There was insufficient evidence to submit this issue to the jury. The assertion by the prosecution that the State intended to argue the issue of intent at closing further demonstrates the insufficient evidence regarding the intent to commit theft. Thus, the trial court erred in denying the motion for a directed verdict on this issue at the close of the State's case.

### B. The Criminal Trespass Charge Insufficiency

In its Brief, the State argues that "the jurors could reasonably infer from the evidence that Defendant unlawfully entered his deceased lover's home in reckless disregard that his presence would cause fear for the safety of another." *See* Brief of Appellee, p. 19. The State's argument fails to substantively rebut Mr. Carrick's argument that there was

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[3]A person engages in conduct "[i]ntentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result." Utah Code Ann. § 76-2-103(1). *See* Addendum H attached to the Brief of Appellant.

insufficient evidence that he entered the home in reckless disregard that his presence would cause fear for the safety of another.[4]

To convict Mr. Carrick of Criminal Trespass, the State had to prove that he entered or remained unlawfully in the home and that he was "reckless as to whether his presence [would] cause fear for the safety of another . . . ." *See* Utah Code Ann. § 76-6-206(2)(a)(iii).[5] Even assuming that Mr. Carrick had unlawfully entered the house, there was no evidence from which a reasonable jury could determine that he was reckless in the manner so required. A person, according to Utah law, engages in conduct

> Recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Utah Code Ann. § 76-2-103(3).

When the evidence is viewed in a light most favorable to the State, it demonstrates that Mr. Carrick's alleged behavior in entering and exiting the house was not reckless as to

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[4]The State contends that because Mr. Carrick was not convicted of the lesser-included offense of Criminal Trespass, he was not prejudiced by the trial court's denial on the lesser charge. *See* Brief of Appellee, p. 19. However, this issue is likely to reappear in the event that this Court reverses Mr. Carrick's conviction and remands the case for a new trial.

[5]A true and correct copy of Utah Code Ann. § 76-6-206 is attached to the Brief of Appellant as Addendum G.

whether his presence would cause fear for the safety of another. The careful manner in which he allegedly entered and exited the house is in stark contrast to even a colloquial definition of the word "reckless." (*See* R. 450:18-20 (Mr. Taylor testifying that the screen was "completely intact"); *see also* R. 459-60 (investigating officer testifying that "very seldom" will a screen be replaced or "stuff" not taken during a burglary)). None of the State's witnesses testified concerning a fear for their safety in the course of Mr. Carrick allegedly entering and exiting the house. At the very most, there may have been some suspicion but nothing constituting a fear for their safety or that of another (*see* R. 327-28 (Starkey testifying that she "actually waved to him" and "he waved back")).

Nothing the State presented established that Mr. Carrick's alleged conduct indicated that he – from his perspective – was aware of but consciously disregarded a substantial and unjustifiable risk that his presence would cause fear for the safety of another. Perhaps, most significantly, there was no evidence introduced that would allow a reasonable inference that Mr. Carrick's alleged conduct constituted a risk of such a nature and degree that its disregard constituted a *gross deviation* from the standard of care that an ordinary person would exercise under those circumstances.

According to the court's rationale, a person's unlawful entry or remaining on the property is presumptively reckless as to causing fear for the safety of another (*see* R. 495-96). The court's rationale thus created a prohibitively narrower reading of the elements to prove Criminal Trespass than that intended by the Legislature. The plain language of the

Criminal Trespass statute provides, "A person is guilty of criminal trespass if . . . the person enters or remains unlawfully on property *and* . . . is reckless as to whether his presence will cause fear for the safety of another." Utah Code Ann. § 76-6-206(2)(a)(iii) (emphasis added). The trial court's ruling effectively eliminated the culpable mental state as an element of the offense. *See* Utah Code Ann. § 76-1-501(2)(b) (dictating that "the culpable mental state required" for the offense constitutes an "element of the offense"). This violates the established principle of statutory construction that requires the reviewing court, when interpreting statutory language, to "presume that the Legislature used each word advisedly," giving "effect to each term according to its ordinary and accepted meaning." *State v. Terwilliger*, 1999 UT App 337, ¶ 10, 992 P.2d 490 (citation and internal quotation marks omitted). The trial court's interpretation also violates the principle that "'any interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided.'" *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995) (quoting *United States v. Rawlings*, 821 F.2d 1543, 1545 (11th Cir. 1987)).

In light of the foregoing, a reasonable jury could not have found that the elements of Criminal Trespass had been proven beyond a reasonable doubt, and the trial court erred by reading the Criminal Trespass statute too narrowly. Consequently, the trial court erred by denying Mr. Carrick's motion for a directed verdict on the Criminal Trespass charge.

## II. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY AS TO THE DEFINITION OF

**THE CULPABLE MENTAL STATE ELEMENT OF BOTH BURGLARY AND CRIMINAL TRESPASS.**

The State argues that Mr. Carrick's "plain error claim fails under the invited error doctrine." *See* Brief of Appellee, p. 31 *et seq*. However, the State's argument fails because the facts of the instant case demonstrate that defense counsel did not lead the trial court into committing the error.

The purpose of the invited error doctrine is to "'discourage[ ] parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal.'" *State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111 (quoting *State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996) (quoting *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993)). In addition, "'it fortifies [the] long-established policy that the trial court should have the first opportunity to address the claim of error.'" *Id.* (quoting *Dunn*, 850 P.2d at 1220).

The State – in propounding its argument – relies exclusively on our supreme court's decision in *State v. Geukgeuzian*, 2004 UT 16, 86 P.3d 742. Geukgeuzian was charged with tampering with a witness and with making a false written statement. *Id.* at ¶ 3. During trial, Geukgeuzian proposed a jury instruction that recited almost verbatim the elements of the witness tampering statute. *Id.* The State also submitted a proposed instruction that tracked the statutory elements. *Id.* at ¶ 4. However, neither instruction provided the requisite culpable mental state. *Id.* Relying on the proposed instructions, the trial court gave a jury instruction very similar to that proposed by Geukgeuzian and the State with no separate

mens rea requirement. *Id.* Geukgeuzian did not object to the instruction and was subsequently found guilty of tampering with a witness. *Id.*

On appeal, Geukgeuzian argued that the trial court erred by failing to include the mens rea requirement in its jury instruction. This court agreed, reasoning that the trial court's failure resulted in manifest injustice. *Id.* at ¶ 5. On certiorari, the supreme court reversed. The Court reasoned that "[w]hile a party who fails to object to or give an instruction may have an instruction assigned as error under the manifest injustice exception, Utah R. Crim. P. 19(e), 'a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.'" *Id.* at ¶ 9 (citing *Anderson*, 929 P.2d at 1109 (quoting *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993) (internal quotation omitted)). In addition, the Court stated the following:

> We acknowledge that Geukgeuzian's failure to include a separate mens rea element in his proposed instruction was most likely inadvertent and not a conscious attempt to mislead the trial court. Nevertheless, we believe that, like those cases discussed above, his proposed jury instruction effectively led the trial court into adopting the erroneous jury instruction that he now challenges on appeal. Contrary to his assertions before this court, Geukgeuzian did not simply omit a mens rea element; rather, he affirmatively purported to list all "essential elements" needed to prove that an individual tampered with a witness. Accordingly, we find that Geukgeuzian invited the trial court's erroneous jury instruction and reverse the court of appeals' decision below.

*Id.* at ¶ 12.

Unlike *Geukgeuzian*, Mr. Carrick's counsel did not provide the trial court with any proposed jury instructions. Rather, the State submitted proposed jury instructions on elements of Burglary and Criminal Trespass, which did not provide the requisite mental state element for either offense (R. 66-67). Consequently, defense counsel's conduct is more akin to a failure to object rather than the more affirmative manner discussed in *Geukgeuzian*. Moreover, the trial court was aware of the intent or mental state issues and deliberately addressed the issues in its ruling on the motion for a directed verdict. *See & cf. Pratt v. Nelson*, 2007 UT 41, ¶¶ 23-24, 164 P.3d 366.

## III. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE LACK OF INSTRUCTION AS TO THE CULPABLE MENTAL STATE ELEMENT FOR BOTH BURGLARY AND CRIMINAL TRESPASS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The State contends that Mr. Carrick's ineffective assistance of counsel claim fails "because he has not shown either that all other competent counsel would have requested the specific intent instruction or that he was prejudiced by the instruction's absence." *See* Brief of Appellee, p. 32 *et seq*. This argument fails because it ignores critical aspects of the two-prong *Strickland* test and the essential importance that accurate jury instructions have on criminal proceedings.

On appeal – jury instructions are reviewed under a correctness standard, with no particular deference provided to the trial court. *See Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 452 (Utah 1993); *State v. Gibson*, 908 P.2d 352, 354 (Utah Ct.

App.1995), *cert. denied*, 917 P.2d 556 (Utah 1996). The appellate court must "review [the] jury instructions in their entirety to determine whether the instructions, taken as a whole, fairly instruct the jury on the applicable law." *Laws v. Blanding City*, 893 P.2d 1083, 1084 (Utah Ct. App.), *cert. denied*, 910 P.2d 425 (Utah 1995). "Further, because '"[t]he general rule is that an accurate instruction upon the basic elements of an offense is essential,"' failure to provide such an instruction is reversible error that can never be considered harmless." *State v. Souza*, 846 P.2d 1313, 1320 (Utah Ct. App. 1993) (quoting *State v. Jones*, 823 P.2d 1059, 1061 (Utah 1991) (quoting *State v. Roberts*, 711 P.3d 235, 239 (Utah 1985) (alteration in original)). "The purpose of the instructions is to set forth the issues and the law applicable thereto in a clear, concise and orderly manner, so that the jury will understand how to discharge its responsibilities." *State v. Torres*, 619 P.2d 694, 696 (Utah 1980).

To convict Mr. Carrick of Burglary or the lesser-included-offense of Criminal Trespass, the State was required to prove every element, including the culpable mental state for each charge. *See* Utah Code Ann. § 76-1-501(1) ("A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proven beyond a reasonable doubt . . . ."). Here, Instruction No. 26 informed the jury that before Mr. Carrick may be found guilty of a crime the evidence must prove "that the defendant was prohibited from committing the conduct charged . . . and that the defendant committed

such conduct with the culpable mental state required for each offense." (R. 120).[6] According to the Instruction, "The culpable mental state required is intentionally, or knowingly, or recklessly." (*Id.*). Instruction No. 28 provides the definition for the culpable mental state of "knowingly" that mirrors the statutory definition found in Utah Code Ann. § 76-2-103(2) (R. 122). The jury instructions – however – are devoid of any definition regarding the culpable mental state required for either Burglary or Criminal Trespass.

Instructions 26 and 28 are wholly insufficient as culpable mental state instructions even when read in light of all other instructions. The definition in Instruction No. 28 is not applicable to the culpable mental state required for either Burglary or Criminal Trespass, namely, "intentionally" and "recklessly." *See* Utah Code Ann. § 76-2-103(1) and (3). This manner of instruction confused rather than enlightened the jury, since it concerns terms nowhere else defined in the Jury Instructions. "The conclusion is inescapable that the jury instructions, taken as a whole, did not fairly instruct the jury" on the culpable mental state for Burglary or Criminal Trespass. *See State v. Stringham*, 957 P.2d 602, 609 (Utah Ct. App. 1998).

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984), the United States Supreme Court established a two-prong test for determining when a defendant's Sixth

[6] A true and correct copy of the Jury Instructions, R. 93-129, is attached to the Brief of Appellant as Addendum I.

Amendment[7] right to the effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct. at 2064. The test – adopted by Utah courts – requires a defendant to show "first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant." *State v. Martinez*, 2001 UT 12, ¶ 16, 26 P.3d 203; *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); *State v. Stidham*, 2014 UT App 32, ¶ 18, 320 P.3d 696; *State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App. 1995); *State v. Wright*, 893 P.2d 1113, 1119 (Utah Ct. App. 1995). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *See Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993).

To satisfy the first prong of the test, a defendant must "'identify the acts or omissions' which, under the circumstances, 'show that counsel's representation fell below an objective standard of reasonableness.'" *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted)). A defendant must "overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment." *State v. Bullock*, 791 P.2d 155, 159-60 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3270 (1990).

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[7]The Sixth Amendment to the United States Constitution states in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Templin*, 805 P.2d at 187. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069; *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah), *cert. denied*, 513 U.S. 966, 115 S.Ct. 431 (1994); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986).

In light of the circumstances of this case, it is difficult – if not impossible – to conceive of a sound trial strategy that would justify trial counsel's decision to remain completely silent concerning the court's failure to accurately instruct the jury as to the culpable mental state for both Burglary and the lesser-included-offense of Criminal Trespass. Based on the issues surrounding Mr. Carrick's lack of intent to commit theft, not to mention the "reckless" mental state issue, trial counsel should have objected to the lack of instruction. By failing to do so, not only did trial counsel fail to conduct the defense in manner consistent with the theory of the case, but he also failed to preserve the issue for appeal. *See and cf. State v. Larrabee*, 2013 UT 70, ¶ 26, 321 P.3d 1136. Hence, trial counsel's decision – according to *Strickland* – constituted deficient performance and cannot be considered "sound trial strategy."

According to the State, the ""relevant question under *Strickland*' is whether 'no competent attorney' would have done the same." *See* Brief of Appellee, p. 35 (quoting

*Premo v. Moore*, 562 U.S. 115, 124, 131 S.Ct. 733 (2011)).[8] Based on the general principle that an accurate instruction upon the basic elements of an offense is essential to the jury discharging its responsibilities, no competent attorney would have failed to request the appropriate instructions as to the mental state elements of Burglary and Criminal Trespass. This goes to the very core of what is "constitutionally compelled" under the Sixth Amendment. *See Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (quoting *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114 (1987)).

But for counsel's unprofessional failure to object, the result of Mr. Carrick's jury trial would have been different. Had the trial court been alerted of its obligation, there is a reasonable probability that the jury, having been properly instructed, would have acquitted Mr. Carrick of Burglary or at least convicted him of the lesser-included-offense of Criminal Trespass. The prejudice to Mr. Carrick resulting from this critical failure is evinced by the fact that the jury was precluded for properly considering the appropriate culpable mental state of the applicable offenses. In other words, the likelihood of a different result is substantial – not just conceivable. *See Harrington v. Richter*, 562 U.S. 86, 112, 131, S.Ct. 770 (2011).

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[8]The Court, in *Premo*, addressed a claim of ineffective assistance for failing to move to suppress a confession prior to advising the defendant to plead no contest to felony murder in exchange for the minimum sentence for that offense notwithstanding a full confession to two witnesses. *See Premo v. Moore*, 562 U.S. 115, 119-20, 131 S.Ct. 733 (2011). This is significantly different than the instant case, which involves the failure to request jury instructions on the essential intent elements of the charges.

## IV. THE CUMULATIVE EFFECT OF THE ERRORS BOTH BEFORE AND DURING TRIAL MERITS REVERSAL OF MR. CARRICK'S CONVICTION OF BURGLARY.

Contrary to the State's assertion, the cumulative effect of the numerous errors in this case, including the ineffective assistance of counsel both before and during trial,[9] prejudiced Mr. Carrick, which undermines confidence that a fair trial was provided to him. As a result, under the cumulative error doctrine, this Court should reverse Mr. Carrick's conviction because the cumulative effect of several errors undermines confidence that a fair trial was had. *See State v. Perea*, 2013 UT 68, ¶ 99, 322 P.3d 624 (stating cumulative error doctrine is "used when a single error may not constitute grounds for reversal, but many errors, when taken collectively, nonetheless undermine confidence in the fairness of a trial").

## V. THE STATE FAILED TO SUBSTANTIVELY REBUT MR. CARRICK'S CLAIMS OF INEFFECTIVE

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[9]*See* Mr. Carrick's previously filed a Rule 23B Motion, which the Court – by Order dated April 20, 2017 – deferred for consideration with the briefing in this case. The Rule 23B Motion raises numerous claims of ineffective assistance of counsel, including trial counsel's failure to investigate and utilize an eyewitness identification expert at trial, trial counsel's failure to investigate and engage a forensic investigations expert concerning the critical failures of the investigating officer to follow standard CSI practices in his investigation of the case, and trial counsel's failure to investigate critical alibi witnesses.

**ASSISTANCE OF COUNSEL RAISED IN HIS RULE 23B MOTION.**

The State – by way of its Memorandum in Opposition to Motion for Rule 23B Remand – failed to substantively rebut Mr. Carrick's claims of ineffective assistance of counsel. The Memorandum is noticeably devoid of any expert affidavits or declarations contradicting in any manner Mr. Carrick's expert witnesses Affidavits critical to the claims of ineffective assistance of counsel not of record in the instant case. Perhaps most noteworthy, is the State's failure to rebut the thoroughly investigated timeline, which establishes that Mr. Carrick would have either arrived or had been arriving at Racks Barber Shop at the time of the alleged Burglary. *See* Amended Second Affidavit of Robert V. Welling in Support of Rule 23B Motion.

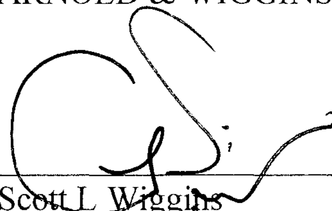
## CONCLUSION

In light the foregoing in addition to that set forth in the Brief of Appellant and the Rule 23B Motion, Mr. Carrick respectfully requests that this Court reverse his conviction and remand the case for a new trial on the Burglary charge consistent with this Court's instructions as set forth in its opinion. Mr. Carrick further requests that the Court provide

him with any other remedy that the Court deems just and appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 22nd day of December, 2017.

ARNOLD & WIGGINS, P.C.

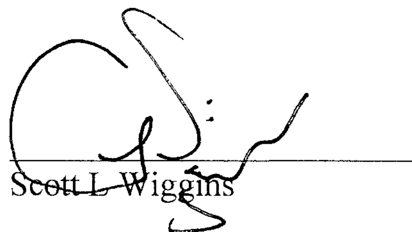


Scott L Wiggins
*Counsel for Appellant*

## CERTIFICATE OF COMPLIANCE

The undersigned, Scott L Wiggins, hereby certifies, pursuant to Utah Rule of Appellate Procedure 24(a)(11)(g), that the Brief of Appellant complies with the applicable by containing 4,690 words.

The undersigned also certifies that the Brief of Appellant complies with Utah Rule of Appellate Procedure 21, governing public and private records.



Scott L Wiggins

## CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 27th day of December, 2017:

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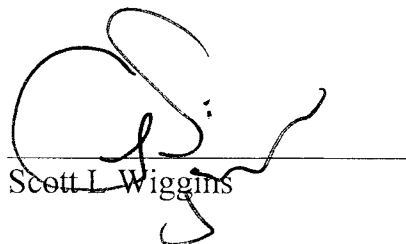
The undersigned also certifies that he included a digital copy of the Reply Brief of Appellant.



Scott L Wiggins

## ADDENDA

No Addendum is utilized pursuant to Utah Rule of Appellate Procedure 24(a)(11).