

2003

Utah v. Joseph Maka Langi : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellee, : Case No. 20030080-CA
 :
 v. :
 :
 JOSEPH MAKALANGI, :
 :
 Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR TWO COUNTS OF AGGRAVATED ROBBERY, FIRST DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JUDITH S.H. ATHERTON, PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

FILED
Utah Court of Appeals

OCT 20 2003

Paulette Stagg
Clerk of the Court

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from convictions of two counts of aggravated robbery, first degree felonies, in violation of Utah Code Ann. § 76-6-302 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Judith S.H. Atherton, presiding. This court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j) (2002).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

STATUTES AND RULES

1. Whether this Court should seriously consider defendant's patently meritless claims of error in light of overwhelming evidence of guilt?

An appellate court may decline to consider the merits of a claim where it is clear that any error would be harmless in light of overwhelming evidence of guilt. *State v. Young*, 853 P.2d 327, 345 (Utah 1993) (citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes and rules are attached at Addendum A:

Sixth Amendment to the United States Constitution;
Article I, section 12 of the Utah Constitution;
Utah Code Ann. § 76-6-301, -302 (1999);
Rule 801, Utah Rules of Evidence.

STATEMENT OF THE CASE

Defendant, Joseph Maka Langi, was charged with two counts of aggravated robbery, both counts subject to an enhanced penalty for acting in concert with two or more persons under Utah Code Ann. § 76-3-203.1 (1999) (R. 2-4). Following a jury trial that concluded on April 26, 2001, defendant was convicted of both counts of aggravated robbery and the in-concert (“gang”) offenses (R. 170-71). On May 31, 2001, before the trial court sentenced him, defendant filed a motion for a new trial (R. 181-83, 193-201). On June 11, 2001, the trial court sentenced defendant to two five-to-life terms, to be served concurrently in the Utah State Prison (R. 190-01). Additionally, the court imposed on defendant’s sentences a minimum nine-year term under the gang enhancement (R. 185, 191; 325:15). Defendant filed a motion for a new trial, which the trial court denied after a hearing (R. 181-83; 262-70; 326:3-17). Defendant filed a notice of appeal (R. 315-16). The Utah Supreme Court

transferred the case to this court, under Utah Code Ann. § 78-2-2(4) (2002) (R. 318).¹ judgment, although dated by the court, was not entered (R. 190).

STATEMENT OF FACTS²

Trial Testimony

In the early morning hours of February 26, 2000, Jose Farias, Gabriel Calvillo, and **Rachel Redding** were playing cards at Rachel's grandmother's house (R. 323:136; 324:157). Wanting to get something to eat, they drove to Beto's restaurant in Kearns, arriving there at

¹ Although the procedural background of the case set out above is somewhat oversimplified, this Court has not been deprived of jurisdiction. On May 31, 2001, before the trial court sentenced him, defendant filed a motion for a new trial (R. 181-83, 193-201). On June 11, 2001, the trial court sentenced defendant, but the signed final order was not formally entered (R. 190-01).

On September 7, 2001, the trial court heard defendant's new trial motion and orally denied it (R. 326:3-17). On March 14, 2002, the trial court entered an order denying defendant's motion (R. 262-270). On April 10, 2002, newly appointed defense counsel filed a notice of appeal, which purported to effect an appeal from the "judgment and conviction filed and entered by [the trial court] on April 26, 2001, and all other post trial motions, including but not limited to, [the trial court's] findings of fact and conclusions of law and order re: defendant's motion for a new trial[,] filed on March 15, 2002" (R. 272).

On September 19, this Court issued a **sua sponte** motion for summary disposition (R. 313-14). The Court held that although the district court docket reflected that defendant was sentenced on June 11, 2001, no signed judgment appeared in the record transmitted to the Court (R. 314). Therefore, the Court held that it lacked jurisdiction over the appeal (R. 314). The Court dismissed the appeal without prejudice, allowing defendant to file a timely notice of appeal after the entry of a final judgment (R. 314). A final judgment was entered on November 5, 2002, and defendant filed a timely notice of appeal on November 26, 2002 (R. 306-09, 315-16).

² The facts and all reasonable inferences drawn therefrom are recited in a light most favorable to the jury's verdict. See *State v. Boyd*, 2001 UT 30, ¶2, 25 P.3d 985.

1:56 a.m. (R. 323:110-11, 136, 142; VT. 1:56:22).³ Gabriel entered the restaurant first, followed by Rachel and Jose (R. 323:111; VT. 1:56:22-27). Jose wore an eyebrow ring (R. 323:137). Jose had his wallet with him when he entered the restaurant (R. 323:136). Gabriel also had his wallet, which had about \$80, “information” papers, and a driver’s license in it (R. 324:158, 164, 174). Gabriel walked to a table, while Rachel and Jose approached the counter to get something to eat (R. 323:111; VT. 1:56:27-36). After placing their order, Rachel and Jose returned to a booth near Gabriel (R. 323:112-13; VT. 1:59:20-2:00:20).

Approximately twenty minutes later, defendant, Konai Bloomfield, and Siao Si “George” Afu arrived at the restaurant (R. 323:113-14).⁴ Afu entered the restaurant first, followed by Bloomfield and then defendant (R. 323:114-15; 324:185; VT. 2:23:19-30). Afu walked directly to the booth where Rachel and Jose sat, shook Jose’s hand, and said,

³ The surveillance videotape, State’s exhibit 3, is a true and accurate copy of the videotape collected from Beto’s on February 26, 2000 (R. 323:75-76). That videotape was played for the jury (R. 323: 109-10). As it played, Detective Jeffrey Lone explained that the videotape depicted a split-screen image recorded by four surveillance cameras (R. 323:110). Jose, Gabriel, and Rachel also testified in accord with the videotape depiction of events. The numeric counter of videotape, superimposed on the image, is cited as “VT:hour:minute:second.”

Detective Lone used the videotape to identify the victims: Gabriel, with “longer” hair, wearing black clothes and a light-colored shirt, entered the restaurant first (R. 323:111). He was followed by Rachel, who wore a light top and dark pants (R. 323:111). Jose, who entered behind Rachel, wore a checkered jacket (R. 323:111). Just before defendant and his companions entered the restaurant, Jose removed his jacket, revealing a light-colored shirt (R. 323:114).

⁴ Detective Lone, with the aid of the videotape, also identified defendant and his two companions: Afu entered the restaurant first, followed by Bloomfield and then defendant (R. 323:114). Bloomfield wore a short-sleeved white shirt (R. 323:114-15). Defendant wore a dark jacket (R. 323:115). By the time of trial, Bloomfield had already been convicted of two counts of aggravated robbery with an in-concert enhancement, and Afu had pleaded guilty to one count of aggravated assault, a third degree felony (R. 263).

“Everything is cool. We are just here to get something to eat” (R. 323:114-15; 324:181-82, 185; VT. 2:23:38-40). Defendant and his companions then ordered food at the counter (R. 323:115-16; VT. 2:23:49). Soon afterward, Rachel and Jose walked to the drink machines to fill their drinks (R. 323:116; VT. 2:25:27). As Bloomfield received his change, defendant moved behind Gabriel (R. 323:116; VT. 2:25:59). Bloomfield then punched Jose in the head, which hit the cash register hard enough to knock it off the counter and leave Jose unconscious (R. 323:117, 139; 324:183-84; VT. 2:25:50-26:03). Bloomfield and Afu pummeled Jose with kicks and punches, and Bloomfield tore Jose’s ring from his eyebrow. At the same instant, defendant began to rain blow after blow with his fists on Gabriel’s head (R. 323:117; 324:188-89, 192; VT. 2:26:01-02). At this point, Afu left (VT. 2:26:25).

Defendant walked to where Jose lay on the floor, bent over, and went through Jose’s pockets (R. 323:117; VT. 2:26:26-38). Detective Lone asserted that “[it] is clearly obvious on the video” (R. 323:117). Defendant then stomped on Jose’s head, walked to Gabriel’s immobile body and went through his pockets (R. 323:117; VT. 2:26:38-27:03). Rachel told Deputy Jason Huggard shortly after the robbery that three men had assaulted her two friends and taken “stuff” from their pockets (R. 323:92, 99, 118). Consistent with that statement, she testified at trial that two or three of her friends’ assailants searched both Jose’s and Gabriel’s pockets. She did not see anything removed from Jose’s pockets, but she did see something come out of Gabriel’s pockets, although she could not say that it was a wallet (R. 324:193, 195). Afu, however, who testified for both the prosecution and the defense, consistently reported, first to Detective Lone, then at trial, and thereafter when investigated for perjury,

that he saw defendant throw a wallet from the car during the getaway (R. 227-29, 323:125-126, 132-33; 324:202, 204-06, 218).

Defendant and Bloomfield then exited the restaurant, got in a vehicle with Afu, and drove away. Seconds later, one of the restaurant clerks pressed the alarm (R. 323:117-18; VT. 2:27:03-06). Detective Huggard arrived six minutes later, at 2:33 am (R. 323:68-70, 102, 118). He found Jose unconscious on the floor in front of the counter (R. 323:70-72). He also found Gabriel slumped on a seat next to a table, conscious, but incoherent. There was a large pool of blood under the table and in the booth in which he lay (R. 323:72-73). Gabriel appeared to have a broken jaw, his teeth were chipped and broken, he had a cut beneath his chin, and his face was swollen (R. 323:78-80, 108; 324:161-62). A row of Gabriel's teeth were later found on the restaurant floor (R. 323:81-82).

Jose and Gabriel were taken to Pioneer Valley Hospital (R. 323:77). When Gabriel awoke in the hospital the following morning, he did not have either the wallet or the \$80 (R. 324:161, 163-64). Gabriel reported the missing wallet and money stolen, but he never did get either the wallet or the money back (R. 324:164, 167). He was in bed for eight days after the incident and for the next twenty-two days could only take liquids (R. 324:163). At trial, fourteen months after the incident, scars from the injuries received in the beating still bothered Gabriel and his jaw still felt crooked (R. 324:161-63).

At trial, Jose could only recall awakening in the hospital the following morning with a headache and an IV in his arm (R. 323:137-38). His face was bruised and he had stitches

on the side of his head (R. 323:138-39; State's Ex. 8). At least four months after he was beaten, Jose still suffered headaches and had difficulty sleeping (R. 323:145).

Facts related to impeachment of Afu, alleged Bruton violation, and new trial motion

Detective Lone interviewed Afu about a month after the robbery (R. 323:103, 107-08, 132-33). During the interview, Afu told him that defendant had thrown the wallet from the getaway vehicle as it passed 5400 South, in the vicinity of a church (R. 323:125-126, 132-33). Detective Lone looked for the wallet several days later, but was unable to find it (R. 323:126).

At trial, Afu appeared for the prosecution (R. 324:202). He initially backpedaled on statements he made to Detective Lone during the interview (R. 324:204). However, when confronted with the transcript of the interview, first to impeach him and then to refresh his memory, Afu affirmatively testified that he recalled telling the detective that defendant had a wallet in his hand when he got into the getaway car and that he later threw the wallet out of the car (R. 324:204-06).

Following his conviction, defendant filed a motion for a new trial, asserting that Afu perjured himself at trial (R. 181-83, 193-97). The motion was supported by Afu's notarized affidavit, which alleged that he had been pressured by the prosecutor and the investigator to lie during his interview with Detective Lone in exchange for favorable treatment and that he did not see defendant take or steal anything (R. 199).

The prosecutor's opposing memorandum noted that Afu admitted at trial that he had given statements to the police that were inconsistent with his trial testimony and that he had

even lied to detectives (R. 210). However, Afu never alleged in the affidavit that he had lied under oath (R. 199, 210).

To determine if Afu had perjured himself, Sergeant Kevin Judd of the Salt Lake County District Attorney's Office interviewed Afu, who was accompanied by his counsel (R. 210, 218-33). That investigation quickly revealed the following facts: (1) the affidavit was presented to Afu by Sam Misini, defendant's uncle (R. 221-23); (2) Afu could barely read (R. 218, 221); (3) Afu's wife read the affidavit, giving him the gist of its meaning (R. 218, 223-24); (4) Afu signed the affidavit, believing that it attested to his having lied to Detective Lone only about his involvement and his relation to defendant, but not that he had lied about the specific events of the crime or while under oath (R. 218-19, 222, 225-27); and (5) neither the police nor the prosecutor ever pressured him to testify in any particular way (R. 218-19, 226-27, 231-32). Afu asserted to Sergeant Judd that he never lied to Detective Lone or while on the stand, that defendant "had the wallets and threw [them] out." Afu admitted that he did lie, however, when, to protect defendant's identity, he told the detective that he had let defendant out at the church when defendant had actually slept at Afu's house that night (R. 227-29, 232).

The trial court reviewed the parties' memoranda and heard argument on defendant's motion (R. 326:3-17). The trial court denied defendant's new trial motion because defendant could have discovered those matters Afu admitted lying about before trial, defendant failed to show Afu lied at trial, defense counsel sufficiently cross-examined Afu at trial on

inconsistencies in his statements, and the overwhelming evidence of defendant's guilt made any error harmless (R. 268-70; 326:15-17).

SUMMARY OF ARGUMENT

Defendant's five claims of error on appeal all seek to undermine the taking-of-personal-property element of aggravated robbery through a variety of legal theories by arguing that the wallets alleged to have been stolen from the victims never existed. This Court may reasonably decline to consider any of defendant's claims because the videotape and the undisputed testimony of an eyewitness show that defendant *attempted* to deprive the victims of personal property by going through their pockets. This was all that was necessary to prove the offenses in this case. Additionally, defendant's claims are patently without merit. They are variously based on unjustifiable readings of the record, arguments specifically rejected under the invited error doctrine, and long-defunct law in direct contradiction to current legal rules.

ARGUMENT

**IN LIGHT OF THE OVERWHELMING EVIDENCE OF
DEFENDANT'S GUILT THIS COURT SHOULD DECLINE TO
SERIOUSLY CONSIDER DEFENDANT'S PATENTLY MERITLESS
CLAIMS OF ERROR FOUNDED ON LESS-THAN-CANDID
REPRESENTATIONS OF THE RECORD**

Defendant asserts five distinct legal claims of error on appeal. Each claim attempts to undermine evidence that defendant stole the victims' wallets. Defendant's assault on the existence of the wallets to defeat the taking-of-personal-property element of aggravated

robbery is a red herring, which deflects the Court's consideration of a prosecution theory that is immediately conclusive of defendant's guilt.

First, as the prosecution argued in closing, whether or not the victims even possessed the wallets was unnecessary for conviction since a mere *attempt to commit* a robbery while causing serious bodily injury is sufficient to prove aggravated robbery. In this case, defendant's infliction of serious bodily injury on Jose and Gabriel is unchallenged. More importantly, evidence of defendant's attempt to rob the victims' of personal property was overwhelming.

Second, defendant's claims are patently without merit. They are variously based on unjustifiable readings of the record, arguments specifically rejected under the invited error doctrine in *State v. Bloomfield*, 2003 UT App 3, 63 P.3d 110, and long-defunct law in direct contradiction to current legal rules. The Court should decline to seriously to consider any of defendant's claims because their resolution could not affect the outcome of the case and would constitute a waste of judicial resources.

A. Because evidence of defendant's attempt to commit a robbery was overwhelming, the Court need not consider the merits of defendant's specific claims.

"[F]or an error to require reversal, the likelihood of a different outcome must be sufficiently high and undermine our confidence in the jury's verdict." *State v. Young*, 853 P.2d 327, 345 (Utah 1993) (citations omitted). Therefore, an appellate court may decline to consider the merits of a claim where it is clear that any error would be harmless in light of overwhelming evidence of guilt. *Id.* (declining to consider various claims of erroneous

admission of evidence where the prosecution put on substantial evidence of guilt, including the defendant's taped confession).

Utah Code Ann. § 76-6-302 (1999), the aggravated robbery statute, includes the offense of robbery, defined by Utah Code Ann. § 76-6-301 (1999). Section 76-6-301 provides:

- 1) A person commits robbery if:
 - (a) the person unlawfully and intentionally takes or *attempts to take* personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear; or
 - (b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft.
-

Utah Code Ann. § 76-6-301 (1999) (Emphasis added).

Section 76-6-302, provides:

- (1) A person commits aggravated robbery if in the course of committing robbery, he:
 -
 - (b) causes serious bodily injury upon another; []
 -
- (3) *For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit ... a robbery.*

Utah Code Ann. § 76-6-302 (1999) (emphasis added).

Utah Code Ann. § 76-4-101 (1999) provides for the inchoate offense of "attempt," as follows:

- 1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

(2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

....

Utah Code Ann. § 76-4-101 (1999).

On appeal, defendant asserts five claims of trial court error: (1) the improper denial of the opportunity to examine the witnesses about their immigration status and the contents of their wallets for the purpose of impeaching their credibility and “negating the existence of wallets and the claimed content” (Aplt. Br. at 15, 18-21); (2) plain error in allowing a law enforcement officer to testify that a codefendant had stated that defendant had one of the victim’s wallets (Aplt. Br. at 15, 21-25); (3) plain error in allowing a law enforcement officer to interpret the events depicted on the videotape, particularly that defendant was shown going through the victim’s pockets looking for something to take (Aplt. Br. at 16, 25-30); (4) the prosecution was improperly allowed to impeach its own witness about defendant’s possession of a wallet that he later threw from the getaway car (Aplt. Br. at 16, 30-35); and (5) failure to grant a new trial in light of evidence that Afu falsely testified that defendant had a wallet (Aplt. Br. at 17, 35-39).

All of defendant’s claims are challenges to the existence of the victims’ wallets. Defendant’s purpose in challenging the existence of the wallets is to undermine confidence that the prosecution failed to prove a crucial element of aggravated robbery under the first variant of the offense, to wit: that the defendant “unlawfully and intentionally [took] . . . personal property in the possession of another from his person.” Utah Code Ann. § 76-6-302 (1), - (3) (incorporating the simple robbery statute). However, defendant has conspicuously

avoided the prosecution's repeated and primary argument to the jury, supported by statute and the jury instructions, that evidence of an "attempt to commit . . . a robbery" was sufficient to support convictions on the two counts of aggravated robbery, even if defendant did not actually remove anything from the victim's pockets (R. 324:252-53, 270; Jury Instructions 11, 12, and 14, at R. 143-44, 146).

Evidence of defendant's attempt to take personal property from each victim was overwhelming and, in part, undisputed. The videotape shows defendant involved in brutally beating both Jose and Gabriel and then going through their pockets (VT. 2:26:26-27:03).⁵ Rachel Redding confirmed what is depicted on the videotape when she testified, without objection, that two or three of Jose's and Gabriel's assailants searched their pockets (R. 324:193, 195). On appeal, defendant does not challenge the accuracy of Rachel's observations. Defendant's rummaging through the victims' pockets is conclusive evidence of his intent to take personal property from the victims. *See State v. Gutierrez*, 714 P.2d 295, 295-96 (Utah 1986) (per curiam) (knife slash while demanding victim's car keys constituted a "substantial step" in attempting to take property sufficient to prove intent to commit a robbery in aggravated robbery conviction); *People v. Harris*, 217 N.E.2d 503, 506 (Ill. App. Ct. 1966) (one of assailants' going through the victim's pockets during victim's beating

⁵ Defendant does not dispute that it was defendant who bent over the victims, although he does dispute that Detective Lone should have been permitted to interpret defendant's actions as "going through [the victims'] pockets." Aplt. Br. at Pt. III, at 26-27. However, by admitting that he assaulted both victims, defendant has essentially admitted that the videotape correctly depicts him going through the victims' pockets because the videotape depicts only one of the victims' three assailants both attacking the victims *and* going through their pockets (R. 324:263-64, 266, 269; VT. 2:26:26-27:03).

constituted a “substantial step” sufficient to prove attempt to commit robbery even though there existed no evidence of actual loss of property); *People v. McAfee*, 225 N.E.2d 74, 75-76 (Ill. App. Ct. 1967) (evidence that defendants’ going through victim’s pockets while beating victim sufficient to prove defendant guilty beyond reasonable doubt). *See also State v. Pearson*, 680 P.2d 406, 407 (Utah 1984) (defendant’s and his accomplices’ specific acts in preparation for uncompleted robbery constituted “substantial steps” sufficient for conviction for attempted robbery).⁶

Thus, overwhelming evidence of defendant’s intent to unlawfully attempt to take personal property from each of the victims, after brutally beating them unconscious, established defendant’s guilt of two counts of aggravated robbery beyond a reasonable doubt. This is so even if the victims and Afu had lied and the wallets did not exist. Stated differently, this Court could not lose confidence in the jury’s verdict, based on overwhelming evidence that defendant plainly attempted to rob his victims. Because the evidence so substantially establishes defendant’s guilt on a theory clearly presented to the jury and that rendered the existence of the wallets superfluous, this Court should decline to even consider

⁶ Additionally, although Rachel did not see anything removed from Jose’s pockets, she did see something come out of Gabriel’s pockets, although she could not say that it was a wallet (R. 324:193, 195). Gabriel testified that he had a wallet containing \$80 when he went into the restaurant, but did not have the wallet or any money when he awoke in the hospital (R. 324:158, 163-64). Similarly, Jose entered the restaurant with a wallet, which he later reported stolen to Detective Lone (R. 323:119, 136). The videotape depicts defendant going through Jose’s pockets even more clearly than it does defendant going through Gabriel’s pockets (VT. 2:26:26-27:03). Thus, there is additional compelling evidence that defendant actually robbed both victims. *See State v. Dumas*, 721 P.2d 502, 505 (Utah 1986) (more than ample evidence sustained conviction for aggravated robbery where the defendant brutally beat and frisked both victims, demanded money, and took a wallet and checkbook of one but not the other victim).

claims that purport to make the nonexistence of those wallets significant. In any event, a review of defendant's claims reveals them to be meritless.

B. Defendant's various claims ultimately challenging the existence of the victims' wallets are uniformly without merit.

1. Defendant invited any error concerning the trial court's refusal to permit examination as to the victims' immigration status

Defendant claims that the trial court improperly denied him the opportunity to examine the witnesses about their immigration status and the contents of their wallets for the purpose of impeaching their credibility and "negating the existence of wallets and the claimed content" (Aplt. Br. at 15, 18-21). Defendant invited any error.

"The doctrine of invited error 'prohibits a party from setting up an error at trial and then complaining of it on appeal.'" *State v. Perdue*, 813 P.2d 1201, 1205 (Utah App. 1991) (quoting *State v. Henderson*, 792 P.2d 514, 516 (Wash. 1990)); accord *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993). The Utah Supreme Court recently reiterated the policy behind this well-established rule:

We adhere to this rule for two important reasons. "First, it fortifies our long-established policy that the trial court should have the first opportunity to address the claim of error. Second, it discourages parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal." [*State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996)] (quoting *Dunn*, 850 P.2d at 1220).

State v. Hamilton, 2003 UT 22, ¶ 54, 70 P.3d 111. See also *State v. Medina*, 738 P.2d 1021, 1022-23 (Utah 1987) (declining to review a challenge to a jury instruction stipulated to by defense counsel at trial under invited error doctrine).

Before trial, the prosecutor filed a motion a limine to prohibit defendant from inquiring into or referring at trial to the victims' immigration status (R. 86, 90-93). In her memorandum, the prosecutor acknowledged that both victims were residing in the United States illegally (R. 92). However, noting the elements of aggravated robbery, the prosecutor argued that their status as illegal aliens was irrelevant to the proof of any element of the charged offenses, and therefore inadmissible (R. 92). At the hearing on the motion, the trial court asked defense counsel, "Is there any objection to the State's motion with regard to immigration status?" (R. 322:5). Counsel responded, "No, Your Honor" (R. 322:5). The trial court then ruled: "By stipulation, then, it won't be mentioned" (R. 322:5). Somewhat later, counsel sought to clarify the court's ruling, stating that the only way in which he would raise the issue of the victims' immigration status was if the prosecution mentioned it, or if it became relevant, which counsel thought probable (R. 322:9). The trial court readily agreed that defendant could address the matter if the prosecution opened the door (R. 322:9). The court also signaled its readiness to reconsider the relevance of the matter, but at that point could see no relevance (R. 322:9).

At trial, even though the prosecutor had not elicited any testimony concerning Jose's immigration status and without any proffer that the matter had become relevant, defense counsel asked Jose on cross-examination if he was presently being deported or whether he claimed to have an INS card (R. 323:147).⁷ The trial court sustained objections to both

Detective Lone explained that a "green card" is issued by the Immigration and Naturalization Service (INS) and entitles the card holder to be in the United States and to work here (R. 323:119-20).

questions on grounds of relevance (R. 323:147). Defense counsel never requested a side-bar or conference with the court regarding the relevance of those questions.

Based on defendant's express agreement to forego asking about the victims' immigration status and his failure to later assert that questions relating to Jose's immigration status were relevant, defendant invited any error stemming from the trial court's exclusion of the victim's immigration status and matters related to it. Invited error makes plain error inapplicable. Consequently, the Court should decline to consider this claim of error.

Even if the Court were to disregard defendant's inviting error and find that the trial court erred, any error was harmless. First, defendant was substantially able to impeach Jose in the manner he intended. Defendant elicited from Detective Lone that he had interviewed Jose, who told him that his wallet, containing cash from his paycheck and his "green card," had been taken in the robbery (R. 323:119-21). Defendant later successfully challenged Jose's credibility when he elicited from Jose that he did not know if anyone had taken \$220 from him, that he did not recall telling anyone that his green card had been stolen, and that the green card was not in his wallet (R. 323:144, 147-48). Defendant also elicited from Jose that he had been convicted of a felony weapons charge and that he had been previously deported (R. 323:146-47). In short, defendant succeeded in challenging Jose's credibility by showing that he had apparently testified differently at trial than he had reported to Detective Lone concerning the contents of the wallet. Defendant also at least suggested that the existence of the INS card was in doubt because Jose was likely still an illegal alien. Defendant reinforced these impressions by eliciting from Detective Lone that he never

located the wallet, the money, or the green card, that he did not see the wallet on the videotape, that he did not know for a “positive certainty” that the wallet was missing, and did not know if the INS card actually existed (R. 323:121-22, 127).

More significantly, as argued at the outset, is that defendant’s casting doubt on the existence or nonexistence of the victims’ wallets and their contents or the victims’ credibility concerning those items could not have resulted in a different outcome at trial.

2. Defendant affirmatively waived his challenge to Detective Lone’s testimony; the record provides no foundation for a denial-of-confrontation challenge

Defendant claims the trial court committed plain error in allowing Detective Lone to testify that Afu told him that defendant had one of the victim’s wallets. Defendant claims allowing this testimony violated *Bruton v. United States*. Aplt. Br. at 15, 21-25.⁸ The Court should decline to consider this claim because defendant’s failure to object to the challenged testimony was evidently deliberate trial strategy, *Bruton* plainly does not apply to this case, and any error is harmless.

In *State v. Bullock*, 791 P.2d 155 (Utah 1989), *cert. denied*, 497 U.S. 1024 (1990), the defendant alleged violations of due process and ineffective assistance of counsel. *Id.* at 157.

Because defense counsel in *Bullock* failed to object, the defendant’s claims were amenable

⁸ “In order to obtain appellate relief through the doctrine of ‘plain error,’ an appellant must establish that ‘(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.’” *State v. Irwin*, 924 P.2d 5, 7 (Utah App. 1996), *cert. denied*, 931 P.2d 146 (Utah 1997) (quoting *State v. Dunn*, 850 P.2d at 1208). “[T]he error must be ‘plain,’ which means that ‘from our examination of the record, we must be able to say that it should have been obvious to a trial court that it was committing error.’” *State v. Braun*, 787 P.2d 1336, 1341 (Utah App. 1990) (quoting *State v. Eldredge*, 773 P.2d 29, 35 (Utah 1989)).

to review only under the plain error doctrine. *Id.* at 158. As a threshold matter, the Utah Supreme Court refused to consider the merits of the plain error claim because counsel's failure to object was a reasonable strategic decision, rather than an oversight: "If the decision was conscious and did not amount to ineffective assistance of counsel, this Court should refuse to consider the merits of the trial court's ruling." *Id.* at 158-59.

In this case, defense counsel's not objecting to Detective Lone's testimony about Afu's previous disclosures about the wallet was almost certainly a reasonable and consciously deliberate decision. Counsel obviously knew that Detective Lone had interviewed Afu. Counsel requested a copy of the interview in discovery; and it is evident from his cross-examination of Afu that he was familiar with the statements Afu had made during the interview (R. 13-15; 324:217-20). From the prosecution's witness list, counsel knew that Afu would be called to testify, and counsel would have reasonably anticipated that Afu's trial testimony would be consistent with the statements he made during the interview with Detective Lone (R. 64). In short, because counsel's not objecting to Detective Lone's report of his interview with Afu was almost certainly deliberate and reasonable, the Court should decline to consider defendant's claim under the plain error doctrine.

In any case, defendant's right to confrontation under the Sixth Amendment to the United States Constitution, and Article I, section 12 of the Utah Constitution were not violated because no *Bruton* issue exists in this case. In *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968), the defendant and his codefendant were convicted of armed robbery at a joint trial based on the codefendant's confession that both he and Bruton

committed the offense. *Id.* at 124, 88 S. Ct. at 1621-22. The court held that the introduction of such a confession where the codefendant-confessor did not take the stand denied Bruton his right to confront a witness against him. *Id.* at 137, 88 S. Ct. at 1628. *See State v. Webb*, 779 P.2d 1108, 1112 (Utah 1989) (“[I]f the declarant is not present, the core values of the confrontation right are implicated because ‘[t]he essence of the confrontation right is the opportunity to have the accusing witness in court and subject to cross-examination, so that bias and credibility can be evaluated by the finder of fact.’”) (quoting *State v. Nelson*, 725 P.2d 1353, 1356 (1986)).

None of the constraints on confrontation which the Supreme Court found objectionable in *Bruton* are present in this case. “When an out-of-court statement is offered at trial for the truth of the matter asserted and the declarant is present and available for cross-examination, no federal or state confrontation problem is presented.” *State v. Loughton*, 747 P.2d 426, 429 (Utah 1987). Afu was not tried jointly with defendant. Rather, Afu pleaded guilty to aggravated assault before trial (R. 263, 324:206); therefore, there was no Fifth Amendment limitation on the extent to which defendant could examine Afu. *See State v. Willett*, 909 P.2d 218, 223 (Utah 1995) (recognizing that following the entry of an accomplice’s guilty plea and his sentencing, there existed “[no] real and demonstrable fear of future prosecution for the same offense”) (citing *Affleck v. Third Judicial Dist. Court*, 655 P.2d 665, 667 (Utah 1982)). Afu was available to testify, defendant vigorously cross-examined him at trial, and he even called Afu to testify on his own behalf (R. 202-221). Moreover, contrary to defendant’s assertion, and as discussed fully in the final section of this

brief, Afu never admitted that he lied about defendant's possession of a wallet, but rather consistently reported throughout the proceedings that he lied only about his relationship with defendant (R. 227-32, 323:125-126, 132-33; 324:202, 204-07, 218). In sum, defendant's claim has no foundation in the record

Even if there were some conceivable error, it was harmless. First, although Detective Lone testified before Afu, the former's testimony was merely cumulative of Afu's testimony that defendant had one of the victim's wallets when he left the restaurant and then threw it from the getaway car. Second, as argued above, the existence of the wallets was immaterial to defendant's convictions for aggravated robbery.

3. Defendant invited any error in Detective Lone's commentary about what the videotape depicted

Defendant argues that the trial court committed plain error in allowing Detective Lone to interpret the events depicted on the videotape, particularly that defendant was shown going through the victim's pockets looking for something to take. Aplt. Br. at 16, 25-30. Again, because defendant invited any error by actively soliciting the same type of commentary by the detective and other witnesses, this Court should decline to consider defendant's claim.

In *State v. Bloomfield*, 2003 UT App 3, 63 P.3d 110, a companion case to this one, the defendant also argued that the trial court committed plain error in admitting the same videotape used in this case without a proper foundation. *Id.* at ¶¶ 19-29. Rejecting the claim, this Court noted that even if there was error, defendant invited it, and the Court would therefore decline to review the merits of the claim under the plain error doctrine. *Id.* at ¶¶

24, 29. In support, the Court recited numerous instances during the trial in which the defendant used the videotape to advance the theory of the defense. *Id.* at ¶¶ 25-29

As in *Bloomfield*, defense counsel in this case acquiesced in the prosecutor's use of the videotape from the outset, and thereafter repeatedly used the videotape to develop the theory of the defense. A nonexhaustive recitation of counsel's acquiescence in the use of the videotape and his subsequent reliance on it during the examination of Deputy Huggard consists of the following: (1) counsel did not object when Deputy Huggard testified, without challenge, that State's exhibit 3 was a true and accurate copy of the videotape made by the surveillance camera at Beto's on the night of the incident (R. 323:73-75); (2) on cross-examination, counsel asked the deputy, "As you looked at the videotape, would it be fair to say that Mr. Langi walked along here, on the north side of those windows?" (R. 323:95); (3) counsel asked, "Didn't you observe the video and observe Jose and Rachel approach the counter?" (R. 323:97); (4) when the deputy stated that one of defendant's companions standing at the counter assaulted Jose, counsel asked, "And are you sure that the video shows that?" (R. 323:98); (5) counsel further asked, "During the course of during [sic] the video, can you hear any conversation between Jose and any of the Polynesian men [codefendants] at the counter?" (R. 323:98); and (6) when the prosecutor elicited from the deputy on redirect examination that his primary sources of information in the investigation were eyewitness interviews and "the videotape," counsel did not object (R. 323:102). In closing, after directing the jury to examine the videotape, defendant relied on information

about the positioning and actions of the parties in the restaurant to suggest that Jose, rather than defendant and his companions initiated the entire incident with a stare (R. 324:264-68)

Defense counsel also acquiesced in the use of the videotape and then later relied on it for defense purposes during the examination of Detective Lone. Defense counsel never objected when Detective Lone completed the foundation for the videotape, State's exhibit 3, or when the videotape was admitted into evidence (R. 323:104-06). Except as to the detective's observation that defendant went through Jose's pockets, defense counsel barely objected to any of the detective's extensive observations about what the videotape depicted (R. 323:109-18). Thereafter, on cross-examination, defense counsel relied heavily on Detective Lone's observations about what the videotape depicted: (1) counsel asked the detective, "At any time during the course of viewing that video, did you see any wallet?" (R. 323:121-22); (2) counsel followed by asking if the detective saw whether it was Rachel or Jose who paid for their meals (R. 323:122); (3) counsel asked a series of questions, explicitly challenging how the detective had "interpret[ed]" the videotape, to attack the detective's uncertainty about whether Afu had shaken hands with Jose or Gabriel (R. 323:122-23); (4) counsel continued to invite the detective to refer to videotape to identify the participants' locations in the restaurant (R. 323:123-35); (5) counsel asked Detective Lone to interpret from the demeanor of one of the restaurant patrons that "something [was] happening" (R. 323 130); (6) directing Detective Lone to his observation of the videotape, counsel asked if the detective could see "any wallets" in defendant's hands, to which the detective was unable to give an affirmative answer (R. 323:131); and (7) when an objection was sustained to

counsel's question, "As you saw the video, the timing in question, could Mr. Afu, at Beto's, have seen Mr. Langi go through the pockets of Jose or Gabriel," counsel responded, "The video speaks for itself" (R. 323:134).

The clear purpose of the foregoing examination was to challenge the detective's unfavorable videotape observations, confirm that the videotape did not clearly show defendant taking the victims' wallets, infer that because Rachel paid for Jose's meal he had no money or a wallet, and suggest that the attack was the result of events initiated by the victims prior to defendants' entry into the restaurant. In sum, because defendant so actively invited the error claimed on appeal, this Court, as in *Bloomfield*, should decline to consider the merits of defendant's claim.

In any event, as argued at the outset of this brief, any error is harmless.

4. Impeachment testimony of Afu was properly admitted substantively

Defendant claims the trial court improperly allowed the prosecution to impeach Afu's testimony that, upon leaving the restaurant, defendant had a wallet that he later threw from the getaway car. Aplt. Br. at 16, 30-35. Defendant's claim, that impeachment evidence comes in only to challenge the witness's credibility and not substantively, is without merit. Moreover, any error is harmless.

The prosecutor called Afu to testify (R. 324:202). After the prosecutor established that defendant and his companions left the restaurant in Afu's car, the following exchange took place:

PROSECUTOR (Ms. Wissler): Do you recall whether the defendant had anything with him when he got into your car?

WITNESS (Afu): You know what, I really don't remember.

Q: You don't remember if he had anything in his hand?

A: No. I don't remember - - no, I don't.

Q: Do you recall being interviewed by Detective Lone about this case shortly after it occurred?

A: Yes.

Q: Do you recall telling Detective Lone that when the defendant got into your car - -

DEFENSE COUNSEL (Mr. Gotay): Objection, your Honor, she is impeaching her own witness.

PROSECUTOR: Your Honor, the rules of evidence specifically allow me to impeach my own witness.

THE COURT: Objection overruled.

Q (By Ms. Wissler): Do you recall telling the detective when the defendant got into your car he had a wallet with him?

A: No, I don't recall, but if that's what I told him, then

Ms. Wissler: May I approach the witness, your Honor?

THE COURT: Yes.

Q: Are you aware of the interview you had with Detective Lone was audio recorded?

A: Yes.

Q: Handing you page 2 of the transcript of that interview, and directing your attention to about the top four questions and answers, does that refresh your recollection of what you told Detective Lone when you were interviewed?

A: Yes.

Q: What was it that you told Detective Lone when you were interviewed?

A: Do you want me to read this?

Q: I just want - - I want to ask you if that refreshes your memory about what you told Detective Lone.

A: Yes, this is what I told him, I guess. It was too long ago. I don't really remember what I said. But, yeah, this is what I said. If it was on tape, this is everything I said.

Q: That transcript accurately reflects the interview you had with Detective Lone?

A: Yes.

Q: Did you not tell Detective Lone it was the defendant that had a wallet in his hand when he got into your car?

A. Yes.

Q: Did you also tell Detective Lone that the defendant threw that wallet out of the car at some point?

A. Yes, I did.

(R. 324:204-06).

Defendant argues that the foregoing exchange, establishing that Afu did indeed recall telling Detective Lone during their interview that defendant had a wallet upon leaving the restaurant which he later threw from the getaway car, was improperly admitted. Specifically, defendant asserts that “[i]t has long been a matter of well settled law in Utah that impeachment is not evidence.” Aplt. Br. at 32. In support defendant cites two ninety-year-old Utah cases and two Tenth Circuit Court of Appeal cases that predate the adoption of the

governing rules of evidence, all for the purpose of asserting that impeachment evidence may not be admitted substantively. Defendant misstates the current rule of law.

The rule applicable to the impeachment set out above is rule 801(d)(1)(A), Utah Rules of Evidence. The rule provides:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten[.]

Utah R. Evid. 801 (d)(1)(A). The Utah rule is adopted from the Federal Rules of Evidence. However, “[i]t deviates from the federal rule in that it allows the use of prior statements as substantive evidence if (1) inconsistent or (2) the witness has forgotten, and does not require the prior statement to have been given under oath or subject to perjury.” Utah R. Evid. 801 advisory committee note.⁹ *See State v. Ramsey*, 782 P.2d 480, 483-84 (Utah App. 1989) (evidence admitted under rule 801(d)(1)(a), Utah Rules of Evidence, as a prior inconsistent statement, is admissible as substantive evidence). Plainly, the trial court correctly permitted Afu’s testimony without a limiting instruction directing the jury to consider it only for impeachment. Moreover, any error, as argued at the outset, was harmless.

⁹ In fact, following the adoption of the Federal Rules of Evidence in 1983 and in accord with the prevailing view, federal courts within the Tenth Circuit have held that impeachment evidence through prior inconsistent statements is admissible substantively. *See United States v. Wittgenstein*, 163 F.3d 1164, 1172 (10th Cir. 1998); *United States v. Bahe*, 40 F. Supp. 2d 1302, 1309 (D. N.M. 1998).

5. Defendant's challenge to the denial of his new trial motion lacks any record support and fails to marshal evidence in support of the trial court's findings and conclusions

Defendant claims that the trial court improperly denied his motion for a new trial. Aplt. Br. at 35-39. He first argues in support of his motion that Afu admitted that he lied to Detective Lone during his interview about defendant's handling and disposing of a wallet. Aplt. Br. at 36. Defendant then argues that the prosecutor conceded at the hearing on the motion that Afu had lied to the detective that defendant had the wallet. Aplt. Br. at 37. Defendant then denounces the prosecution for opposing his new trial motion knowing that Afu lied to the detective about the wallet, all of which he claims exacerbates the trial court's error in having improperly admitted Afu's impeachment testimony (Aplt. Pt. IV) and Detective Lone's testimony in violation of *Bruton* (Aplt. Pt. II). Aplt. Br. at 37-39. Defendant's argument misrepresents both Afu's and the prosecutor's remarks regarding the wallet and totally fails to address the trial court's findings of fact and conclusions of law denying the new trial motion.

Afu admitted that he lied to Detective Lone about his relationship to defendant, and the prosecutor admitted at the hearing on defendant's motion that Afu had lied about "certain things" during the interview (R. 210, 226, 326:9). However, contrary to defendant's claims, Afu never admitted lying about the crucial fact claimed on appeal, that defendant handled a wallet after the robbery, nor did the prosecutor ever concede that Afu had lied about that fact. By substituting the true reference concerning Afu's lie to the detective, defendant has substantially misconstrued the fair import of the record.

In support of defendant's new trial motion, Afu signed an affidavit that he did not see defendant take or steal anything (R. 199). That statement is irrelevant to whether Afu subsequently saw defendant handle a wallet. It is also a red herring because the prosecutor readily conceded at trial that Afu would not have seen defendant take any wallet since he had already exited the restaurant at the point defendant went through the victims' pockets (R. 324:234, 251; VT:2:26:24-27:03).

After defendant filed his motion for a new trial, Sergeant Kevin Judd interviewed Afu to determine whether he had lied in his pretrial interview with Detective Lone or at trial (R. 210, 218-33).¹⁰ Afu admitted that he had lied to Detective Lone about his relationship with defendant (R. 226-27). However, Afu asserted to Sergeant Judd that he never lied to Detective Lone or while on the stand, that defendant "had the wallets and threw [them] out." Afu only admitted to lying when, to protect defendant's identity, he told the detective that he let defendant out at the church when defendant had actually slept at Afu's house that night (R. 227-29, 232). As to this point, Sergeant Judd and Afu had the following exchange:

KJ: So in all reality you did not lie about anything to the investigator
[Detective Lone] about the crime itself?

SA: No.

KJ: Or to . . . the State when you were witness on the stand is that correct?

SA: Oh I did not lie on the stand at all. The only time I lied was when I first
got caught and was talking to investigators.

KJ: And you more or less minimized your relationship with Joe?

¹⁰ A copy of the interview, attached to the prosecution's motion in opposition to defendant's new trial motion, is attached at Addendum B.

SA: Yeah.

KJ: You didn't tell them the whole . . .

SA: Story about Joe.

KJ: Story about how well you knew Joe?

SA: No.

KJ: But you did see him throw that wallet out the window by the Methodist Church?

SA: I seen, I seen him with money I can't, I don't even remember what I said back then about the . . .

KJ: I, I understand it has been quite a while.

SA: Yeah.

KJ: I will refer back to page 24 of the interview with Detective Lone. He asked, I will just mention a few statements on this interview. He says, "Who had the wallets." This is Jeff Lone talking he said, "Who had the wallets and threw [sic] out?" Do you remember where and then you repeat, you answer, "Joe that Joe dude,[""] and you're referring to Joe Langi, right?"

SA: Yeah.

KJ: And he says, "Cause they these guys you know they had their green cards in them, all their personal papers and stuff." That's Jeff Lone then your answer is, "Uh yeah, he throw [sic] out right on the street right when we were driving right on 54, you know what I mean cause we never went." And then there is some inaudible conversations and then uh, he asks, Jeff Lone asks you, "Let him out at the church."

SA: That was a lie.

KJ: Was that a lie?

SA: Yeah.

KJ: So there was little bits and pieces of where you lied to the . . .

SA: Yeah cause see I never let him out at the church. I took; he slept over at my house that night.

(R. 227-28). Thereafter, Afu reiterated that although he had not told Detective Lone the whole truth about his relationship to defendant, he did not lie about the crime itself (R. 230, 232). More particularly, at the conclusion of the interview Sergeant Judd asked if Afu had lied about anything other than his relationship with defendant and his letting defendant out near the church (R. 232). Afu answered, “No” (R. 232).

The fair reading of Afu’s interview with Sergeant Judd is that Afu initially lied to Detective Lone about his relationship with defendant to both distance himself from the crime and to protect defendant, whom he knew well (R. 225-26). However, Afu adamantly asserted that he never lied, either in his interview with Detective Lone or at trial, about the details of the crime, including defendant’s holding a wallet when he entered the getaway car. Consequently, defendant failed to establish a factual basis to support his motion for a new trial.

This Court should also decline to even consider the merits of defendant’s challenge to the trial court’s denial of his motion for a new trial because defendant does not challenge the trial court’s factual findings or legal conclusions.

In denying defendant’s motion, the court made detailed findings of fact (Findings of Fact and Conclusions of Law Re: Defendant’s New Trial Motion, R. 262-71, attached at Addendum C). Among those findings are the following: (1) Afu admitted lying at trial about his relationship with defendant (R. 264 at ¶ 10); (2) Afu testified that when defendant got

into the car he appeared to be holding a wallet and money with blood on it (R. 264 at ¶ 14); (3) in signing the affidavit in support of the new trial motion, Afu believed he was only admitting that he had not been truthful to Detective Lone about his relationship with defendant (R. 267 at ¶ 28); (4) Afu stated that he did not lie about anything else concerning the events at the restaurant (R. 267 at ¶ 29); and (5) Afu denied that he was ever coached or pressured by the prosecutor about how to answer any question put to him at trial and that he had otherwise testified truthfully at trial (R. 267 at ¶ 31-31). Defendant has failed to challenge any of the foregoing findings of fact.

Defendant has also failed to challenge any of the court's conclusions of law denying his motion for a new trial. "[I]f a trial court has applied the correct legal standard, it has broad discretion in granting or denying a motion for a new trial." *State v. Boyd*, 2001 UT 30, ¶ 27, 25 P.3d 985 (quoting *State v. Martin*, 1999 UT 72, ¶ 5, 984 P.2d 975)). "The legal standard to be applied when considering a motion for a new trial based on newly-discovered evidence is that the moving party must show that the evidence satisfies the following factors: (i) it could not, with reasonable diligence, have been discovered and produced at the trial; (ii) it is not merely cumulative; and (iii) it must make a different result probable on retrial." *Id.* (quoting *Martin*, at ¶ 5).

In denying defendant's motion, the trial court concluded that "the revelation . . . of George Afu that he lied to investigators does not constitute newly discovered evidence," because "[a]ll of matters about which Afu admitted lying were matters know[n] to the defendant at the time of trial" (R. 268 at ¶ 1). The court noted that defendant's allegation,

that Afu had perjured himself at trial, was unsupported because Afu did not admit, either in the affidavit or in his interview with Sergeant Judd that he had lied at trial (R. 268, at ¶¶ 2 and 6). The court concluded that because defense counsel had ample time to interview Afu prior to trial, counsel could have discovered, with due diligence, any of Afu's prospective trial testimony (R. 269 at ¶ 4). Finally, the court concluded that "the evidence of defendant's guilt in this case was overwhelming" (R. 269 at ¶ 8). The court stated:

The videotape admitted into evidence, which captured the offenses in progress, provided sufficient evidence to convict defendant. That video, particularly when coupled with the testimony of Jose Farias, Gabriel Calvillo, Rachel Redding, and George Afu, was so compelling that it makes the likelihood of a different result extremely remote. That is, even if this Court were to determine that some newly discovered evidence existed which could not have been discovered with due diligence prior to trial, that new evidence would not make a different result probable at a new trial.

(R. 269-70 at ¶ 8).

Because defendant has not challenged either the trial court's well-founded findings of fact and conclusions of law, this Court should decline to consider his challenge to the court's denial of his motion for a new trial. *Cf. State v. Teuscher*, 883 P.2d 922, 930 (Utah App. 1994) (ruling that because "[d]efendant has failed to properly marshal the evidence in favor of the trial court's findings . . . [w]e therefore accept the findings as entered").

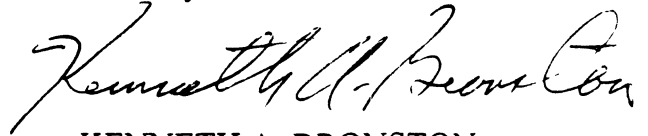
In any event, as argued at the outset of this brief, any error was harmless.

CONCLUSION

For the reasons stated above, the State asks this Court to affirm defendant's conviction.

RESPECTFULLY SUBMITTED this 20th day of October, 2003.

MARK L. SHURTLEFF
Attorney General

A handwritten signature in black ink, appearing to read "Kenneth A. Bronston", written in a cursive style.

KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed to Edwin Stanton Wall, Wall Law Offices, attorneys for defendant, 800 McIntyre Building, 68 South Main Street, Salt Lake City, Utah 84101, this th20 day of October, 2003.

Kenneth A. Stanton

Addendum A

AMENDMENT VI

[Rights of accused.]

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

CONSTITUTION OF UTAH

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

UTAH CRIMINAL CODE

76-6-301. Robbery.

- (1) A person commits robbery if:
 - (a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear; or
 - (b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft.
- (2) An act shall be considered "in the course of committing a theft" if it occurs in an attempt to commit theft, commission of theft, or in the immediate flight after the attempt or commission.
- (3) Robbery is a felony of the second degree.

76-6-302. Aggravated robbery.

- (1) A person commits aggravated robbery if in the course of committing robbery, he:
 - (a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601,
 - (b) causes serious bodily injury upon another; or
 - (c) takes an operable motor vehicle
- (2) Aggravated robbery is a first degree felony.
- (3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of

Rule 801. Definitions.

The following definitions apply under this article

(a) *Statement* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion

(b) *Declarant* A "declarant" is a person who makes a statement

(c) *Hearsay*. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay*. A statement is not hearsay if

(d)(1) *Prior statement by witness* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person, or

(d)(2) *Admission by party-opponent* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(Amended effective October 1, 1992.)

Addendum B

**SALT LAKE COUNTY DISTRICT ATTORNEY
CRIMINAL INVESTIGATION UNIT**

INTERVIEWEE: SIAOSI AFU (George)

SUBJECT: JOSEPH MAKALANGI

DATE: JULY 18, 2001

CASE No: 2001-893

RE: PERJURY

Okay today's date is July 18th year 2001. Time right now is 10:30 hours. This is a meeting with Defense Attorney David Biggs and his client Siaso, spelling, S-I-A-O-S-I.

KJ: You go by the name of George?

SA: George Yeah.

KJ: Afu, A-F-U. This meeting is being held at the District Attorney's office, 231 east 400 south, Salt Lake City, Utah.

DB: Before we begin I wanted maybe to uh, well short circuit this a little bit. I told my client that he is under investigation for perjury since that is what Sirena Wissler indicated to me. Just as a general statement, "Before we begin, George wants you to know that the following are the facts in this case, having to do with the Perjury allegation. Number one; George doesn't read. George never read this document that he signed. That's number one. Number two; it was never read to him Verbatim by anyone. It was basically, distracted for him by his wife and then he signed it but he never read it, cant read and didn't read it. Um, Number three; he never lied under oath. Number four: he did lie to the investigating officer initially that only having to do with his participation. And that's what his wife told him this thing said, that his wife said that two things this document said, one, that he initially lied to the investigating officer which is accurate. But then he told the truth. Second she said that this document said that he never saw his two co-defendants actually take anything from the two victims. And that is true, he didn't see that he was out getting the car in the car leaving but he did tell the investigator that the gentleman in the back seat and I apologize I don't know which co-defendant that is, showed him some bloody money and said do you want some of this. And he said no. And so the document is incorrect when he says that he, or infers that he lied on the stand, he did not do that. It's incorrect or inaccurate when it indicates that he lied to the investigating officer concerning his sore testimony. He didn't do that either. And lastly he wants everyone to know

that Sirena Wissler did not coach him, and did not push him and did not threaten him to testify in any particular way, that just did not happened. And he apologizes to Mrs. Wissler and to the prosecution if he could read, he would have read it if he...

SA: Yeah I would have never signed anything like that saying that I lied under oath cause I didn't lie under oath.

KJ: And that's what the impression was when I read it. After reading the motion, the motion does not, this memorandum does not even really compare to the statement on this paper for one thing and I wanted to go through a series of questions and talk to you about those.

SA: Okay.

KJ: And how they relate okay?

SA: Okay.

KJ: And I talked to Deputy District attorney Sirena Wissler about picking this apart because in my opinion, it is not accurate of what you even signed okay?

SA: Okay.

KJ: What he is suggesting to the court you did okay.

SA: Okay.

KJ: And she didn't have a chance to really thoroughly read this, but I believe its all gonna come, the truth is gonna come out in our little interview here today.

SA: Okay.

KJ: Okay. And I that is what I want to stress, I want to stress truthfulness here.

SA: Okay.

KJ: And that will all come to light okay?

SA: Okay.

KJ: Because Mr. Gotay is accusing you of perjury okay?

SA: Okay.

KJ: Doesn't necessarily mean that we are accusing you of that okay? But that is what he is accusing you of okay? But because he is accusing you of that, I have to investigate because you were a witness for the state, Okay.

SA: Okay.

KJ: Does that make sense?

SA: Yeah.

KJ: Okay. But since you are being accused of that, I need to read your Miranda warnings okay? Even though you are being represented by your attorney here okay you have legal counsel here I'm still going to read you Miranda warnings okay?

SA: Okay

KJ: And that, that we just want the truth okay?

SA: Okay.

KJ: And at any time you don't need to answer or Mr. Biggs can step in and tell me so, okay?

SA: Okay.

KJ: All right listen carefully. You have the right to remain silent anything you say can and will be used against you in court. You have the right to consult to a lawyer before answering any questions and to have a lawyer with you during any questioning. If you can't afford a lawyer one will be provided for you free of cost as you, if you want one, as you well know. Do you understand your rights as I have explained them?

SA: Yes.

KJ: Okay. And you are here with legal counsel right now and you are willing to talk with me about this?

SA: Yes sir.

KJ: Okay. And I appreciate your summary of Mr. Afu's statement from the very start Mr. Biggs. I believe we are all on about the same page here. But we want to get it down because she has to prepare a response to his memorandum, as you well know. Okay now let me start with the very first the letter that you have in front of you is marked exhibit one and it's um, I'm gonna read it for the record. It says it has a date at the top it says May 21, 2001. To whom it may concern; and then it

says, re, reference Joseph M Langi statement of Siao Si Afu. It says, "My name is Siao Si Afu I am Joe's co-defender in this case. I am giving this statement on behalf of Joe Langi. I am sorry to say that I have lied on the investigators report because it was a part of our deal to testify against Joe. And because of the prosecutor's pushing and coaching questions, I have to lie. I did not see Joe took or steal anything from the two victims, because I have left the scene to pick up the vehicle. It was the investigator that asked me and told me about the stolen items, and also told me that if I tell them what they wanted to know, they would give me a lighter sentences and dismiss my other cases. I testified that the above statement is true and correct statement made by me on this 22 day of May. Sincerely Siao Si Afu. And then there is a signature in cursive it looks like it's George Afu and then there is another signature in cursive says Shanna Daniels With the date 5/23/01 and written and then there is Shanna Daniel notary republic stamp on the bottom of the letter. As Mr. Biggs has already stated, you cannot read, is that correct?

SA: I can read a little bit but I can't read big words.

KJ: Do you remember seeing this letter in front of you?

SA: Yeah

KJ: Was it notarized in front of you?

SA: Yes.

KJ: Okay Um, who prepared the letter? Who actually typed this out?

SA: I don't even know

KJ: Who's idea was this letter?

SA: It was brought to me by my friend his name is Sam.

KJ: A friend Sam, what is his last name.

SA: M-I...

KJ: M-I?

SA: S-I...

KJ: S-I?

SA: N-I

KJ: N-I?

SA: Misini.

KJ: And when your friend Sam brought this to you,

SA: Yes.

KJ: At your house?

SA: Yeah.

KJ: Why did he say he was bringing it to you?

SA: To sign it.

KJ: Okay what for, to help Joseph?

SA: To help Joe yeah.

KJ: To help Joe get out of the bad sentencing he had gotten right?

SA: Yeah. I think he's, yeah.

KJ: Cause he was convicted in trial?

SA: Yeah. Well we didn't really talk about he just brought it and told me, "Hey this the thing to help out Joe.

KJ: Okay.

SA: And uh...

KJ: You want to help out Joe and he's a friend?

SA: Yeah.

KJ: And you don't have no hard feelings towards him or anything like that? You did not understand the letter and what it really said at the time that you signed it?

SA: No, no I didn't, I thought that the letter meant that I lied to the detectives when I got interviewed and that was what my wife told me.

KJ: So when Sam Misini brought it over, he said this is to help Joe?

SA: No.

KJ: And you kind of looked it over but you didn't really understand it?

SA: Well I took it, well my wife; I gave it to my wife.

KJ: And did your wife read it to you?

SA: Yeah she read it and then she told me that and I asked her if there was anything that would get me into trouble and she said she didn't think so but she didn't know for sure though.

KJ: Did Sam say that it was from Mr. Gotay? That Mr. Gotay...

SA: No I don't even think he knew where it came he came from L.A.

KJ: Okay so Sam didn't tell you that Joe's attorney that he had got it from Joe's attorney?

SA: No.

KJ: Okay. And at the time that Sam showed this to you, Mr. Biggs was not notified, you did not call Mr. Biggs?

SA: Oh no.

KJ: And ask him about it or anything right?

SA: No.

KJ: And Sam didn't tell you that you had the right to talk to your attorney before...

SA: No.

KJ: You looked it over and signed it did he?

SA: No.

KJ: Okay. So nobody told you that you had the right to legal representation before signing the letter such as this?

SA: No.

KJ: Are you aware that you do?

SA: Yeah, I had known when he called me and told me that.

KJ: Yeah the best thing you could have done at that point was to call Mr Biggs when Sam showed up with this letter and read it to him even over the phone

SA: Okay

DB: That would have been the best thing to do Just to clarify George, Your wife read it, but she didn't read it to you she just read it and said this is what it says, correct?

SA: Yeah.

DB: She didn't read it what is called verbatim she didn't read it to you she just read it and said this is what it say's right?

SA: Yeah that is right.

KJ: So she didn't read it out loud to you?

SA: No.

KJ: Okay

SA: I just asked her to read it and then I took off and then I came back and she told me what was going on with it.

DB: Was this Shannon Daniels? Did you go somewhere to sign it where Shannon Daniels was?

SA: Yeah.

DB: Okay

KJ: Is this the address where you went at 3570 south 2700 west?

SA: Uh yeah.

KJ: In West Valley?

SA: Right next to uh, West Valley Police.

KJ: West Valley Police?

SA: Yeah.

KJ: Okay and you went with Sam to get the stamp put on it?

SA: Yeah.

KJ: Okay let me talk to you about, a little bit about um, what Mr. Biggs has said, you told the investigator and also you know what I know from reading the interview with the investigator and what I also know as what you testified to on the stand okay?

SA: Okay.

KJ: Um, I couldn't see anywhere on the investigators interview with you that you lied about anything to be honest with you?

SA: Uh-huh.

KJ: Okay. You mentioned that you did lie to the investigator but I couldn't see where you did okay so if you can try to explain to me where do you think you lied to the investigator?

SA: Well I got, see the thing was, when we first got caught...

KJ: Uh-huh.

SA: I never thought Joe would get caught so when we interviewed with the investigator, I told the investigator I put everything on Joe.

KJ: Uh-huh.

SA: So when there was, you know when he asked about wallets I was like, "Yeah he took them and..."

KJ: Uh-huh.

SA: And he asked me where I, where he threw them and I told him see the whole statement about Joe was all incorrect cause I knew Joe. I told him, the investigator that I had dropped Joe off across the street from some church and I never did that. There was a lot of things that had to do with Joe that I didn't tell the investigator cause I never thought that they would catch Joe and when they did catch Joe, they found out then that I was, that Joe knew, that Joe knew me the whole time that they thought that this was going on they, when they caught Joe they thought that Joe knew (Inaudible) the other defendant.

KJ: Right.

SA: But the whole time Joe was, Joe knew me that's how Joe got, ended up with us.

KJ: So you lied about your relationship to Joe?

SA: Yeah

KJ: But you didn't, you didn't, that had nothing to do with the crime itself as far as

SA: No.

KJ: Who did what in the crime?

SA: Oh no, no, no.

KJ: And as far as a wallet goes, you were telling the truth when you uh, told the investigator and testified on the stand that you never saw who took the wallets?

SA: Yeah.

KJ: But you in the interview, you test, you told the investigator you saw Joseph pitch the wallet out the window by the Methodist church?

SA: Yeah.

KJ: Do you remember telling them that?

SA: Yeah.

KJ: You testified truthfully and you told the investigator truthfully that you did not see who took the wallet at the time of the assault cause you'd already walked outside to get a car?

SA: Yeah, yeah.

KJ: Okay. So the only lying you did to the detective was just your relationship with Joe?

SA: Yeah.

KJ: How well you knew Joe?

SA: Yeah.

KJ: But not about the crime itself?

SA: Yeah.

KJ: Also during the interview with the detectives um, they never offered you any kind of deal is that correct?

SA: No they didn't

KJ: Yeah. So they never offered you a deal that if you testified against Joe Langi down the road or that you're going to get a better deal out of this, is that correct?

SA: That's correct.

DB: May I also add that in our discussions together that there was never any indication of that? Uh, at all that it would affect his sentencing what so ever.

SA: That's correct.

DB: But I did indicate that it certainly might if uh, if he were honest and forthright That always is a helpful thing for a person to do when the Adult Probation and Parole presentence is prepared. If the presentence people believe that you are now being honest and truthful with them and you participation in the crime their much more willing to work with you as a probation.

KJ: So in all reality you did not lie about anything to the investigator about the crime itself?

SA: No.

KJ: Or to or to the state when you were witness on the stand is that correct?

SA: Oh I did not lie on the stand at all. The only time I lied was when I first got caught and I was talking to the investigators.

KJ: And you more or less minimized your relationship with Joe?

SA: Yeah.

KJ: You didn't tell them the whole...

SA: Story about Joe.

KJ: Story about how well you knew Joe?

SA: No.

KJ: But you did see him throw that wallet out the window by the Methodist church?

SA: I seen, I seen him with money I can't, I don't even remember what I said back then about the...

KJ: I, I understand it has been quite awhile.

SA: Yeah.

KJ: I will refer back to page 24 of the interview with Detective Jeff Lone. He asked, I will just mention a few statements on this interview. He says's, "Who had the wallets." This is Jeff Lone talking he said, "Who had the wallets and threw out?" Do you remember where and then you repeat, you answer, "Joe that Joe dude and you're referring to Joe Langi right?"

SA: Yeah.

KJ: And he says, "Cause they these guys you know they had their green cards in them, all their personal papers and stuff." That's Jeff Lone then your answer is, "Uh yeah, he threw out right on the street right when we were driving right on 54, you know what I mean cause we never went." And then there is some inaudible conversation and then uh, he asks, Jeff Lone asks you, "Let him out at the church"

SA: That was a lie.

KJ: Was that a lie?

SA: Yeah.

KJ: So there was little bits and pieces of where you lied to the...

SA: Yeah cause see I never let him out at the church. I took; he slept over at my house that night.

KJ: So that is what you're referring to?

SA: Yeah.

KJ: Is little bits and pieces about where you let Joe out because you were friends with Joe?

SA: Yeah.

KJ: And you didn't want Joe to get in to trouble at that time?

SA: Yeah.

KJ: Right.

SA: Yeah.

KJ: Okay So he slept at your house that night?

SA: Yeah

KJ: Any, can you think of any questions asked by you on the witness stand by either um, the prosecutor Sirena Wissler or the defense attorney Mr Gotay, that you were untruthful about? Was there anything on there that you might have lied about during the trial of Joseph Langi?

SA: You know what to tell you the truth, I don't I don't think I did.

KJ: Uh-huh.

SA: But you know I have been to trial so many times you know and they ask, you know they I don't know, I have never been in courtrooms before and the way they ask their questions is sometimes you know they spin them around and one person will ask one thing and I don't, I just don't understand what they ask and that's just the plain, you know that's just the truth of it. Of sometimes I will say "yes" and they'll say, "But you stated this day before, this day that you did." And I would be like, "Well I guess then that's what I did then." But I don't, I don't, I've been in court so many times that I don't even know you know what's truth and what's not truth any more.

KJ: I know that some of those questions can get extremely confusing.

SA: Yeah.

KJ: Um, but, George what I am asking is, um, as far as you being truthful?

SA: Uh-huh.

KJ: Um, when it came to any fact about the crime itself?

SA: Uh-huh.

KJ: In your mind, you are not distorting the facts or trying to change what actually happened?

SA: Yeah.

KJ: Were you trying to be totally truthful at all times?

SA: Oh yeah.

KJ: Even when during confusing questions?

SA: Oh yeah, oh yeah.

KJ: Um, at that point, there was no reason to lie about anything right?

SA: No.

KJ: Uh, initially

SA: Once they caught Joe, there was no reason to lie about anything.

KJ: Right so you never intentionally lied on the stand?

SA: No I never lied on the stand.

KJ: You were extremely truthful at all times?

SA: Yes I was.

KJ: Okay. That, that's the whole point of this interview today.

SA: Okay.

KJ: Is because uh, in the memorandum sent to the sent to our office, requesting a motion for a new trial, your being accused of lying on the stand.

SA: No I never ..

KJ: And at no time did you lie on the stand?

SA: No way.

KJ: You did not give the whole truth to the investigator about your relationship with Joe?

SA: Yes.

KJ: But you did not lie even about the crime that occurred?

SA: No.

KJ: You told the truth about the crime from the start, from the time you went into Beto's...

SA: Yes I did.

KJ: And confronted the two individuals um or, you just confronted the one individual basically um, initially because of the, their staring problem?

SA: Uh-huh.

KJ: And fear of a gun and things like that. And that all came out in trial okay?

SA: Yeah.

KJ: And, and we want, we wanted the truth from the start and, and you gave the truth, is that correct?

SA: Yes sir.

KJ: Okay um, because your probably gonna have to be called upon to testify if their is a motion for a new trial with the judge and that's gonna be what your gonna be asked to testify to is your truthfulness.

SA: Okay.

KJ: Okay. Um,

DB: George, Sirena Wissler never asked you to lie did she?

SA: No she didn't.

KJ: And Kevin Judd never asked you to lie, did he?

SA: I don't know who Kevin Judd is?

KJ: I'm Kevin Judd. I never asked you to lie, is that correct?

SA: No, no.

KJ: Detective Jeff Lone never asked you to lie is that correct?

SA: No he didn't.

KJ: Okay. Mr. Biggs touched on a point about this letter also. Um, it refers to the prosecutors pushing and coaching questions did Sirena Wissler or Mark Kouris the previous prosecutor, did they ever push you or coach you into saying a certain statement about what happened?

SA: No.

KJ: They did not?

SA: No they didn't.

KJ: Okay you remember Mark Kouris he was the previous prosecutor?

SA: Yeah.

KJ: Okay cause that is, that is one of the statements that is on this letter that you signed and that's, that's an important. .

DB: I can also state for the record that was always present with Mr Kouris or Mrs. Wissler when they spoke to George and I never witnessed anything of that nature (Inaudible)

KJ: Very good. Can you think of anything Mr Biggs that I might be forgetting to ask of uh, Mr. Afu?

DB: No I think you covered it.

KJ: Let me look over my notes briefly bare with me. As far as back to the reference of lying to the investigator, can you think of anything else that you might have lied about other than uh, your relationship with Joe?

SA: No.

KJ: And uh, letting him out of the church that night?

SA: No

KJ: He slept at your house rather than let him out at the church and also. .

SA: Anything that has to do with that.

KJ: You didn't want the detective to know how close you actually were to Joseph at that point?

SA: Yeah.

KJ: Okay. And at no time when you were under oath, when you gave that statement to that investigator, is that correct?

SA: Yeah.

KJ: Under oath is when you, as you raised your hand on the stand, on the witness stand, that is an oath.

SA: Yeah.

KJ: And they didn't ask you to take an oath when you uh, met with them and gave them a statement?

SA: No.

KJ: Okay. I think that is about it. Mr Biggs?

DB: That's fine.

KJ: All right. This will terminate the interview with um, Mr. George Afu and his attorney, David Biggs. Time right now is 11:00 on July 18th

SERGEANT KEVIN JUDD

Date: July 18, 2001

Typed by: flb

Addendum C

DAVID E. YOCOM
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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- JOSEPH LANGI, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER RE: DEFENDANT'S MOTION FOR NEW TRIAL Case No. 001917415 Hon. Judith S. Atherton
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Defendant's Motion for New Trial came before the Court for argument on September 7, 2001 at 2:00 pm. The defendant was not present, having been transported to the Utah State Prison unbeknownst to the Court and counsel. However, defendant's counsel, Paul Gotay, was present and requested that the motion be heard despite the defendant's absence. The State was present and represented by Sirena M. Wissler, Deputy District Attorney for Salt Lake County. The Court, having presided over the trial, reviewed the memoranda submitted by each party, and heard oral argument, hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Defendant was charged with two counts of Aggravated Robbery, both First Degree Felonies, following an incident that occurred at Beto's restaurant on February 26, 2000. Both counts of Aggravated Robbery carried group enhancements, as it was alleged that in committing the offenses, defendant acted in concert with two or more persons.
2. Defendant was represented by Paul Gotay, who promptly filed both a Notice of Appearance of Counsel and Request for Discovery.
3. The State promptly responded to defendant's Request for Discovery and provided, among other things, a transcript of an interview conducted with George "Siaosi" Afu.
4. Co-defendant Konai Bloomfield had already been convicted by a jury of two counts of Aggravated Robbery with group enhancements. The other co-defendant, Siaosi "George" Afu (hereafter "George Afu"), was offered a plea bargain. He pled guilty to one count of Aggravated Assault, a Third Degree Felony, in exchange for his agreement to testify against Bloomfield and Langi.
5. Defendant Langi was tried before a jury beginning on April 25, 2001.
6. During the defendant's trial, the State introduced as evidence a videotape of the events that occurred at Beto's restaurant February 26, 2001
7. Defendant did not object to the admission of the videotape. Rather, defendant utilized the videotape, arguing at trial that the videotape showed that while the victims were certainly beaten, they were not robbed.

- 8 As part of its case-in-chief, the State called George Afu to testify, who testified under oath as to the events of February 26, 2000, and his role in the events that occurred at Beto's on that night.
- 9 Defendant had been notified well in advance of trial that the State intended to call George Afu as a witness as part of its case-in-chief.
- 10 During his testimony, Afu admitted that when police initially interviewed him, he was untruthful about his relationship with defendant Langi. He testified that he had told police that he had only met Langi the night of the crime, when in fact, he had known Langi for some time.
- 11 George Afu also testified that he had been offered a plea bargain and had pled guilty to a reduced charge of Aggravated Assault, a Third Degree Felony, in exchange for testifying against defendant Langi.
12. At the time he entered his plea, Afu, who was then represented by David C Biggs, executed a "Statement of Defendant, Certificate of Counsel, and Order " That document was written in English.
- 13 In executing the Statement of Defendant, Afu acknowledged that he could "read and understand the English language," or that "an interpreter has been provided to me."
14. George Afu testified that he had participated in assaulting Jose Farias and Gabriel Calvillo, and that when defendant Langi got into his car, Langi appeared to be holding a wallet and money with blood on it. George Afu indicated that he had not seen Langi take the wallet, because Afu had already left the restaurant to go get the car

15. On cross-examination, George Afu was asked whether it was the detectives who interviewed him who first raised the issue of the bloody money. Afu indicated that he could not remember. When shown one portion of the transcript of that interview, Afu stated that it was the detectives who raised the issue. On re-direct, and upon being shown an earlier portion of the transcript, Afu acknowledged that it was he who first notified detectives that he had seen defendant Langi holding bloody money.
16. Afu was also questioned on cross-examination about the plea bargain he had received in exchange for his agreement to testify against defendant Langi. He was shown a copy of the Statement of Defendant he had executed in connection with his plea, and acknowledged that it indeed bore his signature.
17. After the State rested, defendant indicated that he did not wish to take the stand in his own behalf. Defendant called no other witnesses.
18. At the conclusion of the two-day trial, and following slightly more than two hours of deliberation, the jury returned a unanimous verdict of guilty as charged on both counts of Aggravated Robbery, and found beyond a reasonable doubt that in committing the offenses, the defendant had acted in concert with two or more persons, subjecting him to the group enhancement.
19. Defendant was sentenced on June 11, 2001. This Court imposed two indeterminate terms of 9 years to life, and ordered that the two terms run concurrently and not consecutively.

20. Defendant then timely filed a Motion for New Trial, attached to which were what purported to be affidavits from three people: George Afu, Samuel Misini, and Fineeva Maka.
21. The affidavit of George Afu contains a statement indicating that he “lied on the investigator’s report,” and that “because of the prosecutor’s pushing, and coaching questions, I have to lie.” The affidavit bears George Afu’s signature and was notarized on May 23, 2001.
22. The affidavit of Samuel Misini contains a statement indicating that George Afu told him “he has to lie in court, because of the prosecutor’s pushing, and coaching questions.” The Misini affidavit further claimed that George Afu told Misini that “it was the prosecutor and the investigator who told him about the stolen items, but he did not see Joe took or stolen [sic] anything from the victims, because he has left first to pick up the vehicle.”
23. In his memorandum in support of his motion for new trial, defendant Langi alleged that the affidavit of George Afu contained an admission that Afu had perjured himself during the trial. He later characterized the discovery of Afu’s “perjury” as newly discovered evidence.
24. Based upon the allegations leveled in defendant’s memorandum, the State contacted George Afu’s attorney, David C. Biggs. Mr. Biggs and Afu agreed to an interview on the subject of the perjury allegation.
25. During the interview, Afu was read his Miranda rights, and informed that he was under investigation for perjury. Afu agreed to waive his right to remain

silent, and agreed to speak with Sergeant Kevin Judd. David Biggs was present during the entire interview.

26. David Biggs informed Sgt. Judd, on behalf of his client, that Afu does not read English well. He indicated that at the time Afu signed the affidavit which defendant attributed to him, he was not able to read the big words, and that his wife had paraphrased it but apparently not read the document word for word.
27. Afu admitted to having signed the affidavit, but indicated that he did not understand what it said.
28. Afu indicated that he believed that in the affidavit, he was only admitting that he had not been truthful to investigators when he was asked about his relationship with defendant Langi.
29. Afu stated that he did not lie to police or anyone else about anything pertaining to the events that occurred at Beto's Restaurant on February 26, 2000.
30. Afu vehemently denied on several occasions during his interview with Sgt. Judd that he had lied to the jury during defendant Langi's trial.
31. Afu further denied that any State prosecutor had ever coached him as to his answer to any question, and further indicated that he had not been pressured or coerced. Afu's counsel confirmed that he had been present during the prosecutors' meetings with his client, and had never witnessed any such inappropriate behavior on the part of the State's attorneys.

32 Afu affirmatively stated that he had been truthful when he testified at defendant Langi's trial

CONCLUSIONS OF LAW

- 1 The revelation in the affidavit of George Afu that he lied to investigators does not constitute newly discovered evidence. All of the matters about which Afu admitted lying were matters known to the defendant at the time of trial. Defendant was certainly aware of the fact that he had known Afu prior to February 26, 2000, and was similarly aware that he had spent the night over at Afu's house on the night of February 26, 2000. Moreover, because defendant was present at the time the crimes at Beto's were committed, any discrepancies between Afu's version of events and his own were certainly known to defendant prior to trial. Because these matters were known to defendant prior to trial, they do not constitute newly discovered evidence
2. The affidavit of George Afu, submitted by defendant, is on its face, insufficient to establish that Afu testified falsely at trial. Despite defendant's characterization of it, the affidavit does not contain an admission by Afu that he lied on the witness stand when he testified at defendant's trial. To the contrary, the affidavit indicates only that Afu lied to investigators, a fact which he admitted to the jury. Defendant's assertion that Afu perjured himself at trial is, therefore, unsupported.
- 3 The affidavits of Samuel Misini and Fineeva Maka are double hearsay and are so unreliable that this Court declines to consider them when evaluating defendant's motion for new trial.

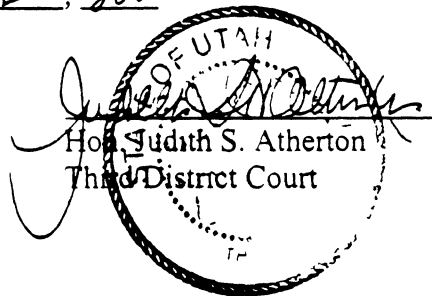
4. Defense counsel had ample opportunity, prior to trial, to conduct an interview with George Afu in order to ascertain any information that was not a part of the formal interview conducted by police. Therefore, any information disclosed during trial about which defense counsel had no prior knowledge could have, with due diligence, been discovered prior to trial.
5. Defendant's trial counsel conducted a competent cross-examination of George Afu which appropriately addressed the issue of the plea agreement he had reached with prosecutors in exchange for his testimony, and on the fact that because he had left the restaurant prior to the robbery, Afu did not actually witness defendant Langi removing or attempting to remove any property from the victims.
6. Based upon the transcript of Sergeant Kevin Judd's interview with George Afu, this Court finds that George Afu did not perjure himself during defendant Langi's trial. Any inconsistencies in his statements, or bias that may have arisen as a result of Afu's plea agreement with the State, were properly explored on cross-examination.
7. Also based upon this Court's review of the transcript of Sgt. Judd's interview with George Afu, this Court is satisfied that no representative of the State coached George Afu regarding his testimony, nor was George Afu coerced or pressured by any representative of the State.
8. Notwithstanding defendant's argument to the contrary, the evidence of defendant's guilt in this case was overwhelming. The videotape admitted into evidence, which captured the offenses in progress, provided sufficient

evidence to convict defendant. That video, particularly when coupled with the testimony of Jose Farias, Gabriel Calvillo, Rachel Redding, and George Afu, was so compelling that it makes the likelihood of a different result extremely remote. That is, even if this Court were to determine that some newly discovered evidence existed which could not have been discovered with due diligence prior to trial, that new evidence would not make a different result probable at a new trial.

- 9 Because this Court was not provided a transcript or other recording of George Afu's guilty plea in connection with his own involvement in the events that occurred at Beto's on February 26, 2000, this Court did not consider any issue related to the entry of that plea in reaching these Findings of Fact and Conclusions of Law.

This Court hereby enters the preceding Findings of Fact and Conclusions of Law on the issue of defendant's Motion for New Trial. Based upon those findings, and for the reasons enumerated above, defendant's Motion for New Trial is denied.

DATED this 14 day of March, 2002



Approved as to form:

Attorney for Defendant Joseph Langi

CERTIFICATE OF DELIVERY

I hereby certify that on this 6th day of February, 2002, I caused a true and correct copy of the foregoing Findings of Fact and Conclusions of Law Re: Defendant's Motion for New Trial to be mailed in the U.S. Mail, postage prepaid to: Joseph Jardine, Attorney for Defendant Joseph Langi, 39 Exchange Place, Suite 100, Salt Lake City, Utah 84111.

A handwritten signature in cursive script, appearing to read "J. Melisse", is written over a horizontal line.