

2004

# Utah v. Robert Kelton Berry : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff/ Appellee,

v.

ROBERT KELTON BERRY,

Defendant/ Appellant.

Case No. 20040142-CA

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BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION FOR AGGRAVATED ROBBERY,  
A FIRST DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT  
COURT, SALT LAKE COUNTY, THE HONORABLE STEPHEN L.  
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## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
JURISDICTION AND NATURE OF THE PROCEEDINGS .....	1
ISSUES PRESENTED AND STANDARDS OF REVIEW .....	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES .....	2
STATEMENT OF THE CASE .....	2
STATEMENT OF FACTS .....	3
SUMMARY OF ARGUMENT .....	9
ARGUMENT	
I. TRIAL COUNSEL DID NOT DIMINISH THE STATE’S BURDEN OF PROOF BY ARGUING THAT THE JURY’S DECISION WAS “AS IMPORTANT, IF NOT MORE IMPORTANT, THAN DECIDING WHO YOU ARE GOING TO MARRY OR IF YOU ARE GOING TO BUY A HOUSE” .....	12
A. <i>Reyes</i> and <i>Cruz</i> overruled the entire <i>Robertson</i> test. ....	13
B. Defense counsel’s closing argument did not diminish the State’s burden of proof. ....	15
II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY INSTRUCTING THE JURY TO BASE ITS VERDICT ONLY ON “TESTIMONY AND OTHER EVIDENCE PRESENTED IN COURT” .....	20
CONCLUSION .....	31

## ADDENDA

Addendum A. Jury Trial transcript of December 10, 2003 (R. 267: 293-94)

Addendum B. Jury Trial transcript of December 9, 2003 (R. 266: 136-45)

Addendum C. *State v. Hale*, 2000 UT App 297

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966) .....	24, 29
<i>Sterling v. United States</i> , 516 U.S. 1105 (1996) .....	25
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	12, 13, 18
<i>United States v. Tolliver</i> , 61 F.3d 1189 (5th Cir. 1995), <i>vacated on other grounds</i> by <i>Sterling v. United States</i> , 516 U.S. 1105 (1996) .....	25, 27
<i>Victor v. Nebraska</i> , 511 U.S. 1 (1994) .....	14

### STATE CASES

<i>Commonwealth v. Toon</i> , 773 N.E.2d 993 (Mass. App. 2002) .....	25
<i>Moles v. Regents of University of Calif.</i> , 187 Cal. Rptr. 557 (Cal. 1982) .....	32
<i>People v. Smith</i> , 624 N.E.2d 836 (Ill. App. 1993) .....	26, 29
<i>Perez-Llamas v. Utah Court of Appeals</i> , 2005 UT 18, 110 P.3d 706 .....	32
<i>State v. Boone</i> , 820 P.2d 930 (Utah App. 1991) .....	26
<i>State v. Cruz</i> , 2005 UT 45, 530 Utah Adv. Rep. 30 .....	10, 11, 14
<i>State v. DeMille</i> , 756 P.2d 81 (Utah 1988) .....	24
<i>State v. Hale</i> , 2000 UT App 297 .....	31
<i>State v. Humphrey</i> , 793 P.2d 918 (Utah App. 1990) .....	2, 24
<i>State v. Ireland</i> , 773 P.2d 1375 (Utah 1989) .....	14, 15
<i>State v. Litherland</i> , 2000 UT 76, 12 P.3d 92 .....	2
<i>State v. Pearson</i> , 943 P.2d 1347 (Utah 1997) .....	25
<i>State v. Pike</i> , 712 P.2d 277 (Utah 1985) .....	30, 31

<i>State v. Reyes</i> , 2005 UT 33, 116 P.3d 305 .....	10, 11
<i>State v. Robertson</i> , 932 P.2d 1219 (Utah 1997) .....	14, 15
<i>State v. Rodriguez</i> , 509 N.W.2d 1 (Neb. 1993) .....	25, 27, 28
<i>State v. Shipp</i> , 2005 UT 35, 116 P.3d 317 .....	31
<i>State v. Snyder</i> , 860 P.2d 351 (Utah App. 1993) .....	13
<i>State v. Taylor</i> , 947 P.2d 681 (Utah 1997) .....	12, 13
<i>State v. Tennyson</i> , 850 P.2d 461 (Utah App. 1993) .....	13
<i>State v. Tueller</i> , 2001 UT App 317, 37 P.3d 1180 .....	29
<i>State v. Tyler</i> , 850 P.2d 1250 (Utah 1993) .....	12
<i>State v. Velasquez</i> , 672 P.2d 1254 (Utah 1983) .....	24
<i>State v. Young</i> , 853 P.2d 327 (Utah 1993) .....	15, 17
<i>Tillman v. Cook</i> , 855 P.2d 211 (Utah 1993) .....	17

## STATE STATUTES AND RULES

Utah Code Ann. § 76-2-202 (West 2004) .....	19
Utah Code Ann. § 76-3-203 (West 2004) .....	2
Utah Code Ann. § 76-6-302 (West 2004) .....	1, 2
Utah Code Ann. § 78-2a-3 (West 2004) .....	1
Utah R. App. P. 29 .....	32
Utah R. App. P. 30 .....	31

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff/ Appellee,

v.

ROBERT KELTON BERRY,

Defendant/ Appellant.

Case No. 20040142-CA

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BRIEF OF APPELLEE

---

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from a conviction for aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (West 2004), in the Third Judicial District Court, Salt Lake County, the Honorable Stephen L. Roth presiding.

This Court has pour-over jurisdiction under Utah Code Ann. § 78-2a-3(2)(j) (West 2004).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did trial counsel diminish the State's burden of proof by arguing that the jury's decision was "as important, if not more important, than deciding who you are going to marry or if you are going to buy a house"?



**Standard of review.** When a claim of ineffective assistance is raised for the first time on appeal, there is no lower court ruling to review. Ambiguities or deficiencies in the record will be construed in favor of finding that counsel performed effectively. *State v. Litherland*, 2000 UT 76, ¶ 17, 12 P.3d 92.

2. Did the trial court abuse its discretion by instructing the jury to base its verdict only on “testimony and other evidence presented in court” and not on gestures or facial expressions of courtroom spectators?

**Standard of review.** “Trial courts have the discretion to determine whether a curative instruction is required in a particular case.” *State v. Humphrey*, 793 P.2d 918, 925 (Utah App. 1990) (citation omitted).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

This case does not require interpreting any statutory or constitutional provision.

## STATEMENT OF THE CASE

Defendant was charged by Amended Information dated 10 June 2003 with one count of aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (West 2004), with a firearms enhancement pursuant to Utah Code Ann. § 76-3-203 (West 2004). R. 18-20. Following a mistrial, a redrawn jury found defendant guilty as charged. R. 153, 207-09. Defendant was sentenced to six years to life and restitution. R. 228. He timely appealed. R. 231.

## STATEMENT OF FACTS

Kneeling in a corner of a deserted and dimly lit industrial area, 19-year-old Brandan Booth felt cold steel on the back of his head. R. 266: 85, 94-95, 103-04. It felt like a gun. R. 266: 130. One of his assailants said, "If you move, you are dead." R. 266: 131, *see also* R. 266: 103, 105. Brandan thought, "My life [is] over." R. 266: 103.

Earlier that day, 12 March 2003, Brandan had been cleaning out his dad's camper trailer. R. 266: 85. Afterwards he was going to his mom's place, walking south on 3500 South towards a bus stop on 900 West in Salt Lake County. R. 266: 85-86; R. 267: 220. He was carrying his CD's, CD player, razor, toothbrush, and \$15. R. 266: 86-87. After waiting at the bus stop for awhile, he concluded that the buses were no longer running and decided to walk. R. 266: 86. It was pretty cold and getting dark; he was wearing a hoodie. *Id.*

As he walked along, a white Hyundai with Idaho plates made a "U" turn, stopping beside him. R. 266: 87-88, 116. The passenger rolled down his window and asked Brandan where he was going. R. 266: 87-88. Brandan thought (mistakenly) that he recognized the driver from Job Corps or school or somewhere. R. 266: 87. (Brandan later realized that he did not know him. R. 266: 89.) Brandan answered, "To the bus stop on 35th." R. 266: 88. They offered him a ride, which he accepted.

*Id.* The driver was defendant; the passenger was defendant's brother Karl. R. 266: 90-91; 118.

Brandan sat in the back seat. Because the seat was folded down to accommodate a bumper, he had to sit kind of "[c]runched up" on the folded seats. R. 266: 89. One of the two men said, "We have to make a stop at the mall, and we can drop you off there." *Id.* They seemed nice, although Brandan later reflected, "I guess I should have been concerned at that point." R. 266: 90.

*"My life is over"*

At Valley Fair Mall, Karl returned a pair of pants at J.C. Penney, leaving Brandan alone with defendant in the car. R. 266: 90-92. Defendant was friendly. R. 266: 107. He complained that he was "sick of giving [Karl] rides," acting "like a chauffeur." R. 266: 91. By the time Karl returned, the buses had left the mall; defendant and Karl offered to drive Brandan to Magna. R. 266: 92-93. Their first stop was McDonald's. R. 266: 93. They asked Brandan if he wanted anything, and when he declined they bought him an ice cream anyway. *Id.*

Defendant drove west from McDonald's, then turned down a street in an industrial area. *Id.* When Brandan asked where they were going, they responded, "We are going to a friend's. We have to stop at a friend's real quick." *Id.* They drove to an industrial area, where Karl got out and vomited. *Id.* Brandan thought he might have been drunk. R. 266: 94.

About three minutes later Karl got back into the car. *Id.* Defendant looked back and said, "I think we need to adjust your seat." *Id.* He then parked the car behind some warehouses. *Id.* It was dark; the only light came from a dim light above the door of a nearby loading dock. R. 266: 95. No cars or people were around. *Id.* They all got out of the car. *Id.* Defendant started adjusting the rear seat. R. 266: 96.

As Brandan was watching, Karl "came up and socked [him]" on the right cheek. *Id.* It was a forceful blow. *Id.* Brandan started to put his fists up to defend himself, but Karl pulled out a knife. R. 266: 97. It was about two inches long. *Id.* He held it to Brandan's chest, then to his throat. R. 266: 97-98. He said, "What do you have? Give me all your stuff." R. 266: 98. Brandan thought, "My life is over." R. 266: 99.

Brandan gave Karl his CD player, his wallet, his bag containing his razor and toothbrush, "everything [he] had." R. 266: 99, 127, 148. His CD's were still in the car. R. 266: 99. Karl looked through the wallet, removed the money, and threw the wallet back at Brandan. *Id.* Brandan had about 200 CD's. R. 266: 100. Karl wanted to give them back to him, but defendant looked through them and said, "I am keeping these." *Id.* They returned his toiletries kit, but kept the razor. R. 266: 148.

They told Brandan to take his clothes off. R. 266: 100. He started to remove his sweater, but defendant stopped him and said something like, "We got to go." R. 266: 132. One of the brothers, probably Karl, told him to "[g]o get in the corner" and

kneel down. R. 266: 101-02, 129. Karl said to defendant, "Get the gun. Get the gun." R. 266: 101. Brandon saw defendant reaching under the car seat, apparently for the gun. R. 266: 99, 104. Brandon "thought for sure [his] life was over." R. 266: 103.

On his knees, in the corner, Brandon felt cold steel on the back of his head. R. 266: 103-04. It felt like a gun; he assumed it was a gun. R. 266: 130. One of them said, "If you move, you are dead." R. 266: 131, *see also* R. 266: 103, 105. Then they drove off, throwing a dollar bill out of the car window for the bus. R. 266: 105-06, 128. Brandon got up and looked at the license plate of the car. R. 266: 105. Brandon started walking. He "was crying, couldn't breathe, was trying to find somebody." R. 266: 106. He "was in shock." R. 266: 111.

*"I never seen nobody that scared before ever in my life"*

Security guard John Maez saw him. R. 267: 168. Brandon was veering off, swaying, staggering, "looking just lost." R. 267: 168-69. Maez thought he was drunk. R. 267: 168. When Brandon got closer, Maez could see he was hurt. R. 267: 169. The side of his face was bruised and bleeding, he was crying, and he was having trouble breathing. *Id.* He was so afraid that he opened the door of Maez's vehicle and "just jumped right in" and proceeded to tell Maez what had happened to him. *Id.* The first thing out of his mouth was a request to "get him out of the area." R. 267: 170. He said, "They are going to kill me." *Id.* Maez offered to get him medical help, but Brandon asked, "Can you please get me out of the area?" *Id.* He

kept saying, "Please, please, get me out of here. Get me out of here." R. 267: 171. Maez had "never seen nobody that scared before ever in my life." R. 267: 172. Maez called 911. *Id.*

When Officer Mike Christenson arrived, Brandan "was very upset, shaking, crying, having a hard time talking and breathing." R. 267: 190, 194. He said he had just been robbed. R. 267: 194. He described the crime in detail. R. 267: 210-12. He described his two assailants and said their car had a bumper in the back seat and smelled like gasoline . R. 267: 199, 203-04, 208-09. An "attempt to locate" was broadcast over police dispatch. R. 267: 206. The vehicle was described as a white Hyundai with Idaho plates with two male occupants. R. 267: 234.

Officer Robert Cowan responded. R. 267: 206, 233. Officer Cowan drove to Officer Christenson's location and told him about a traffic stop he had made earlier in the day. R. 267: 235. He had stopped a white Hyundai with Idaho license plates for speeding. R. 267: 232. The car was occupied by a driver and a front seat passenger. R. 267: 233, 235. Officer Cowan noticed a large bumper protruding from the trunk into the back seat, where the seats were folded down. R. 267: 234. He also smelled a strong odor of gasoline. *Id.* Cowan requested Christenson to ask the victim about the smell and the auto part in the back seat. R. 267: 235. Christenson responded that the victim had told him the same thing. *Id.*

Officer Frank Johnson also went to the location where Brandan was being interviewed. R. 267: 241-42. Brandan had by then calmed down and was talking to the officers. R. 267: 242. Officer Johnson got defendant's name and interviewed him over the telephone. R. 267: 247, 263.

*"I was actually being a good Samaritan"*

In the telephone interview with Officer Johnson, defendant claimed that Karl had robbed Brandan. R. 267: 251. He stated that, after Brandan got in the car, Karl sent him a telephone text message saying, "[P]ull over just right at the next light, . . . I want to jack him." R. 267: 259.

When asked whether he had pointed something at Brandan's head to make him think he had a gun, defendant replied, "No. I did not. I told the kid, I says, I didn't want, I honestly didn't want my license plate [reported], and I told the kid, I says just turn and face the wall, I says don't turn around." R. 267: 253. Defendant admitted saying, "[W]hatever you do, do not turn around. My brother's like, you know, and then that's when we drove away." R. 267: 253. He said that Karl "said don't turn around or he was going to shoot him or something like that." R. 267: 254.

Defendant denied that either of them had a gun, but he acknowledged that Karl had put a knife to Brandan's throat. *Id.* "I had nothing to do with it," defendant claimed. "I was totally against it." R. 267: 256. In fact, he said, "I was actually being a good Samaritan, giving someone a ride home." R. 267: 252.

## SUMMARY OF ARGUMENT

1. Defendant claims that his trial counsel was ineffective when she argued that the jury's decision was "as important, if not more important, than deciding who you are going to marry or if you are going to buy a house." R. 267: 294.

Defendant's claim fails because it is premised on the *Robertson* test, which the supreme court rejected in *State v. Reyes* and *State v. Cruz*. It also fails because counsel complied with *Robertson*. She did not equate the jury's decision to making major life decisions, but said it was more important because it was irrevocable.

Defendant also fails to demonstrate prejudice. There is no likelihood that, but for counsel's argument, the jury would have believed defendant's claim that he was "actually being a good Samaritan" over Brandan's compelling testimony.

2. Defendant claims the trial court abused its discretion in responding to a juror's claim to have seen a spectator prompting Brandan on the witness stand. However, the court's response to the incident was textbook: it excluded the alleged coaches, instructed the jury to base their verdict solely on the evidence, and permitted defense counsel to cross-examine Brandan about the alleged prompting.

Defendant's request to query the other jurors about the alleged prompting was pointless. The only possible effect of seeing the prompting was to bias a juror against the prosecution, not against the defendant.



## ARGUMENT

### Introduction

Defendant's original brief argued three issues. Two were affected by the supreme court's decision in *State v. Reyes*, 2005 UT 33, 116 P.3d 305, issued after defendant's opening brief was filed. This Court invited defendant to file a supplemental brief "addressing the effect of *State v. Reyes*." Order of 14 June 2005. Defendant filed a supplemental brief addressing one sub-argument in defendant's original brief.

Defendant's original point I centers on the principle of reasonable doubt.

Point I.A argues that the reasonable doubt instruction violated due process by failing to instruct the jury that the State must obviate all reasonable doubt. Br. Aplt. at 19-23. This argument was rejected in *Reyes*, 2005 UT 33, ¶ 30 and *State v. Cruz*, 2005 UT 45, ¶ 21, 530 Utah Adv. Rep. 30 ("the *Robertson* test is no longer in force"). In defendant's supplemental brief, he does not mention this claim as having survived *Reyes*. Supp. Br. Aplt. at 6. The State agrees that this claim did not survive *Reyes* and accordingly will not address it.

Point I.B contains two sub-points. The first sub-point argues that defense counsel was ineffective for failing to raise *Robertson* objections. This sub-point rests upon the claims asserted in Point I.A In defendant's supplemental brief, he does not

mention this claim as having survived *Reyes*. Supp. Br. Aplt. at 6. The State agrees that this claim also did not survive *Reyes* and accordingly will not address it.

The second sub-point of defendant's original point I.B argues that defense counsel was ineffective for comparing reasonable doubt to major life decisions in closing argument. Br. Aplt. at 25. Defendant asserts that this claim is unaffected by *Reyes*. Supp. Br. Aplt. at 6. Accordingly, the State will respond to this argument. This will be the State's Point I.

Defendant's original point II argues that the trial judge erred by not instructing the jury on the law at the close of the evidence. Br. Aplt. at 28. This argument was rejected in *Reyes*, 2005 UT 33, ¶ 49 and *Cruz*, 2005 UT 45, ¶ 27. In defendant's supplemental brief, he does not mention this claim as having survived *Reyes*. Supp. Br. Aplt. at 6. The State agrees that this claim did not survive *Reyes* and accordingly will not address it.

Defendant's point III argues that the trial judge erroneously limited the jurors' ability to determine credibility and failed to ensure that the jurors were impartial. Br. Aplt. at 41. This claim is wholly unaffected by *Reyes*. Accordingly, the State will respond to this argument. This will be the State's Point II.

In sum, point I of this brief will respond to the second sub-point of defendant's original point I.B, as expanded in defendant's supplemental brief. Point II of this

brief will respond to defendant's original point III, found only in defendant's original opening brief. This brief will not respond to point I.A, the first sub-point of point I.B, or point II of defendant's original opening brief.

Defendant's supplemental brief is not explicit as to which claims or portions of claims defendant continues to assert post-*Reyes*. To the extent the State has misread defendant's intentions with respect to a particular claim, it requests leave to file a supplemental brief.

**I  
TRIAL COUNSEL DID NOT DIMINISH THE STATE'S BURDEN  
OF PROOF BY ARGUING THAT THE JURY'S DECISION WAS "AS  
IMPORTANT, IF NOT MORE IMPORTANT, THAN DECIDING  
WHO YOU ARE GOING TO MARRY OR IF YOU ARE GOING TO  
BUY A HOUSE"**

Defendant claims that "defense counsel was ineffective for comparing a reasonable doubt to major life decisions." Supp. Br. Aplt. at 6 (boldface and capitalization omitted). He argues that trial counsel's closing ran afoul of the second *Robertson* factor, which he contends survived *Reyes*. *Id.*

A defendant claiming ineffective assistance of counsel faces a "difficult burden." *State v. Tyler*, 850 P.2d 1250, 1259 (Utah 1993). First, he must demonstrate that his counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment. See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997). Second, he must

demonstrate that his counsel's deficient performance was prejudicial, in that it affected the outcome of the case. *See Strickland*, 466 U.S. at 687-88, 692.

When reviewing counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Taylor*, 947 P.2d at 685 (quoting *Strickland* 466 U.S. at 689). "If a rational basis for counsel's performance can be articulated, [the court] will assume counsel acted competently." *State v. Tennyson*, 850 P.2d 461, 468 (Utah App. 1993). Thus, "an ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." *Id.*

To satisfy the prejudice requirement, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.* at 697.

"Given the arduous nature of the defendant's burden, ineffective assistance of counsel claims rarely succeed." *State v. Snyder*, 860 P.2d 351, 354 (Utah App. 1993).

**A. *Reyes* and *Cruz* overruled the entire *Robertson* test.**

Defendant's ineffective assistance claim fails because its premise is false: *Robertson's* second prong did not survive *Reyes* and *Cruz*.

Relying heavily upon Justice Stewart's dissent in *State v. Ireland*, 773 P.2d 1375 (Utah 1989), *Robertson* adopted a three-part test for evaluating reasonable doubt instructions:

First, "the instruction should specifically state that the State's proof must obviate all reasonable doubt." *Ireland*, 773 P.2d at 1381 (Stewart, J., dissenting). Second, the instruction should not state that a reasonable doubt is one which "would govern or control a person in the more weighty affairs of life," as such an instruction tends to trivialize the decision of whether to convict. *Id.* (Stewart, J., dissenting). Third, "it is inappropriate to instruct that a reasonable doubt is not merely a possibility," although it is permissible to instruct that a "fanciful or wholly speculative possibility ought not to defeat proof beyond a reasonable doubt." *Id.* at 1382 (Stewart, J., dissenting).

*State v. Robertson*, 932 P.2d 1219, 1232 (Utah 1997).

Although *Reyes* and *Cruz* involved only the first and third prongs of this test, in both cases the supreme court repudiated the entire test. Thus, in *Cruz*, the court stated, "In *State v. Reyes* . . . the State also urged us to overrule *Robertson*. We accepted that invitation, and pursuant to our opinion in *Reyes*, the *Robertson* test is no longer in force." *Cruz*, 2005 UT 45, ¶ 21. In its place, the court adopted the test articulated in *Victor v. Nebraska*, 511 U.S. 1 (1994): "Simply put, we need only ask whether the instructions, taken as a whole, correctly communicate the principle of reasonable doubt . . ." *Id.*

Defendant's ineffective assistance of counsel argument fails because it is premised on the second prong of an abandoned test.

**B. Defense counsel's closing argument did not diminish the State's burden of proof.**

Defendant does not contend that counsel's argument violated the *Victor* test. However, even if the second prong of the *Robertson* test were still in effect, defendant could not demonstrate his trial counsel was ineffective. Counsel did not equate reasonable doubt to major life decisions, but argued that the decision to convict was irrevocable and therefore "as important, *if not more important*," than major life decisions. R. 267: 294 (emphasis added).

*Robertson* stated that a reasonable doubt instruction "should not state that a reasonable doubt is one which 'would govern or control a person in the more weighty affairs of life,' as such an instruction tends to trivialize the decision of whether to convict." *Robertson*, 932 P.2d at 1232 (quoting *Ireland*, 773 P.2d at 1381 (Stewart, J., dissenting)). However, a jury instruction that "impress[es] upon the jurors that the reasonable doubt standard requires *greater* proof than such decisions" was proper even under the *Robertson* standard. *State v. Young*, 853 P.2d 327, 356 (Utah 1993).

This is precisely what defense counsel did here. In closing, she first emphasized that "beyond a reasonable doubt" is the highest standard of proof known to our legal system:

Now, ladies and gentlemen, I told you in opening that I would talk about beyond a reasonable doubt. And that's a very, very high standard in our justice system. **It is the highest standard of proof that there is.** And there are several standards of proof. One is by the preponderance of the evidence. And that's in a civil case. And the jury can find for, say, like a plaintiff, if they have shown by the preponderance of the evidence whatever they are trying to prove.

A higher standard is clear and convincing evidence. That's even a higher standard.

And, ladies and gentlemen, if you find that the State has proven this case by a preponderance of the evidence, or if you find that the State has proven its case by clear and convincing evidence, your verdict must be not guilty, because that is not high enough. Beyond a reasonable doubt is higher than that. If you think that he maybe committed an aggravated robbery or a robbery, your verdict must be not guilty. If you think that he probably committed a robbery or an aggravated robbery, your verdict must still be not guilty. That is how high the standard of proof is in this case.

R. 267: 293-94 (addendum A). After impressing upon the jury the difficulty of proving guilt beyond a reasonable doubt, counsel stated that the decision before them was as important, if not more important, than deciding who to marry or what house to buy:

And I have talked about how serious these offenses are, and how important this decision is that you are making today. It is as important, **if not more important**, than deciding who you are going to marry or if you are going to buy a house. That's how careful you have to be and what factors you would weigh in saying, "Am I going to marry this person?" **And the thing is, in a case like that, with buying a house or marrying somebody, you can change that decision. You can get a divorce. You can sell your house. But in this case you cannot.**

R. 267: 294 (emphasis added) (addendum A).

Far from equating the decision to convict with the decision to marry or buy a house, defense counsel explained that because they could not later undo an error, they must be more certain of their verdict than they would be when deciding to marry or buy a house. Whether consciously or not, counsel was paraphrasing a line from Justice Stewart's *Tillman* dissent: "Human error in making 'weighty and important' decisions in the conduct of one's personal life is common, as shown, for example, by the high divorce rate and large numbers of bankruptcies. Of course, many of those decisions can be corrected, unlike the irreversible decision to execute." *Tillman v. Cook*, 855 P.2d 211, 230 (Utah 1993) (Stewart, J., dissenting).

In sum, counsel stressed that proof beyond a reasonable doubt is "a very, very high standard," in fact "the highest standard of proof that there is." R. 267: 293. She stressed that the jurors had better be sure about their verdict, because they could not change it later. R. 267: 294. She thus "impressed upon the jurors that the reasonable doubt standard requires *greater* proof than such decisions," a proper statement of the law even under the *Robertson* standard. *Young*, 853 P.2d at 356. Her argument was thus entirely reasonable.

Moreover, even if counsel's performance were deficient, defendant has failed to demonstrate "that there is a reasonable probability that, but for counsel's



unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

Defendant’s prejudice argument rests on supposed inconsistencies in Brandan’s testimony concerning who took his CD’s. Defendant cites six times to the transcript of the preliminary hearing and once to the transcript of the first trial, which ended in a mistrial. *See* Supp. Br. Aplt. at 12. Of course, these transcripts were not before the jury at trial, and so had no effect on the verdict. They are therefore not relevant to the question of prejudice or any other question on appeal. However, even the passages from those irrelevant transcripts, read together with the relevant trial transcript, demonstrate that Brandan consistently maintained that, however Karl and defendant obtained possession of his CD’s, it was defendant who refused to return them. *Id.* at 11-13; R. 266: 99-100, 135. For example, when asked on cross-examination whether it was not defendant who said, “Give the CD’s back,” Brandan stood firm: “No, it wasn’t. He was the one who took them.” R. 266: 135. In other words, like his younger brother Karl, defendant was an active participant in this crime.

Moreover, defendant’s own story—adduced at trial by the prosecution—confirmed his guilt. He admitted driving Brandan to a secluded location after receiving Karl’s text message, “[P]ull over just right at the next light, . . . I want to

jack him.” R. 267: 259. Thus, even if it was Karl who brandished the knife, touched the back of Brandan’s head with a gun (or a facsimile, its legal equivalent), and took physical possession of the CD’s, defendant was equally guilty of the crime. “Every person, acting with the mental state required for the commission of the offense . . . who . . . intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.” Utah Code Ann. § 76-2-202 (West 2004). The jury was instructed on this principle. *See* R. 195.

But regardless of such subtleties, this case was not close. Brandan had no motive to falsely implicate defendant; defendant had every motive to falsely shift blame to Karl. Brandan gave a detailed, consistent account, tested under cross-examination. Defendant’s telephone statement to police confirmed most of Brandan’s account. It differed only in that defendant claimed that his brother Karl was the criminal, whereas he was “actually being a good Samaritan.” R. 267: 252. The jury was out less than an hour. *See* R. 267: 302.

On these facts, there is no likelihood that the jury convicted defendant because defense counsel argued that their decision was “as important, if not more important” than the decision to marry or buy a house.

## II

### THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY INSTRUCTING THE JURY TO BASE ITS VERDICT ONLY ON "TESTIMONY AND OTHER EVIDENCE PRESENTED IN COURT"

Defendant claims that the trial court deprived him of "a fair trial when he misinformed the jurors not to consider Brandan's mother's coaching for any purpose, including determining Brandan's credibility." Br. Aplt. at 41. He also contends that "[t]he trial judge further abused his discretion in failing to grant defense counsel's request to interview all the jurors for possible bias." Br. Aplt. at 47.

**Proceedings below.** At one point during Brandan's cross-examination, juror Ryan interrupted the proceedings and asked to speak to the court. R. 266: 136 (addendum B, which includes R. 266: 136-45). The court cleared the courtroom, then directed the juror to make a written statement and give it to the bailiff. *Id.* The statement read: "The lady in the audience is prompting the witness with head shakes the last ten minutes." R. 266: 137.

The judge said that he had not been watching the audience. *Id.* Defense counsel stated, "I haven't noticed anything. And that's always my concern when we get other people in the courtroom. I just wish the State would make me a decent offer in this case, and we could end it." *Id.* The court ordered the victim's mother and the victim coordinator to return to the courtroom. *Id.* Both stated they had not

prompted Brandon on the stand, and the victim coordinator stated that she had not been observing the mother, but watching Brandon testify. R. 266: 137-38.

The court then asked both women to leave. "I am not sure what happened here. But I don't believe that you should be in the audience at this point, because an issue has been raised." R. 266: 138. The judge stated that he was "not making any accusations at all. But I want to make sure this trial goes on with as little problem as can be possible." *Id.*

Defense counsel then requested that the other jurors be questioned concerning what they saw or did not see. *Id.* She asserted "a right to mention what happened in the courtroom, and it appeared that someone was prompting Brandon." R. 266: 139. The court ordered that defense counsel could not comment on anything the juror said. *Id.* Defense counsel then expressed a preference "to ask them if they noticed anything. They may not. And then just do a general instruction that they are not to take that into consideration. And I think that would cure it." R. 266: 140. The court was "not inclined to further emphasize the process by going through and talking to individual jurors, especially when I believe that the issue can be cured with an instruction." R. 266: 141.

Defense counsel suggested a wording change in the court's draft instruction, which the court adopted. R. 266: 142. She then complained that "you are telling the

juror to disregard what he saw, and he can't give any weight to what she was saying." *Id.* The court responded that counsel could cross-examine the witness about it; counsel responded, "Okay. He will say no." *Id.* The court replied, "The issue here really is both the effect of this alleged activity on the witness – we don't know whether it happened or not – and on the juror. And I think that it can – that you can deal with that issue in that way." *Id.*

Defense counsel responded, "Why don't we just forget the instruction, and that will just be my question." R. 266: 143. Over the prosecutor's objection, the court decided not to give the instruction "at this point." *Id.* But it expressed an intent to instruct the jury that they "are to accept as evidence and rely on in their deliberations only testimony or other evidence presented in court. They may not consider gestures, facial expressions, or other demonstrations by anyone else present in the courtroom." R. 266: 144. Defense counsel then expressed a concern that "this juror should be able to consider that. I don't think he should be instructed to disregard what he saw as prompting." *Id.* The court ruled, "I will allow you to cross examine the witness, subject to objection, about whether he was prompted by anybody in the courtroom. . . . I don't think he can rely on anything she did there. She is not a witness . . ." *Id.*

The trial proceeded with the victim's mother and the victim coordinator outside the courtroom. *See* R. 266: 145. The judge instructed the jury that "[j]urors are to accept as evidence and rely on in their deliberations only testimony and other evidence presented and accepted in court. They may not consider gestures, facial expressions, or any other demonstrations by any other person present in the courtroom." R. 266: 145-46. Defense counsel then resumed her cross-examination of Brandon Booth:

Q Brandon, before we just took a break, there were two other people in the courtroom; is that correct?

A Yes.

Q And now they are not here anymore?

A No.

Q When I was asking you questions about this case, did you see anybody make gestures towards you?

A No.

Q You didn't see anybody prompting you to say a certain answer in a certain way?

A What's prompting? Telling me to say something?

Q Yes.

A No.

Q Anybody nodding?

A No.

Q Trying to alter your testimony?

A I was looking at you.

R. 266: 146.

**Standard of review.** “Trial courts have the discretion to determine whether a curative instruction is required in a particular case.” *State v. Humphrey*, 793 P.2d 918, 925 (Utah App. 1990).

**Precedent.** “It is axiomatic that a defendant is entitled to a fair and impartial trial based on the evidence presented to the jury, without the jury being influenced by information from outside sources.” *State v. Velasquez*, 672 P.2d 1254, 1263 (Utah 1983). Consequently, a jury’s verdict must be “based on the evidence and the law presented to it.” *State v. DeMille*, 756 P.2d 81, 85 (Utah 1988) (Stewart, J., dissenting). “Verdicts decided on some other basis make the constitutionally guaranteed right to trial by jury a nullity.” *Id.*

The United States Supreme Court has similarly held that a jury’s verdict must “be based on evidence received in open court, not from outside sources.” *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966). Indeed, a conviction may be set aside where jurors are exposed to “information that was not admitted at trial.” *Id.* (citing *Marshall v. United States*, 360 U.S. 310 (1959)).

In *State v. Pearson*, 943 P.2d 1347 (Utah 1997), our supreme court held that the prosecutor's remarks in closing were improper because they "called the jury's attention to facts outside the evidence." *Id.* at 1352. Nevertheless, the action did not prejudice the outcome of the case because the court had instructed the jurors that the arguments of counsel were not evidence and that "they were to rely only on the evidence in reaching factual conclusions." *Id.* at 1353.

Prompting presents a special case. "When the trial court's attention is drawn to the fact that a witness is being coached by a spectator at the trial, the trial court has a duty to take curative action." *State v. Rodriguez*, 509 N.W.2d 1, 3-4 (Neb. 1993). "Ordinarily, permitting the issue to be raised on cross-examination will constitute an effective cure." *Id.* at 4. Alternatively, "admonition to the coach may be sufficient." *Id.* (citing *Evers v. State*, 121 N.W. 1005 (1909), *overruled on other grounds by State v. Brockman*, 168 N.W.2d 367 (1969)); cf. *Commonwealth v. Toon*, 773 N.E.2d 993, 1006-07 (Mass. App. 2002). Excluding the purported coach and instructing the jury not to let the court's admonition and exclusion of the spectator "affect the credibility of the witness in this case" will also suffice. *United States v. Tolliver*, 61 F.3d 1189, 1208 (5th Cir. 1995), *vacated on other grounds by Sterling v. United States*, 516 U.S. 1105 (1996). Where a spectator may have engaged in disruptive behavior, the



trial court may appropriately instruct the jurors to be “governed solely by the evidence.” *State v. Boone*, 820 P.2d 930, 935 (Utah App. 1991).

Defendant cites no case, and the States is aware of none, holding that the appropriate response to a coaching incident is to instruct the jury that they may consider facts not admitted into evidence.

*People v. Smith*, 624 N.E.2d 836 (Ill. App. 1993), bears sufficient similarity to the case at bar to be instructive. Smith appealed her conviction for arson of the Kopy Kat Restaurant. *Id.* at 838. Aimee Manis, a waitress at the Kopy Kat, was a witness for the prosecution. *Id.* at 844. An alternate juror reported to the bailiff that the witness’s mother had on several occasions mouthed the words “I don’t know” while her daughter was testifying. *Id.*

The judge interviewed the juror with counsel present in the jury room. The juror stated that she had mentioned the incident to other jurors, whom the judge also interviewed. None of the others had observed anything. *Id.* The judge interviewed the witness, who denied that her testimony was being directed by her mother. The witness’s mother also denied trying to communicate with her. *Id.* The judge denied the defendant’s mistrial motion but ordered the mother to leave the courtroom during her daughter’s testimony. *Id.*

After surveying several precedents, the Appellate Court of Illinois held that the trial court's handling of the alleged coaching incident was reasonable and "well within its discretion." *Id.* at 845. The court noted that this was not "an incident of obvious coaching," as "only one alternate juror claims to have noticed the incident" and the witness and her mother "both claimed they were not attempting to communicate during testimony." *Id.* In fact, the court concluded, "[t]he most logical effect of this incident was to impeach Manis and weaken the State's case, as Manis was a prosecution witness." *Id.*

**Analysis.** *Smith* provides a useful guide here. The incidents were similar: as in *Smith*, the instant case involves a juror who claimed to have seen a coaching incident and a witness and a mother who denied it. In *Smith*, the only curative action taken by the court was to exclude the purported coach. Here, the court excluded the purported coaches and invited defendant to cross-examine the witness about the purported coaching. This latter action alone, according to *Rodriguez*, 509 N.W.2d at 4 , will "[o]rdinarily, constitute an effective cure." In addition, as approved in *Tolliver*, 61 F.3d at 1208, the trial court gave a curative instruction. The court, however, was "not inclined to further emphasize the process by going

through and talking to individual jurors, especially when I believe that the issue can be cured with an instruction.” R. 266: 141.<sup>1</sup>

Defendant compares the court’s curative instruction to the judge’s improper comment in *Rodriguez*. See Br. Aplt. at 46. The comparison is inapt.

In *Rodriguez*, the trial court “allowed the defense to make a factual issue of the matter, permitting five defense witnesses to testify before the jury that they had seen [a detective] coaching [a prosecution witness] on the stand.” *Rodriguez*, 509 N.W.2d at 3. Nevertheless, the judge’s own conduct “amount[ed] to testimony from the bench.” *Id.* at 4. “Speaking directly to these issues, the trial judge stated that he had been watching [the detective] and that [the detective] had not coached [the witness].” *Id.* “In relaying this information,” the Nebraska Supreme Court ruled, “the trial judge assumed the role of a witness.” *Id.*

Nothing similar occurred here. The trial court merely gave a legally unassailable curative instruction to the jury: “Jurors are to accept as evidence and rely on in their deliberations only testimony and other evidence presented and accepted in court. They may not consider gestures, facial expressions, or any other demonstration by any other person present in the courtroom.” R. 266: 145-46. The

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<sup>1</sup> Defendant does not challenge the trial court’s sua sponte announcement that it was “not going to make a juror a witness here. That’s just not going to happen.” R. 266: 139.

court expressed no opinion as to whether coaching had occurred. If anything, the exclusion of Brandan's mother and the victim coordinator from the courtroom, coupled with defense counsel's cross-examination of Brandan concerning coaching, left the impression that coaching may well have occurred. R. 266: 146.

This was of course defendant's goal. As in *Smith*, "[t]he most logical effect of this incident was to impeach [Brandan] and weaken the State's case, as [Brandan] was a prosecution witness." *Smith*, 624 N.E.2d at 845. Evidence that Brandan was merely parroting the views of his mother, who knew nothing of the incident, could only have eroded his credibility. Consequently, any "bias" resulting from this event ran in defendant's favor. There is some potential for prejudice against a defendant where jurors suspect that he is involved in prompting. See *State v. Tueller*, 2001 UT App 317, ¶¶ 12-13, 37 P.3d 1180 (finding no prejudice). But there is no potential for prejudice against a defendant where jurors suspect that a prosecution witness is involved in prompting.

Defendant's preferred solution of permitting the jury to consider matters not admitted into evidence is the one obviously wrong choice. All cases agree that the jury's verdict must be "based on evidence received in open court, not from outside sources." *Sheppard*, 384 U.S. at 351. He cites no contrary authority.

Defendant's complaint that the court failed to interview other jurors rings equally hollow. It is true enough that "the only way to determine if any other jurors had seen the coaching and were biased by it was to question the jurors themselves." Br. Aplt. at 47. But whether other jurors had seen the coaching was irrelevant. One biased juror would have required a mistrial. Juror Ryan had or claimed to have "seen the coaching," yet defendant did not move for a mistrial; he merely asked whether the court was going to question "the other jurors." R. 266: 139. But interviewing the other jurors "just to ask them if they noticed anything," which is what defense counsel wanted, would have added nothing. R. 266: 140. Defendant does not explain how increasing the number of jurors known to have seen the purported prompting would change anything.<sup>2</sup>

Finally, defendant argues that "improper contacts between jurors and interested parties support the need for an evidentiary hearing." Br. Aplt. at 47 (citing *State v. Pike*, 712 P.2d 277, 281 (Utah 1985)).

There were no improper contacts here. Seeing a person across the room is not an "improper contact." If it were, a juror seeing a defendant seated at counsel table or a witness in the gallery would raise "a rebuttable presumption of prejudice."

---

<sup>2</sup> From the defense perspective, one tactical objective for interviewing the other jurors would have been to inform them of the coaching allegation, since that information could only harm the State's case. Cross-examining Brandan achieved this objective.

*State v. Shipp*, 2005 UT 35, ¶ 8, 116 P.3d 317 (quoting *Pike*, 712 P.2d at 280). “Contact” in this context typically refers to a “conversation in the hall,” or other “brief conversation.” *Pike*, 712 P.2d at 280; *Shipp*, 2005 UT 35, ¶ 2. Any such conversation that amounts to “more than a brief, incidental contact” risks “breeding a sense of familiarity that could clearly affect the jurors['] judgment as to credibility.” *Pike*, 712 P.2d at 281. Merely viewing someone across the courtroom, like overhearing a bailiff yell “they are guilty,” is not “the type of contact which raises a presumption of prejudice.” *State v. Hale*, 2000 UT App 297, ¶ 1 (unpublished) (copy attached at addendum C in compliance with Utah R.App.P. 30(f)).

In any event, defendant never claimed below that the juror’s view of the alleged coaching constituted a *Pike* contact, nor did he seek an evidentiary hearing or move for a mistrial. See R. 266: 136-45. On the contrary, defense counsel stated that “the only concern is I think this juror should be able to consider that. I don’t think he should be instructed to disregard what he saw as prompting.” R. 266: 144. This demonstrates that his tactical objective at trial was to maximize, not minimize, the effect of this “contact.”

## CONCLUSION

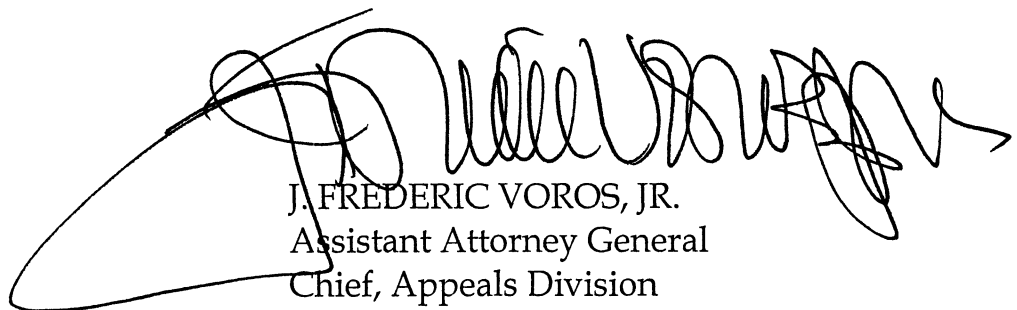
Defendant’s conviction should be affirmed.

## ORAL ARGUMENT REQUESTED

The State requests oral argument. “[O]ral argument is a tool for assisting the appellate court in its decision making process,” *Perez-Llamas v. Utah Court of Appeals*, 2005 UT 18, ¶ 10, 110 P.3d 706, and “the only opportunity for a dialogue between the litigant and the bench.” *Moles v. Regents of Univ. of Calif.*, 187 Cal. Rptr. 557, 560 (Cal. 1982). In the case at bar, the decisional process would “be significantly aided by oral argument.” Utah R. App. P. 29(a)(3).

RESPECTFULLY submitted on 7 October 2005.

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Attorney General



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CERTIFICATE OF SERVICE

I hereby certify that this 7 October 2005, 4 copies of the foregoing brief of appellee were ☐ hand-delivered to an agent of ☒ mailed to the following:

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# Addenda

# Addendum A

# ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

STATE OF UTAH,

Plaintiff,

**vs.**

ROBERT KELTON BERRY,

Defendant.

**Case No. 031100783**

Transcript of:

**JURY TRIAL**

VOLUME II

**FILED DISTRICT COURT**  
Third Judicial District

MAY - 5 2004

By hse SALT LAKE COUNTY

**Deputy Clerk**

BEFORE THE HONORABLE STEPHEN L. ROTH

3636 Constitution Blvd.  
West Valley City, Utah 84119

DECEMBER 10, 2003

FILED  
UTAH APPELLATE COURTS

REPORTED BY: BRAD YOUNG  
238-7531

JUN 16 2004

JUN 16 2004  
20040142-CA  
000267

1 what's going on. He wouldn't have wasted his time to fix the  
2 seat. There would be no reason to do it.

3 Now, the State is trying to suggest that the -- the  
4 victim is trying to suggest that the victim was taken on a wild  
5 goose chase here. And that just is not true. Again, he was in  
6 the car for a long period of time. And if you are going up to  
7 Bangerter to go out to Magna, you can cut through there. They  
8 went to the McDonald's which is on 36th West. You go north  
9 there. You run into the residential areas. And there are  
10 several streets that head up to Bangerter. The only reason  
11 they pulled over in that area was, number one, first, Karl had  
12 to throw up, if you remember that. He got sick and he got out.  
13 He threw up. Then they get back in. Then they have to adjust  
14 the seat, because the guy was uncomfortable. He mentions that.  
15 He says that his feet were scrunched up and it was very  
16 uncomfortable. And that is why they pulled over, not to pull  
17 over into some secluded area to rob him.

18 Now, ladies and gentlemen, I told you in opening that  
19 I would talk about beyond a reasonable doubt. And that's a  
20 very, very high standard in our justice system. It is the  
21 highest standard of proof that there is. And there are several  
22 standards of proof. One is by the preponderance of the  
23 evidence. And that's in a civil case. And the jury can find  
24 for, say, like a plaintiff, if they have shown by the  
25 preponderance of the evidence whatever they are trying to

1 prove.

2 A higher standard is clear and convincing evidence.  
3 That's even a higher standard.

4 And, ladies and gentlemen, if you find that the State  
5 has proven this case by a preponderance of the evidence, or if  
6 you find that the State has proven its case by clear and  
7 convincing evidence, your verdict must be not guilty, because  
8 that is not high enough. Beyond a reasonable doubt is higher  
9 than that. If you think that he maybe committed an aggravated  
10 robbery or a robbery, your verdict must be not guilty. If you  
11 think that he probably committed a robbery or an aggravated  
12 robbery, your verdict must still be not guilty. That is how  
13 high the standard of proof is in this case.

14 And I have talked about how serious these offenses  
15 are, and how important this decision is that you are making  
16 today. It is as important, if not more important, than  
17 deciding who you are going to marry or if you are going to buy  
18 a house. That's how careful you have to be and what factors  
19 you would weigh in saying, "Am I going to marry this person?"  
20 And the thing is, in a case like that, with buying a house or  
21 marrying somebody, you can change that decision. You can get a  
22 divorce. You can sell your house. But in this case you  
23 cannot.

24 And, ladies and gentlemen, I was going over the  
25 transcript last night, and I just gave up counting how many

1 times the victim said, "I don't know. I'm not sure. I don't  
2 know. I'm not sure." That is not beyond a reasonable doubt.  
3 He is not sure what happened, so how can you be sure? How can  
4 they ask you to convict him? They have not proven their case  
5 beyond a reasonable doubt, and I ask for two not guilty  
6 verdicts.

7 Thank you.

8 THE COURT: Thank you, Ms. Gustin-Furgis.

9 Ms. Peters?

10 MS. PETERS: Thank you, your Honor. The defendant  
11 did the best he could. So then he drove Brandon to safety. He  
12 was the driver. His brother wanted to jack him. He got a text  
13 message and then he said, "Don't do it." So, of course, the  
14 next step would be to drive Brandon to safety, because he  
15 didn't want it to happen, so he drove Brandon to a bus stop.  
16 No, we didn't hear anything about that. He drove Brandon to a  
17 police station, so he wouldn't get jackd. We didn't hear  
18 anything about that, either. Did he drive Brandon home? No.  
19 Instead, he drove Brandon to a secluded area. When you go back  
20 and deliberate, look at the map. See how many houses you see  
21 on the map. See how many warehouses you see. There is nothing  
22 back there but warehouses. And you heard testimony from John  
23 Maez, who has been a security guard with USANA for six years,  
24 that there is nothing over there except warehouses. I don't  
25 think that that is a protective area. I don't think the

## Addendum B

**ORIGINAL**

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	)	
	)	
	)	
Plaintiff,	)	Case No. 031100783
	)	
vs.	)	Transcript of:
	)	
ROBERT KELTON BERRY,	)	JURY TRIAL
	)	VOLUME I
Defendant.	)	

**FILED DISTRICT COURT**  
Third Judicial District

MAY - 5 2004

By Bn SALT LAKE COUNTY  
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BEFORE THE HONORABLE STEPHEN L. ROTH

3636 Constitution Blvd.  
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REPORTED BY: BRAD YOUNG  
238-7531

**2004042-CA**  
000266



1           A     Yeah.

2           Q     That you said was from Robert Berry and his brother?

3           A     Yeah.

4           Q     Then do you remember showing them a cigarette butt?

5           A     Yes.

6           Q     And you said that's what Robert had smoked?

7           A     I am not sure who I said smoked it.

8           Q     But you may have said that to the cops?

9           A     I remember saying the cigarette, there was a  
10 cigarette. I think I said one of them smoked or something like  
11 that.

12                     Sorry.

13           THE COURT: Are you having a little trouble hearing?

14           JUROR: (Mr. Ryan) No, I need to talk to you, Judge,  
15 and the prosecutor. Or I can tell the bailiff.

16           THE COURT: No, let's hold on at this point. Let's  
17 take a break, and we will have the jury taken out, and then you  
18 can speak briefly to the bailiff. Why don't you write down  
19 what you want me to know, and give it to the bailiff, and he  
20 will bring it in to me. All right? Let's have the jury go  
21 out. If you will do that without the other jurors seeing what  
22 you are writing.

23                     (A brief pause in the proceedings.)

24           THE COURT: Okay. I am going to ask the other people  
25 in the courtroom to leave for just a minute while we discuss

1 this issue. The statement says, "The lady in the audience is  
2 prompting the witness with head shakes the last ten minutes."  
3 I haven't been observing anybody in the audience, so I can't  
4 confirm that. Has anybody else been watching anybody in the  
5 audience and noticed anything?

6 MS. GUSTIN-FURGIS: I haven't noticed anything. And  
7 that's always my concern when we get other people in the  
8 courtroom. I just wish the State would make me a decent offer  
9 in this case, and we could end it.

10 THE COURT: Well, at this point, please have the  
11 victim coordinator and the mother come in. Okay. What the  
12 juror has said is, "The lady in the audience is prompting the  
13 witness with head shakes for the last ten minutes."

14 THE MOTHER: I wasn't.

15 THE COURT: Pardon?

16 THE MOTHER: I wasn't.

17 THE COURT: Were you?

18 THE WITNESS COORDINATOR: No, sir.

19 THE COURT: Were you observing -- who are you, ma'am?

20 THE MOTHER: I am his mother, Brandan's mother.

21 THE COURT: Were you observing her at all?

22 THE MOTHER: What?

23 THE COURT: I am talking to the witness coordinator.

24 THE WITNESS COORDINATOR: No, I am sorry, I wasn't.

25 I was watching the victim, your Honor.

1 THE COURT: Ms. Peters?

2 MS. PETERS: I am not sure, because we weren't  
3 looking back there. I think that might not even be relevant.  
4 It is relevant that that's what the juror feels he saw. But I  
5 am not sure what was happening behind me. They might not even  
6 realize they had done it.

7 THE COURT: Were you consciously prompting the  
8 witness?

9 THE MOTHER: I don't -- I wasn't there. I don't know  
10 what happened or how it happened.

11 THE COURT: I am going to ask at this point that you  
12 leave here. I am not sure what happened here. But I don't  
13 believe that you should be in the audience at this point,  
14 because an issue has been raised. I am not making any  
15 accusations at all. But I want to make sure this trial goes on  
16 with as little problem as can be possible.

17 So we will call the jury back in, and we will proceed  
18 at this point.

19 MS. GUSTIN-FURGIS: Your Honor, can we ask them about  
20 that? Because that's a concern to me, as to what the other  
21 jurors saw or didn't see.

22 THE COURT: What do you suggest?

23 MS. PETERS: Rather than talking to all of the  
24 jurors, it didn't seem like all the jurors had a problem, if we  
25 are so inclined to speak to the jury, maybe speak to that one

1 specific juror.

2 MS. GUSTIN-FURGIS: I think at this point, your  
3 Honor, I have a right to mention what happened in the  
4 courtroom, and it appeared that someone was prompting Brandan.  
5 I think I have a right to say that in the courtroom.

6 THE COURT: Well, I am not sure you do at this point.  
7 That's your position. I understand that that's your position.

8 MS. GUSTIN-FURGIS: Because it was his observation.  
9 So I don't know if the rest of the jurors saw it or not. But I  
10 think I have a right to comment on that. Because I don't know  
11 what they are going to be talking about.

12 THE COURT: I am not going to make a juror a witness  
13 here. That's just not going to happen. So you can't comment  
14 on anything that a juror told us that he saw, at this point.  
15 That's my ruling, and I know you take exception to it. That's  
16 on the record.

17 MS. GUSTIN-FURGIS: Are we going to ask the other  
18 jurors about anything?

19 THE COURT: Well, that's a question. It appears to  
20 me that it is appropriate -- I am concerned about going further  
21 into this than we have at this point. We have gotten an  
22 indication from one of the jurors that he perceived something  
23 which he understood as being prompting of a witness. Given  
24 that, one of the jurors perceived that, we don't know how many  
25 others did, I think we have two options that I am willing to

1 consider at this point. One is to talk to that juror and tell  
2 him that he is not to consider anything done by any audience  
3 member as being germane, in terms of testimony; and that the  
4 jurors are to listen only to the testimony, and not take  
5 inferences from any gesture or facial expression that an  
6 attorney, party or audience member may make.

7 MS. GUSTIN-FURGIS: It would be my preference just to  
8 ask them if they noticed anything. They may not. And then  
9 just do a general instruction that they are not to take that  
10 into consideration. And I think that would cure it.

11 THE COURT: All right.

12 MR. NEILL: Your Honor, we would hate to ask all of  
13 the jurors. Obviously, none of us recognized or noticed it.

14 THE COURT: Well, obviously, you didn't.

15 MR. NEILL: And, I don't know, I have been paying  
16 attention to the jury a bit. They seem to be going back from  
17 the witness and the person asking the question. I hate to make  
18 it a bigger issue than it is with that potential -- with that  
19 single juror.

20 MS. GUSTIN-FURGIS: The problem is we don't know if  
21 it is just a single juror issue, or if the rest of them noticed  
22 it, too. It is in their direct line of sight that they would  
23 see her. I am concerned about that, if the rest of them saw  
24 that. We can just ask them. If they say no, then we will just  
25 proceed with the jury instructions.

1 MR. NEILL: Your Honor, if I could respond, we  
2 believe it would pretty much taint the jury. That juror has,  
3 as he will be instructed, is to determine the credibility of a  
4 witness. If he observed something which he thinks attacks that  
5 credibility, that's his prerogative. But, as far as whether  
6 the other jurors -- I think it goes to the credibility of the  
7 witness and the weight of the evidence.

8 THE COURT: Mr. Neill, the concern I have is that we  
9 have had one juror who says he has observed such a thing.  
10 There certainly is the issue raised about whether other jurors  
11 observed such a thing, as well. It appears to me I am going to  
12 have to give some kind of an instruction to the jury as a  
13 whole, that they are to pay attention to the testimony, only;  
14 and gestures or any indication of agreement or disagreement or  
15 gestures from audience members, lawyers or anyone else is not  
16 evidence. It is not to be taken into consideration by them.

17 I am not inclined to further emphasize the process by  
18 going through and talking to individual jurors, especially when  
19 I believe that the issue can be cured with an instruction. So  
20 I think we can call the jury in here, I will give them an  
21 instruction, and the instruction will be -- give me a minute  
22 here, and I will write something out, and I will tell you what  
23 it is going to be, so you will understand what it is going to  
24 be.

25 (A brief pause in the proceedings.)

1           THE COURT: Okay, "Jurors are to accept as evidence  
2 and rely on only testimony and other evidence presented in  
3 court. They may not consider gestures, facial expressions, or  
4 any other demonstration by lawyers, parties, or other persons  
5 present in the courtroom."

6           MS. GUSTIN-FURGIS: I would just ask that it be  
7 "other persons present in the courtroom." I think by putting  
8 "lawyers" first, it sounds like the lawyers were making some  
9 gestures.

10          THE COURT: Okay, I will eliminate "lawyers" and  
11 "parties" from that. "Anyone present in the courtroom, other  
12 than the witness."

13          MS. GUSTIN-FURGIS: Well, but the only problem with  
14 this, your Honor, is that you are telling the juror to  
15 disregard what he saw, and he can't give any weight to what she  
16 was saying.

17          THE COURT: I am going to tell you what you can do on  
18 this. You can question the witness about whether he saw any  
19 gestures from anybody in the courtroom.

20          MS. GUSTIN-FURGIS: Okay. He will say no.

21          THE COURT: It seems to me that is the fairest way to  
22 deal with it. The issue here really is both the effect of this  
23 alleged activity on the witness -- we don't know whether it  
24 happened or not -- and on the juror. And I think that it  
25 can -- that you can deal with that issue in that way.

1 MS. GUSTIN-FURGIS: Why don't we just forget the  
2 instruction, and that will just be my question.

3 THE COURT: You can cross examine on that issue, and  
4 it resolves, in my view, the problem of trying to shape an  
5 instruction that would avoid the possible pitfalls.

6 MR. NEILL: Your Honor, could we have the  
7 instruction, as well?

8 THE COURT: I am not going to give it at this point.  
9 If we need to give it at the end of the evidence, then I will  
10 do that. If you can tell me a way to do it, that can avoid  
11 anything -- for example, I believe witnesses can certainly look  
12 at a party, and observe his reactions to things. That's  
13 something that's normally done, and you don't tell them they  
14 can't do. Certainly, those kinds of things can be  
15 objectionable. I guess I will recover that. I think it  
16 probably is objectionable for a party to react to testimony.  
17 If someone raises an objection, I would have to tell the party  
18 not to react to the testimony, because in that way the party is  
19 testifying through gestures or expressions without being under  
20 oath and on the stand.

21 The same thing for attorneys. Attorneys can't make  
22 gestures, can't make expressions. I know people do this, and  
23 it is the issue of when it becomes objectionable. People in an  
24 audience will do that, as well. It happens in trials. In my  
25 view, it is not appropriate for anyone to be doing that in a



1 courtroom.

2           So I am willing to do that. It seems to me I can do  
3 it without suggesting that they are not to -- that they are to  
4 accept -- the jurors are to accept as evidence and rely on in  
5 their deliberations only testimony or other evidence presented  
6 in court. They may not consider gestures, facial expressions,  
7 or other demonstrations by anyone else present in the  
8 courtroom. Okay? And then I will allow you --

9           MS. GUSTIN-FURGIS: So you are going to give that?

10          THE COURT: I am going to give that.

11          MS. GUSTIN-FURGIS: Because the only concern is I  
12 think this juror should be able to consider that. I don't  
13 think he should be instructed to disregard what he saw as  
14 prompting.

15          THE COURT: Well, I agree with you to a certain  
16 extent. What I have stated, I believe to be the law. He can't  
17 rely on her saying anything for the truth of anything else.  
18 What I am going to allow you to do is to cross examine this  
19 witness in a -- I will allow you to cross examine the witness,  
20 subject to objection, about whether he was prompted by anybody  
21 in the courtroom. And that seems to me to go to the issue you  
22 have raised about whether his testimony was affected. I don't  
23 think he can rely on anything she did there. She is not a  
24 witness, at least not at this point, and certainly not under  
25 these circumstances. That's what I am going to do. If there

1 are any other objections to this, other than what I have heard  
2 at this point.

3 MR. NEILL: No, your Honor.

4 THE COURT: Let's bring the jurors back in, then.  
5 Before you bring the jury in, close the door just for one  
6 second. I didn't see what went on here. We have had this  
7 allegation. I don't know what happened with her. But I  
8 believe, to make sure that there is no hint of any further  
9 problem, that she should not be in the courtroom. I have asked  
10 her a pointed question. I am not making accusations about  
11 that. You understand what the process is here.

12 MS. PETERS: Should we ask both of them to remain  
13 outside, and then just have Brandan come in?

14 THE COURT: Yes.

15 (A brief pause in the proceedings.)

16 THE COURT: We are ready to have the jury in.

17 (The jury returned to the courtroom.)

18 THE COURT: Okay. Thank you. We are going to  
19 proceed now with cross examination, where we left off. Let me  
20 give you an instruction in between here. The jurors are not to  
21 accept as evidence or rely on in their deliberations -- excuse  
22 me. Let me start again. Jurors are to accept as evidence and  
23 rely on in their deliberations only testimony and other  
24 evidence presented and accepted in court. They may not  
25 consider gestures, facial expressions, or any other

1 demonstration by any other person present in the courtroom.

2 And we will now return to cross examination,

3 Ms. Gustin-Furgis.

4 Q (By Ms. Gustin-Furgis) Brandan, before we just took a  
5 break, there were two other people in the courtroom; is that  
6 correct?

7 A Yes.

8 Q And now they are not here anymore?

9 A No.

10 Q When I was asking you questions about this case, did  
11 you see anybody make gestures towards you?

12 A No.

13 Q You didn't see anybody prompting you to say a certain  
14 answer in a certain way?

15 A What's prompting? Telling me to say something?

16 Q Yes.

17 A No.

18 Q Anybody nodding?

19 A No.

20 Q Trying to alter your testimony?

21 A I was looking at you.

22 Q All right, well, I will just return. You stated that  
23 Karl walked you to the corner and knelt you down; is that  
24 correct?

25 A Yeah.

# Addendum C

**H**

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.  
STATE of Utah, Plaintiff and Appellee,  
v.  
Jacob Ross HALE, Defendant and Appellant.  
No. 990939-CA.

Nov. 2, 2000.

Catherine E. Lilly and Lisa J. Remal, Salt Lake City, for appellant.

Jan Graham and Marian Decker, Salt Lake City, for appellee.

Before GREENWOOD, JACKSON, and BILLINGS, JJ.

MEMORANDUM DECISION (Not for Official Publication)

BILLINGS.

\*1 Defendant appeals his convictions for aggravated robbery and aggravated kidnapping.

First, Defendant argues the trial court erred in denying his motion for a mistrial because of juror contact with court personnel. "[A] rebuttable presumption of prejudice arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors which goes beyond mere incidental, unintended, and brief contact." *State v. Pike*, 712 P.2d 277, 280 (Utah 1985).

In this case, one member of the jury overheard a bailiff in the courthouse yell "they are guilty." The bailiff who made the comment was operating the metal detectors at the court's entrance and was not

assigned to the jury. When questioned by the trial court about the statement, the juror said that she was not sure who had made the remark, believed it was a joking comment, and did not understand it to pertain to any particular case. Further, the juror stated that it did not in any way interfere with her ability to be fair and impartial and she did not discuss it with any of the other jurors.

Given the "incidental, unintended, and brief" nature of the "contact," we do not think this is the type of contact which raises a presumption of prejudice. Certainly we cannot say that it had the "effect of breeding a sense of familiarity that could clearly affect the juror's judgment as to credibility." *Pike*, 712 P.2d at 281. Furthermore, given the "incidental, unintended, and brief" nature of the contact, there is no appearance of impropriety and thus no deleterious effect upon the judicial process that would violate *Pike*. We therefore conclude that the trial court did not abuse its discretion when it denied Defendant's motion for a mistrial.

Defendant next argues that the trial court erred in denying his motion to suppress an eyewitness identification. "The ultimate question to be determined is whether, under the totality of circumstances, the identification was reliable." *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991). In making this determination, the court must consider the following factors:

- (1) the opportunity of the witness to view the actor during the event;
- (2) the witness's degree of attention to the actor at the time of the event;
- (3) the witness's capacity to observe the event, including his or her physical and mental acuity;
- (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and
- (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly.

*Id.* (quoting *State v. Long*, 721 P.2d 483, 493

Not Reported in P.3d, 2000 WL 33244220 (Utah App.), 2000 UT App 297

(Cite as: 2000 WL 33244220 (Utah App.))

(Utah 1986)).

Defendant challenges the reliability of the identification under the first three factors, arguing that fear rendered the witness's perception unreliable and that his ability to see Defendant was obstructed. A comparison of the facts found by the trial court in this case with those upheld in *Ramirez* leads us to a different conclusion.

\*2 In *Ramirez*, the entire event occurred at night. *See id.* at 783. The length of time the witness viewed the defendant varied from seconds to a minute or longer from a distance of between ten to thirty feet. *See id.* at 782. The defendant wore a mask. *See id.* The witness perceived the defendant while the defendant threatened the witness with a gun and while the defendant's accomplice hit and threatened the witness with a pipe. *See id.*

In this case, the eyewitness, victim Mitchell Lewis, had over two hours within which to view Defendant's unmasked face at the park, riding in the backseat of the car, and in the ravine in Big Cottonwood Canyon. The eyewitness sat next to Defendant in the ravine for an hour. Although Defendant wore dark sunglasses, Lewis could see his face behind them and noted Defendant's unusual blinking pattern. The trial court found that although Lewis was frightened, he was both "deliberate" and "thoughtful" in his approach to the situation, as he concentrated on observing and remembering Defendant's face and intentionally engaged Defendant in conversation. Additionally, as we have previously held, "we do not think the victim's ordinary fear is sufficient to defeat this factor. Otherwise, no victim of a violent crime could ever meet this factor." *State v. Rivera*, 954 P.2d 225, 227 (Utah Ct.App.1998).

Defendant next argues that under the fourth factor the identification was neither spontaneous nor consistent. However, Lewis provided the police with an accurate description of Defendant on the day of the kidnaping and robbery. Thereafter, Lewis consistently identified Defendant: at a photo array ten days after the incident; at a lineup approximately one month later; and finally at trial.

While Defendant argues that Lewis originally omitted details of Defendant's description, the same bears on his credibility and does not render the identification inadmissible. *See State v. Mincy*, 838 P.2d 648, 658 (Utah Ct.App.1992).

Defendant further argues that under the fourth factor Lewis' identification was the product of impermissible suggestion. Defendant argues that because an officer told Lewis he had picked the right person out of the photo array, the subsequent lineup, where Lewis once again identified Defendant, was the product of impermissible suggestion. Again, a comparison with the facts upheld in *Ramirez* leads to a different conclusion.

In *Ramirez*, police informed the eyewitness they had a suspect fitting the description he had provided them. *See Ramirez*, 817 P.2d at 784. The identification took place on the street in the middle of the night. *See id.* The eyewitness viewed the defendant from the back seat of a police car while the defendant, a dark-complexioned Apache Indian, was the only suspect, had his hands cuffed to a chain link fence behind his back, and had the headlights of several police cars on him. *See id.*

Here, there was only a single comment made after the photo identification which was negated by a subsequent comment--that there was a possibility that the subject would not be in the lineup--before the lineup identification.

\*3 We conclude that under the totality of circumstances the eyewitness identification was sufficiently reliable. We therefore affirm.

GREENWOOD, P.J., and JACKSON, Associate P.J., concur.

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