

2004

## Utah v. Mazhar Tabesh : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	)	
	)	APPELLANTS' REPLY
Plaintiff/Appellee,	)	BRIEF
	)	
vs.	)	
	)	Case No. 20040358-CA
MAZHAR TABESH,	)	
	)	
Defendant/Appellant.	)	
	)	

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APPELLANT'S APPEAL FROM A CONVICTION ON ONE COUNT OF AGGRAVATED ARSON, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANNOTATED §76-6-103. SAID CONVICTION OCCURRED IN THE FOURTH JUDICIAL DISTRICT COURT, WASATCH COUNTY, STATE OF UTAH, THE HONORABLE JUDGE DONALD J. EYRE PRESIDING.

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**UTAH COURT OF APPEALS**  
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ORAL ARGUMENT REQUESTED

## TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	3
I.    DEFENDANT SUFFICIENTLY MARSHALED THE EVIDENCE ADDUCED AT TRIAL IN HIS OPENING BRIEF SUCH THAT THIS COURT SHOULD DECIDE THE MERITS OF THE ISSUE. ....	3
A. <i>The partial Statement relied upon by the State did not               constitute a concession as to the sufficiency of evidence</i> .....	3
B. <i>The evidence was sufficiently marshaled in Appellant's               opening brief</i> .....	6
II.    THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED A MOTION FOR NEW TRIAL WHERE THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT .....	11
III.   THE COURT IMPROPERLY PERMITTED EXPERT TESTIMONY REGARDING INCONCLUSIVE TESTING OF ACCELERANTS FOUND AT THE LODGE.. ....	13
CONCLUSION AND PRECISE RELIEF SOUGHT .....	16
CERTIFICATE OF SERVICE .....	17

## **TABLE OF AUTHORITIES**

### **PAGE**

#### **CASES CITED:**

<i>Chapman v. California</i> , 386 U.S. 18, 87 S. Ct. 824 (1967) .....	13, 14
<i>Kotteakos v. United States</i> , 328 U.S. 750 (1946) .....	14
<i>People v. Collins</i> , 438 P.2d 33 (Cal. 1968) .....	15
<i>State v. Bradley</i> , 57 P.3d 1142 (Utah App. 2002) .....	5
<i>State v. Bullock</i> , 791 P.2d 155 (Utah 1989) .....	13
<i>State v. Byrd</i> , 937 P.2d 532 (Utah App. 1997) .....	14
<i>State v. Genovesi</i> , 909 P.2d 916 (Utah App. 1995) .....	13
<i>State v. Heaps</i> , 999 P.2d 565 (Utah 2000) .....	5
<i>State v. Holgate</i> , 10 P.3d 346 (Utah 2000) .....	5, 6
<i>State v. Larsen</i> , 999 P.2d 1252 (Utah App. 2000) .....	7
<i>State v. Petree</i> , 659 P.2d 443 (Utah 1983) .....	6
<i>State v. Matsamas</i> , 808 P.2d 1048 (Utah 1991) .....	12
<i>State v. Tucker</i> , 96 P.3d 368 (Utah App. 2004) .....	5, 6
<i>State v. Workman</i> , 852 P.2d 981 (Utah 1993) .....	6
<i>State v. Johnson</i> , 821 P.2d 1150 (Utah 1991). ....	11, 12, 13

<i>State v. Rammel</i> , 721 P.2d 498 (Utah 1986) .....	15
<i>State v. Verde</i> , 770 P.2d 116 (Utah 1989) .....	13, 14
<i>State v. Villarreal</i> , 889 P.2d 419 (Utah 1995) .....	14
<i>United States v. Jefferson</i> , 925 F.2d 1242 (10th Cir. 1991) .....	14

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**SUMMARY OF THE ARGUMENT**

The State's primary argument regarding the sufficiency of evidence concerns the marshaling of facts in the instant case. The State argues that this issue should not be addressed where the facts were insufficiently marshaled. However, Appellant devoted fifteen pages of his opening brief to detailing the facts adduced at trial. This lengthy recitation was summarized in ten bullet-points in Appellant's argument. The summary in no

way served to vitiate the preceding full description of facts. As such, the facts were described in detail and were fully marshaled in the instant case.

The State's first argument regarding prosecutorial misconduct during closing arguments focuses on preservation. The State argues that this issue was not properly preserved. However, where the issue was fully raised, briefed and argued in a post-trial motion and where the trial court reached the merits of the issue rather than denying the motion on the basis of waiver, Utah case law is clear that appellate review of the issue's merits is appropriate.

Finally, in relation to the issue of improperly admitted scientific evidence, the State does not argue that no error occurred. Rather the State argues that any error was harmless. However, where the issue as to identity of the perpetrator was close and where juries routinely lend scientific evidence undue weight, the erroneous admission affected Appellant's substantial rights and was not harmless.

## ARGUMENT

### I. DEFENDANT SUFFICIENTLY MARSHALED THE EVIDENCE ADDUCED AT TRIAL IN HIS OPENING BRIEF SUCH THAT THIS COURT SHOULD DECIDE THE MERITS OF THE ISSUE.

Defendant argued in his initial brief that, while there may have been sufficient evidence to allow a jury to conclude that arson was involved, there was insufficient evidence to support the conclusion that Defendant committed the crime at issue. (Aplt. Br. At 25). In response to Appellant's argument in this regard, the State first argues that a partial sentence in Appellant's brief constituted a concession that the evidence was sufficient. The State next argues that Defendant insufficiently marshaled the evidence adduced at trial. There is no distinct argument offered that the evidence, when marshaled, was sufficient to sustain the jury's verdict. The arguments presented in the State's brief will be addressed in turn.

#### *A. The partial Statement relied upon by the State did not constitute a concession as to the sufficiency of evidence.*

The following statement was made in Appellant's opening brief:

Here, while much evidence was adduced suggesting that the fire was the result of arson, there was relatively little evidence indicating that Appellant committed the crime. A jury could readily infer that the fire was caused by arson due to the presence of accelerants, pour spots, and matches. However,



alone such does not give rise to the reasonable inference that Appellant committed the arson.

(Aplt. Br. at 25). The State argues that by stating “there was relatively little evidence indicating that Appellant committed the crime,” Appellant effectively conceded that there was sufficient evidence to sustain the jury’s verdict. (Aplee. Br. at 10). The State took one part of one sentence of Appellant’s brief out of context and then argues that the partial clause constituted a concession contradicting and, in a sense, nullifying the argument set forth in the brief. This misconstrues the statement upon which the State relies.

Appellant was conceding that there was evidence of arson. Given the presence of accelerants, burn patterns, pour spots, and matches, it was appropriate for Appellant to concede that the jury could infer that arson was involved. The statement quoted by the State was meant to appropriately narrow the issues for review. It in no way constituted, in itself, a description of the evidence adduced to tie Appellant to the arson. Seven pages of Appellant’s brief were devoted to the insufficiency argument. There was no concession regarding the sufficiency of the evidence indicating that Appellant committed the crime at issue.

Nonetheless, the State argues that the reference to some evidence in the aforementioned partial statement vitiates Appellant’s argument that insufficient evidence was

adduced at trial. The State relies upon *State v. Holgate*, 2000 UT 74, 10 P.3d 346, and *State v. Tucker*, 2004 UT App 217, 96 P.3d 368, to support this argument. However, the reliance on either case is misplaced.

In *Holgate*, the issue as to sufficiency was not preserved. In fact, the paragraph quoted in the State's brief was directly under the heading, "II. Plain Error." *Holgate*, 96 P.3d at 352 (Aplee. Br. at 10). The court explained that, as is generally the case, where the sufficiency issue was not preserved at trial, the defendant faced a more onerous burden on appeal. In the instant case, there is no argument that the sufficiency issue was not preserved at trial. Therefore, *Holgate* is distinguished.

In *State v. Tucker*, this Court explained that "[T]o reverse a jury verdict, we must find that 'the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust.'" *Tucker*, 96 P.3d at 372-73 (quoting *State v. Bradley*, 2002 UT App 348, ¶¶ 52, 57 P.3d 1142 (quoting *State v. Heaps*, 2000 UT 5, ¶¶ 19, 999 P.2d 565)). Consequently, as both this Court and the Utah Supreme Court have recognized, even where the evidence was not "completely lacking" reversal may be appropriate where it "was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." *Id.* As such, the State's reliance on *Holgate* is likewise misplaced.

In determining whether a jury verdict should be set aside, the appropriate appellate standard of review for this Court is the same as that applied for determining whether an order arresting judgment is erroneous. *State v. Petree*, 659 P.2d 443, 444 (Utah 1983). “A trial court may arrest a jury verdict when the evidence, viewed in the light most favorable to the verdict, is so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element.” *Id.* See also *State v. Workman*, 852 P.2d 981, 984 (Utah 1993). This standard was reiterated in *Tucker* upon which the State relies. *Tucker*, at 372-3.

The State seizes upon one part of one sentence in Appellant’s brief to argue that he effectively conceded that there was sufficient evidence to sustain the jury’s verdict. (Aplee. Br. at 10). The statement was taken out of context and did not constitute any such concession. Moreover, the State’s reliance on *Holgate* and *Tucker* is misplaced. *Holgate* is factually and procedurally distinguished and, in *Tucker*, this Court reaffirmed the standard set forth by the Utah Supreme Court, which has been previously described.

***B. The evidence was sufficiently marshaled in Appellant’s opening brief.***

An Appellant challenging the sufficiency of the evidence to support a conviction "must marshal all of the evidence in support of the [verdict] and then demonstrate that the

evidence, including all reasonable inferences drawn therefrom, is insufficient to support the [verdict] against an attack." *State v. Larsen*, 999 P.2d 1252, 1255 (Utah App. 2000) (quotations and citation omitted). Consequently, the evidence against an appellant must be set forth in the appellant's brief. The argument must then focus on establishing the insufficiency of that evidence and the inferences reasonable drawn therefrom. There is no formulaic procedure relating to the format in which the facts must be marshaled. The facts must be set forth in the brief and the argument must address their sufficiency.

In the instant case, Appellant spent no less than fifteen pages describing the facts adduced at trial. (Aplt. Br. at 6-21). Then, in relation to the argument and under that heading, Appellant summarized the most pertinent of the fifteen pages in ten bullet points. (Aplt. Br. at 23-24). This brief summary of the most pertinent facts should not be deemed to vitiate the full explanation of facts to which Appellant devoted fifteen pages of his brief. The summary assisted the argument but, where fifteen pages were devoted to describing the evidence adduced at trial, it would have been unnecessarily cumulative and repetitive to again reiterate all of these facts in the argument section. When deciding whether the facts were sufficiently marshaled, this Court should look at the facts described from page six to page twenty-one in Appellant's brief as well as the two page summary thereof.

The State first argues that the status of the fire alarms in nearby rooms was inadequately addressed in Appellant's version of facts. (Aplee. Br. at 11). However, Appellant explained forthrightly that the fire alarm in the room in question as well as those in rooms 109, 110, and 111 were not operational because the batteries were not properly installed. Appellant also stated that the alarm in room 117 was knocked off of the wall. (Aplt. Br. at 11). Appellant also noted that responding personnel had to force their way into some rooms. *Id.* These facts were again summarized in one brief sentence under the argument section of the brief. (Aplt. Br. at 23-24). However, the summary of facts should not be deemed to detract from their earlier full explanation.

The State then argues that Appellant inadequately addressed the fact that his fingerprints were found in the room at issue. However, the presence of Appellant's fingerprints as well as Elisa Macken's testimony relating thereto were fully described. (Aplt. Br. at 14-15). Moreover, officers found a fingerprint on the telephone in room 112, but it did not match Mr. Tabesh, any of his family, or any of the investigating officers. (Vol. IV at 35). This fact was included in Appellant's brief but omitted from the State's analysis. The evidence relating to fingerprints was fully described and then summarized in point form. (Aplt. Br. at 24). These facts were fully marshaled.

Regarding the marshaling of facts concerning the motel's insurance and profitability (See. Aplee. Br. at 12) these facts were all fully described. John Michael Sullivan was the Insurance Agent for The Lodge. His testimony was reiterated in detail on pages nineteen through twenty-one. His testimony relating to insurance was described accurately and completely over these three pages and was then summarized in point form. These facts were marshaled. That evidence suggested that Mr. Tabesh often rewrote illegible information was similarly detailed in the opening brief. (Aplt. Br. at 13). The financial condition of the motel was fully described and then briefly summarized. The State's argument in this regard is misplaced.

The State additionally argues that Appellant failed to explain that his testimony as to how his fingerprints were found on certain items was contradicted by the testimony of government witnesses. (Aplee. Br. at 12). The State argues, "Appellant also fails to acknowledge that his innocent explanation for his fingerprints – that an officer told him to retrieve the receipt and that he had to move the taco bag in order to do so – was rebutted not only by the officer but by a firefighter who was also present." This statement is inaccurate. As stated in Appellant's opening brief:

Both Sergeant Winterton and Deputy Graves testified that they never gathered any evidence from room 112. (Vol. IIB at 121, 148). Officer Clegg, who arrived on the scene close to midnight, testified that he and Officer Allred

returned to room 112 some time after his arrival and collected the receipt that was located on the night stand. (Vol. III at 48). In addition, he testified that he put on a new pair of gloves and collected a taco shell bag that was located near the receipt and placed it in an evidence bag. (Vol. III at 49). However, this testimony was contrary to that of Mr. Tabesh, who indicated that, in addition to the receipts from the office, he was “certain” that Officer Graves had him go into the room and get the receipt off the night stand. (Vol. IV at 134).

(Aplt Br. at 10-11). The State’s argument that Appellant failed to “acknowledge” the foregoing facts is factually inaccurate and legally misplaced.

Appellant devoted fifteen page to fully describing the facts as they were developed at trial. It would have been unduly burdensome and unnecessarily repetitive to have fully reiterated these facts again under the argument section of the brief. Given the page limit on briefs, in many cases to do so may not be possible. The facts were fully marshaled and then summarized in ten bullet points. The State’s argument to the contrary is in error.

The state does not offer a separate and distinct argument that, if fully marshaled, the facts were sufficient to support the jury’s verdict. As such, Appellant’s argument in this regard will not be unnecessarily reiterated herein. Appellant relies on the argument as described in his opening brief.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED A MOTION FOR NEW TRIAL WHERE THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

In this regard, the State argues that the issue was not properly preserved for appellate review. The State argues that Appellant initially only reserved an objection during the prosecutor's closing argument and then failed to renew it after a sidebar was held. (Aplee. Br. at 20). Appellant first contends that the issue was properly preserved through the combination of objection, sidebar, and post-conviction motion. However, even if this Court determines that the preservation of the objection at issue was insufficient, the trial court addressed the merits of the issue in a post-trial motion such that the issue is appropriate for appellate review. *State v. Johnson*, 821 P.2d 1150 (Utah 1991).

In *Johnson*, trial counsel failed to preserve a *corpus delicti* issue. However, after the defendant was convicted, he retained new counsel who raised the issue in a post-trial motion. The State argued that the issue was not preserved such that it was inappropriate to reach its merits. Nonetheless, the trial court made its ruling denying the defendant's motion based on the merits of the argument rather than waiver. The Utah Supreme Court reasoned that, "[b]ecause the trial court addressed the corpus delicti issue fully and did not rely on waiver, we consider the issue on appeal, even though trial counsel failed to properly preserve it as



required by Utah Rule of Evidence 103(a)(1).” *Id.* at 1161 (citing *State v. Matsamas*, 808 P.2d 1048, 1053 (Utah 1991)).

Even if this Court were to accept the State’s argument that an objection was reserved but that this failed to preserve the issue, appellate review is appropriate where the trial court decided the merits of the issue raised herein. *Id.* The State has forthrightly admitted that the court denied Appellant’s post-trial motion on the merits and not based on the prosecutor’s waiver argument. (Aplee. Br. at 20). Consequently, *Johnson* is controlling and appellate review is appropriate. As the Utah Supreme Court reasoned, “One of the primary reasons for imposing waiver rules . . . is to assure that the trial court has the first opportunity to address a claim that it erred. If the trial court already has had that opportunity, the justification for rigid waiver requirements is weakened considerably.” *Id.* at 1161.

The State further argues that failing to find waiver in this case would encourage defendants not to object at trial and then preserve issues through post-trial motions. (Aplee. Br. at 20). The State made the same argument in *Johnson* and the Utah Supreme Court rejected the argument as follows:

Some might argue that our refusal to find waiver under these circumstances will give defense counsel a tactical advantage because they can withhold an objection at trial and, in the event of an adverse result, still challenge the admissibility of the evidence in a motion for a new trial, thus preserving the opportunity to appeal. A clear understanding of such a tactic points out its perilousness. For example, the trial court may refuse to consider the merits of the argument on the motion for new trial because

it may find the issue waived. If so, the issue can be considered on appeal only if the appellate court concludes that the admission of the evidence was plain error.

*Id.* (citing *State v. Verde*, 770 P.2d 116, 121 (Utah 1989); *State v. Bullock*, 791 P.2d 155, 158 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3270, 111 L.Ed.2d 780 (1990)).

Consequently, where the trial court decided the merits of the issue raised herein, it was properly preserved for appellate review.

### III. THE COURT IMPROPERLY PERMITTED EXPERT TESTIMONY REGARDING INCONCLUSIVE TESTING OF ACCELERANTS FOUND AT THE LODGE.

In this regard, the State does not argue that the testimony at issue was permissible. Nor does the State argue that counsel failed to preserve this issue before the trial court. Rather, the State argues that, if an error occurred, it did not amount to prejudicial error. (Applee. Br. at 27). However, in the instant case, where an error occurred, it affected Appellant's substantial rights and did not amount to harmless error.

This Court has addressed the issue as to the standard of review employed where an error affecting constitutional rights has occurred. In *State v. Genovesi*, 909 P.2d 916 (Utah Ct. App. 1995), the court adopted the standard set forth by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967). The standard set forth in both

of these cases is that, the court “cannot declare federal constitutional error harmless unless [it] sincerely believe[s] that it was harmless beyond a reasonable doubt.” *Genovesi*, 909 P.2d at 922.

The harmless error standard where constitutional violations are not at issue requires courts to review whether the claimed errors had substantial and injurious effect on the jury verdict, i.e., whether there is a reasonable likelihood that the outcome would have been different absent the errors. *See State v. Byrd*, 937 P.2d 532 (Utah Ct. App. 1997); *State v. Villarreal*, 889 P.2d 419, 425 (Utah 1995). A trial court is regarded as having committed a reversible, non-constitutional error in admitting evidence if a substantial right of the accused has been abridged.<sup>1</sup> A substantial right is affected by error that had a material effect or substantially swayed the deliberations of the jury. Error not affecting a substantial right is often characterized as harmless.

In the instant case, as fully detailed in Appellant’s opening brief, the evidence indicating that he committed the crime in question had many distinct weaknesses.<sup>2</sup> Where the evidence was insufficient to support the jury’s verdict, or where the case was at least

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<sup>1</sup> *See Kotteakos v. United States*, 328 U.S. 750, 760-65 (1946); *United States v. Jefferson*, 925 F.2d 1242, 1255 (10th Cir. 1991).

<sup>2</sup>Appellant makes no concession as to the sufficiency of the evidence at issue.

close on the issue of identity, the jury was more likely swayed by any errors committed by the trial court. In this case, even if the error is deemed to be non-constitutional, it affected Appellant's substantial rights such that it was not harmless.

Courts have long recognized that evidence presented in a scientific light carries an undeserved weight with juries. *People v. Collins*, 438 P.2d 33 (Cal. 1968); *cited with approval by State v. Rammel*, 721 P.2d 498 (Utah 1986). In the instant case, the evidence erroneously admitted was presented in a scientific light. Even though the expert testimony could not compare the accelerant found at The Lodge with that used in the fire, there was a propensity for a jury to place undue weight on the testimony due to its scientific nature. Moreover, as noted in Appellant's opening brief, the State repeatedly noted that the store-bought paint thinner was not excluded, the clear implication being that the accelerant found at The Lodge could have been used in the fire. Where, due to its scientific nature, the evidence was more likely to hold sway over the jury and where the State's case was at least weak as to identity, the error in the instant case should not be deemed harmless.


CONCLUSION AND PRECISE RELIEF SOUGHT

Based upon the foregoing, Appellant respectfully requests this Court to reverse his conviction.

RESPECTFULLY SUBMITTED this 4 day of May, 2005.

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By

  
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CERTIFICATE OF SERVICE

I hereby declare that I mailed/delivered two true and correct copies of the foregoing  
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