

2004

Utah v. Salvador Torres-Garcia : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
SALVADOR TORRES-GARCIA, : Case No. 20040815-CA
Defendant/Appellant. : APPELLANT IS INCARCERATED

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (2003), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Ann M. Boyden presiding.

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INTRODUCTION

First, this Court should reverse because the trial court erred by denying Torres-Garcia's motion to continue after the State failed to give notice of its expert, as required by Utah Code Ann. § 77-17-13 (2003). Second, this Court should reverse because the trial court abused its discretion by admitting the drug and weapon evidence in violation of rule 404(b) of the Utah Rules of Evidence. Third, this Court should reverse because the cumulative effect of the errors undermines confidence that Torres-Garcia had a fair trial.

ARGUMENT

**I THIS COURT SHOULD REVERSE BECAUSE THE TRIAL COURT
ERRED BY DENYING TORRES-GARCIA'S MOTION TO
CONTINUE AFTER THE STATE FAILED TO GIVE NOTICE OF
EXPERT TESTIMONY AS REQUIRED BY SECTION 77-17-13**

This Court should reverse the trial court's decision to admit Watson's expert testimony without granting Torres-Garcia a continuance because the trial court: (A) erred

by holding section 77-17-13(6) applied, and (B) abused its discretion by denying Torres-Garcia's request for a continuance when the State failed to provide notice of Watson's expert testimony under section 77-17-13(1) and the lack of notice prejudiced Torres-Garcia's case.

A. The Trial Court Erred By Concluding Section 77-17-13(6) Applied.

First, the meaning of subsection six's phrase "reasonable notice through general discovery," has not yet been determined by Utah's appellate courts, but can be discerned from "read[ing] the plain language of the statute as a whole." State Farm Fire & Casualty Co. v. Sundance Development Corp., 2003 UT App 367, ¶4, 78 P.3d 995. Section 77-17-13 was enacted to ensure defendants receive enough time and information "to adequately prepare to meet adverse expert testimony." State v. Arellano, 964 P.2d 1167, 1170 (Utah Ct. App. 1998). Subsection six was not added to section 77-17-13 to exempt the State from providing notice of its State-employed expert witnesses. Rep. K. Bryson, sponsor, speaking on floor of Utah House of Representatives, H.B. 238, 55th Leg., Day 40, February 28, 2003 (Tape 2, Counter 0839) (explaining that by enacting subsection six, Utah Legislature intended to excuse State from subsection one's formal notice requirements only where "general discovery provided by the state gives notice that the expert may be used"). Instead, it was added to excuse the State from complying with subsection one's formal notice requirements if the State has already put the defendant "on reasonable notice through general discovery that the expert may be called as a witness at trial." Utah Code Ann. § 77-17-13(6). Thus, reasonable notice through general discovery under subsection six, like formal notice under subsection one, is notice that

gives the defendant enough time and information “to adequately prepare to meet” the adverse expert testimony. Arellano, 964 P.2d at 1170.

Specifically, subsection six might not require the State to formally list the expert’s name, address, qualifications, and substance of testimony, as subsection one does. See Aple. Br. at 13-14. It does, however, require the State to ensure similar information is included in its general discovery. See Utah Code Ann. § 77-17-13(6); Arellano, 964 P.2d at 1170. Moreover, by requiring such information to be disclosed during general discovery, subsection six ensures the defendant will receive the information early in the case, just as he would have under subsection one. See Utah R. Crim. P. 16(b) (requiring State to provide general discovery “as soon as practicable following the filing of charges and before the defendant is required to plead”). To hold otherwise, would contradict the purpose of section 77-17-13 and leave defendants without the notice necessary to adequately prepare to meet State-employed expert witnesses. See State v. Tolano, 2001 UT App 37, ¶12, 19 P.3d 400 (explaining notice under section 77-17-13 gives defendant opportunity to examine testing procedures, hire own expert, examine resumes, and possibly impugn qualifications); Arellano, 964 P.2d at 1170.

In this case, the State did not provide reasonable notice through general discovery of its intent to call Watson as an expert witness. The State did not provide Watson’s name or notice of Watson’s expert testimony in any of the information it gave Torres-Garcia during general discovery. R. 256:11. Instead, it attempted but failed to comply with the formal notice requirements of subsection one. R. 60-62. Accordingly, Torres-Garcia did not receive any notice of Watson’s testimony until five days before trial when

the State mentioned Watson's name on a witness list and in a motion hearing. R. 255:4-5, 16; 256:9-10. Further, he did not know he needed to prepare to meet Watson's testimony until the first day of trial when the trial court, based on the State's motion to reconsider under subsection six, changed its previous ruling and permitted the State to call Watson without a continuance. R. 256:14-16. As recognized by the trial court, notice provided the day of trial, or even five days before trial, is not sufficient notice to satisfy the formal notice requirements of subsection one because it does not allow the defendant enough time to adequately prepare to meet the expert testimony. See State v. Begishe, 937 P.2d 527, 528-31 (Utah Ct. App. 1997) (holding trial court erred by denying continuance where notice was given first day of trial and allowed defendant two evenings to prepare, because defendant was forced to find "expert hastily," "did not even have time to conduct additional testing," and was prevented "from formulating a trial strategy best calculated to address the totality of the State's case"). For similar reasons, such short notice of expert testimony does not satisfy the reasonable notice through general discovery requirement of subsection six. See id.

Second, determining whether the State complied with section 77-17-13 requires the trial court to make two rulings: (1) whether the state "substantially compl[ied]" with the statute and whether a continuance is necessary to "prevent substantial prejudice," and (2) whether the State's "failure to comply" was "the result of bad faith." Utah Code Ann. § 77-17-13(4). In this case, the trial court's statement that the State had "submitted notice of the expert testimony . . . in a timely fashion," R. 255:14, was not a finding that the State had substantially complied with the statute and a continuance was not necessary

to prevent substantial prejudice. See Aple. Br. at 15. Instead, it was a ruling that the State's failure to comply with the statute was not the result of bad faith. R. 255:14. In whole, the trial court said:

I do agree with Mr. Mack's assessment that there is not bad faith in this. In fact, the State has in fact submitted notice of the expert testimony, it was done in a timely fashion, there were no specific reports to attach so that they could not comply with that and they have stated a statement of what Mr. Watson's testimony would be and that he would be called to testify concerning drug trafficking.

Id. The trial court then went on to rule a continuance was necessary because Torres-Garcia did not receive notice of Watson's testimony until the motion hearing held five days before trial and that notice did not provide Torres-Garcia sufficient time and information to allow him to "counter [Watson's] expert testimony, whether that's through testimony of [his] own witnesses . . . , or a scientific reliability argument." Id. at 16. The trial court only later changed its ruling that a continuance was necessary because it misinterpreted subsection six's reasonable notice requirement. R. 256:14-16. Thus, because the trial court did not make a finding that the State had substantially complied with subsection one's formal notice requirements, Torres-Garcia was not required to challenge such a finding or marshal the evidence in support of such a finding. See State v. Widdison, 2001 UT 60, ¶60, 28 P.3d 1278 (holding duty to marshal attaches when defendant is seeking to "demonstrate that a finding of fact is clearly erroneous"); R. 255:14-16; Aple. Br. at 15, 17.

Third, Torres-Garcia did not argue below and does not argue now that the State's failure to comply with subsection one's formal notice requirements was the result of bad

faith. R. 255:4-5, 10-11; Aplt. Br. at 20-33. Thus, his statements below that he believed the State did not act in bad faith in failing to comply with subsection one's notice requirements are not concessions of his argument or invited error. Aple. Br. at 16; State v. Bloomfield, 2003 UT App 3, ¶25, 63 P.3d 110 ("Invited error may exist when 'defendant's counsel consciously chose not to object and "affirmatively led the trial court to believe that there was nothing wrong with the instruction.'"" (citations omitted)).

Instead, Torres-Garcia argued below and continues to argue now that he "didn't receive any notice" of Watson's potential testimony until five days before trial when Watson's "name was mentioned in conjunction with [his] motion in limine" and he could not "prepare to meet this expert or consider obtaining [his] own expert to counter their expert when . . . the requirements of . . . 77-17-13(1)(b)[] have not . . . been completely followed." R. 255:4-5; 256:11. Thus, Torres-Garcia's argument is properly preserved for appeal because he gave the trial court "an opportunity to address a claimed error and, if appropriate, correct it," and he did not "forego making an objection with the strategy of enhanc[ing] [his] chances of acquittal." State v. Holgate, 2000 UT 74, ¶11, 10 P.3d 346 (quotations and citations omitted) (alterations in original); see Hart v. Salt Lake County Comm'n, 945 P.2d 125, 129 (Utah Ct. App. 1997) (holding issue is properly preserved if ""it is submitted to the trial court, and the court is afforded an opportunity to rule on the issue"" (citations omitted)); Aple. Br. at 15-16.

The only support for Torres-Garcia's argument that was not specifically discussed and ruled on below was the fact that the certificate of delivery attached to the State's notice of expert testimony says notice was not served on Torres-Garcia, but on another

attorney not representing Torres-Garcia. R. 60-62. The certificate of delivery, however, is not a separate argument that required separate preservation. Cf. State v. Valenzuela, 2001 UT App 332, ¶25 n. 4, 37 P.3d 260 (addressing identity issue even though not specifically preserved because defendant preserved probable cause issue and identity included in probable cause issue). Indeed, such preservation would have been difficult since the problem on appeal is that Torres-Garcia never received the notice or accompanying certificate of delivery. R. 255:4-5, 16; 256:9-11. Instead, the faulty certificate of delivery, which is located in the record before this Court, simply provides further support for defense counsel's argument below that the State did not provide notice of its expert testimony and the trial court's original ruling that a continuance was necessary. Id.; R. 60-62.¹

B. The Trial Court Abused Its Discretion By Denying Torres-Garcia's Request For a Continuance Under Subsection One.

Torres-Garcia was substantially prejudiced when the trial court abused its discretion by denying him a continuance. Utah Code Ann. § 77-17-13(4)(a); Aplt. Br. at 31-33. First, as explained above, the trial court never found that the State complied with subsection one by successfully serving notice of Watson's expert testimony on Torres-Garcia. See supra at Part I.A; R. 255:16. Instead, the trial court held a continuance was necessary because Torres-Garcia did not receive notice of Watson's expert testimony

¹ As explained above, the faulty certificate of delivery is merely support for Torres-Garcia's argument that a continuance was necessary because the State did not provide notice of its expert testimony. If this Court disagrees, however, it should still reverse because, as argued in Torres-Garcia's opening brief, the trial court's error was plain. See Aplt. Br. at 29 n.1.

until the motion hearing held five days before trial and that notice did not provide Torres-Garcia sufficient time and information to allow him to “counter [Watson’s] expert testimony, whether that’s through testimony of [his] own witnesses . . . , or a scientific reliability argument.” R. 255:14-16. This holding is substantiated by Torres-Garcia’s counsel’s repeated statements that he had not received the State’s notice of expert testimony and the fact that the certificate of delivery indicates the notice of expert testimony was not sent to Torres-Garcia’s counsel. R. 60-62; 255:4-5; 256:9-11. Thus, Torres-Garcia’s inability to prepare to meet Watson’s expert testimony was the result of the State’s failure to provide notice of its expert testimony in time for Torres-Garcia to adequately prepare to meet the expert testimony. See Tolano, 2001 UT App 37 at ¶13; Begishe, 937 P.2d at 530; Aple. Br. at 21.

Second, the State’s mention of Watson’s name and general description of his expertise five days before trial did not provide Torres-Garcia sufficient time and information to allow him to adequately prepare to meet the expert testimony. R. 254:27-28; see Arellano, 964 P.2d at 1171 (holding notice of expert testimony provided “five days before trial” did not allow defendant enough time to “prepare to challenge [State expert’s] testimony on cross-examination,” “consult with his own expert,” and “incorporate any new information into the defense strategy”); Aple. Br. at 21-22. This is especially true in this case because the trial court originally ruled a continuance was necessary and the State agreed not to call Watson to testify. R. 255:16. Thus, Torres-Garcia did not know he needed to prepare to meet Watson’s testimony until the first day of trial, when the trial court changed its ruling based on its misinterpretation of

subsection six's notice requirements. R. 256:14-16; Begishe, 937 P.2d at 528, 532 (reversing where State gave notice of expert but did not give notice of new test expert would testify about until first day of trial); State v. Harshman, 658 P.2d 1173, 1176 (Or. Ct. App. 1983) (holding "effective administration of justice requires that discoverable evidence be provided much sooner than 'moments' before trial").

Third, "testimony of an expert at a preliminary hearing . . . constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing." Utah Code Ann. § 77-17-13(5)(a). For this subsection to apply, however, notice of the expert testimony must be witness specific. See State v. Rothlisberger, 2004 UT App 226, ¶30, 95 P.3d 1193 (holding section 77-17-13 "clearly contemplates that the opposing party will have the opportunity to prepare for that expert's testimony in a witness-specific fashion"), cert. granted, 106 P.3d 743 (Utah 2004). In this case, the State did not call any expert witness at the preliminary hearing, let alone Watson, and did not make any reference to Watson's possible testimony. R. 253. Thus, the preliminary hearing did not put Torres-Garcia on notice that he should prepare to meet Watson's expert testimony. See Rothlisberger, 2004 UT App 226 at ¶31 (holding, in case where State called different witnesses at preliminary hearing and trial to offer expert testimony, State "deprived [defendant] of the notice that he would need to prepare a witness-specific response to that testimony"); Aple. Br. at 22.

Fourth, expert testimony is testimony about "scientific, technical, or other specialized knowledge" and must be provided by "a witness qualified as an expert by

knowledge, skill, experience, training, or education.” Utah R. Evid. 702. Because expert testimony is composed of specialized knowledge, the Legislature enacted section 77-17-13 to ensure that defendants have enough information and time “to adequately prepare to meet adverse expert testimony.” Arellano, 964 P.2d at 1170. Adequate preparation includes preparing to “challenge” expert testimony, planning “for effective cross-examination,” consulting “with [the defendant’s] own expert,” obtaining “rebuttal testimony,” and, most important, incorporating “any new information into the defense strategy.” Id. at 1169 n.2, 1171 (citations omitted). In this case, the State never challenged Watson’s designation as an expert witness. In fact, the State itself categorized Watson as an expert by filing notice of Watson’s expert testimony. R. 60-62. When he finally learned of Watson’s testimony, Torres-Garcia stated that he needed time to learn what Watson’s testimony would entail, consider “the necessity of having a Rimmasch hearing,” and “consult an expert of [his] own in some sort of rebuttal.” R. 255:15-16. The trial court, before changing its ruling based on its misinterpretation of subsection six’s notice requirements, agreed that Torres-Garcia needed a continuance to allow him time to “counter” Watson’s expert testimony, “whether that’s through testimony of their own witnesses . . . , or a scientific reliability argument.” R. 255:16. The State did not object to Torres-Garcia’s stated need for a continuance or the trial court’s finding that Torres-Garcia needed time to prepare to meet Watson’s expert testimony and to incorporate Watson’s testimony into his defense strategy. Id. Thus, the State cannot now argue on appeal that Torres-Garcia did not need time to prepare to meet Watson’s testimony. See State v. Topanotes, 2003 UT 30, ¶9, 76 P.3d 1159 (holding appellate court

may affirm based on alternative ground only if the alternative ground is apparent on the record and supported by the trial court's factual findings); Bailey v. Bayles, 2002 UT 58, ¶20, 52 P.3d 1158 (same); Aple. Br. at 22-23.

Fifth, as explained in his opening brief, the trial court's order denying a continuance substantially prejudiced Torres-Garcia because it prevented him "from formulating a trial strategy best calculated to address the totality of the State's case." Aplt. Br. at 31-33 (quoting Begishe, 937 P.2d at 531). In Begishe, the State failed to disclose part of its expert testimony. Begishe, 937 P.2d at 528. On appeal, this Court reversed because the State's failure to disclose the expert testimony led defense counsel to "believe that the prosecution had no physical evidence corroborating the allegations" and to pursue "tactics and strategies with this assumption in mind." Id. at 531. Specifically, defense counsel emphasized in her opening statement "that the State had no inculpatory physical evidence." Id. Then, because the expert was permitted to testify, defense counsel had to use her closing argument "to counter the physical evidence" and "argue[] alternative reasons for blood appearing." Id. "It is likely defense counsel's credibility in the eyes of the jury was greatly compromised by the prosecution's having introduced evidence of the blood test after she assured them the State had no physical evidence supporting the charge." Id.

Similarly, in this case, Torres-Garcia's counsel said during opening statements that he intended to discredit Irwin's identification by demonstrating the discrepancies in her testimony. R. 256:147-50. He then elicited these discrepancies through cross-examination and recorded them on a chart he displayed before the jury. R. 256:176-214;

258:250-61, 300-92, 407-425. Following Torres-Garcia's extensive cross-examination of the State's witnesses, Watson took the stand and resolved several of the discrepancies Torres-Garcia had highlighted in Irwin's testimony. R. 258:436-40. Whether Watson resolved every discrepancy is beside the point. See Aple. Br. at 22-23. The fact that an expert repeatedly dismissed the discrepancies that Torres-Garcia's counsel had called attention to and relied upon throughout trial, "greatly compromised" defense counsel's "credibility in the eyes of the jury." Begishe, 937 P.2d at 531; see Aplt. Br. at 31-33.

Specifically, Torres-Garcia highlighted Irwin's conflicting statements that Delgado-Cruz usually drove the gold Nissan and the shooter drove the gold Nissan after the shooting, but Delgado-Cruz was not the shooter. R. 256:176-214; 258:250-61, 300-92, 407-425. Torres-Garcia used these statements to suggest Irwin's identification was not reliable and Delgado-Cruz was in fact the shooter. R. 256:147-50 (defense counsel telling jury to pay careful attention to testimony about "different people going to different cars and a very important description of who left in which vehicle"); Aple. Br. at 23. Watson, however, resolved Irwin's contradictory statements, thereby discrediting Torres-Garcia's counsel in the eyes of the jury, by testifying drug dealers keep multiple cars and runners do not always use the same car. R. 258:436-40. Similarly, Torres-Garcia highlighted Irwin's inconsistent statements about whether Todd asked for money or drugs in exchange for the heroin, and her use of different names to identify the shooter. R. 256:176-214; 258:250-61, 300-92, 407-25. Again, Watson resolved these statements and discredited Torres-Garcia's counsel by testifying drug users use "monetary amounts to

represent the amount of drug they want,” and drug dealers use nicknames and change their nicknames “[e]very time they answer the phone.” R. 258:436-40.

Thus, a continuance was necessary to allow Torres-Garcia to interview Watson about his expert testimony, examine Watson’s testimony for scientific reliability and Watson for expert qualifications, prepare an effective cross-examination, consult other experts, obtain rebuttal testimony and, most important, incorporate what he learned into his defense strategy. R. 255:14-16; 258:434-40. This, at the very least, would have allowed Torres-Garcia to alter his trial strategy so as to avoid having his defense directly attacked by the State’s expert. Begishe, 937 P.2d at 531.

II THIS COURT SHOULD REVERSE BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING THE DRUG AND WEAPON EVIDENCE IN VIOLATION OF RULE 404(b) OF THE UTAH RULES OF EVIDENCE

First, the drug and weapon evidence was not offered for a proper, noncharacter purpose and was not relevant as required by rule 402. See Utah R. Evid. 404(b); Aplt. Br. at 34-38. As admitted by the State, the “only element at issue before the jury was the identity of Todd’s killer.” Aple. Br. at 29 (emphasis in original). This is because the shooter’s motive, opportunity, intent, preparation, plan, knowledge, and absence of mistake or accident were clear—Todd would not return the drugs so the shooter shot Todd to retrieve the drugs. R. 259:488-49, 500-24; Aplt. Br. at 36. Further, as admitted by the State, the prosecutor offered the drug and weapon evidence to show Torres-Garcia was “a drug dealer, like the shooter,” and “was willing to enforce his trade through violence, like the shooter.” Aple. Br. at 27-28. Using the drug and weapon evidence to

characterize Torres-Garcia as a dangerous drug dealer, however, did not help the jury identify him as the shooter. Aplt. Br. at 36-37. Nor did it increase the probability that Torres-Garcia was the shooter. Id. at 39-41. The drug and weapon evidence did not place Torres-Garcia at the scene of the crime, demonstrate a pattern of behavior that tended to link Torres-Garcia to the crime, or distinguish Torres-Garcia from any other possible shooter as the likely perpetrator. Id. Instead, it singled out Torres-Garcia as a drug dealer who shoots people who interfere with his business, thereby allowing the jury to infer his guilt in this case. Id.

Second, the drug and weapon evidence did not meet the requirements of rule 403. The first factor to consider when deciding whether evidence is admissible under rule 403 is “the strength of the evidence as to the commission of the other crime.” State v. Allen, 2005 UT 11, ¶24, 108 P.3d 730 (citation omitted). Under this factor, it does not matter whether the other crime evidence is “strongly indicative” of the State’s theory of the present case. Aple. Br. at 31. The question is whether the evidence is “strong” that the defendant “in fact” committed the other crime. Allen, 2005 UT 11 at ¶30. In this case, as explained in Torres-Garcia’s opening brief, the strength of the evidence as to the commission of the other crime was weak because Torres-Garcia had not yet been convicted of possessing the drug and weapon evidence and had a defense that the prosecutor could not prove constructive possession. R. 254:8-15; Aplt. Br. at 39.

The second factor to consider when deciding whether evidence is admissible under rule 403 is “the similarities between the crimes.” Allen, 2005 UT 11 at ¶24 (citation omitted). This factor is not met by alleging the charged crime was “motivated by” the

other crime. Aple. Br. at 32. Motivation is a factor to be considered when deciding whether other crime evidence was relevant and was offered for a proper, noncharacter purpose. See Utah R. Evid. 402, 404(b). Instead, this factor is met if the charged crime and the other crime share “significant and striking similarities.” State v. Nelson-Waggoner, 2000 UT 59, ¶29, 6 P.3d 1120; see Aplt. Br. at 39 (citing additional cases). Thus, this factor was not met in this case because, as admitted by the State, “the crimes of murder and drug distribution are not similar.” Aple. Br. at 32; see Aplt. Br. at 39-40.

Third, the State’s need for the other crime evidence was low and the efficacy of alternative proof was high. As discussed in Torres-Garcia’s opening brief, this case is not like State v. Decorso, 1999 UT 57, 993 P.2d 837. Aplt. Br. at 40; but see Aple. Br. at 32. In Decorso, the “other crimes evidence . . . was vital to the State’s case” because the defendant murdered the only witness and the only other evidence was a fingerprint. Decorso, 1999 UT 57 at ¶33. Whereas, in this case, the other crime evidence was not vital to the State’s case because the State had Irwin’s testimony identifying Torres-Garcia as the shooter and Delgado-Cruz’s corroborating testimony. In fact, the other crime evidence was not even helpful to the State’s case, except to impermissibly establish bad character, because the only issue at trial was identification and the drug and weapon evidence did not help establish identity. See supra at Part II; Aplt. Br. at 34-37, 40.

Fourth, the drug and weapon evidence suggested Torres-Garcia had a greater “proclivity for violence” or a more “significant criminal character” than the charged crime. State v. Bisner, 2001 UT 99, ¶59, 37 P.3d 1073 (citation omitted); Aplt. Br. at 40-41 (listing additional citations). The State admits it offered the drug and weapon

evidence to show Torres-Garcia was “a drug dealer” who “was willing to enforce his trade through violence.” Aple. Br. at 27-28. Thus, although the drug and weapon evidence did not help the jury to identify Torres-Garcia as the shooter in the charged case, it allowed the jury to infer Torres-Garcia’s guilt in this case because he was a drug dealer who collected weapons for the specific purpose of committing crimes like the charged crime. See Aplt. Br. at 34-37, 40-41. Accordingly, the drug and weapon evidence likely roused the jury to overmastering hostility by allowing it to conclude Torres-Garcia, even if he was not the shooter in this case, was deserving of prison because he collected weapons and used these weapons to kill people who interfered with his drug business. R. 259:487, 527-28, 538.

Fifth, the interval of time between the charged crime and the other crime in this case was six weeks. R. 258:291. This fact, however, is meaningless where the other rule 403 factors are not met. See State v. Webster, 2001 UT App 238, ¶¶35-37, 32 P.3d 976 (ignoring time factor where other rule 403 factors, especially similarity factor, were not met); Aplt. Br. at 38-41; supra at Part II.


III THIS COURT SHOULD REVERSE BECAUSE THE CUMULATIVE EFFECT OF THE TRIAL COURT’S ERRORS UNDERMINES CONFIDENCE THAT TORRES-GARCIA HAD A FAIR TRIAL

The State’s brief does not address Torres-Garcia’s argument that this Court should reverse because the cumulative effect of the trial court’s errors undermines confidence that Torres-Garcia had a fair trial. See Aple. Br. at 12-34. Thus, for the reasons stated in Torres-Garcia’s opening brief, this Court should reverse Torres-Garcia’s conviction under the cumulative-error doctrine. See Aplt. Br. at 47-49.

CONCLUSION

This Court should reverse Torres-Garcia's conviction because the trial court abused its discretion by denying Torres-Garcia's motion for a continuance and by admitting the drug and weapon evidence.

SUBMITTED this 2nd day of September, 2005.



LORI J. SEPP
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 2nd day of September, 2005.



LORI J. SEPPI

DELIVERED this _____ day of September, 2005.
