

1993

## Utah v. O'Brien : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Floyd W. Holm; Attorney for Appellant.

Julie George; Assistant Attorney General; Jan Graham; Attorney General; Attorneys for Appellee.

---

### Recommended Citation

Brief of Appellee, *Utah v. O'Brien*, No. 930459 (Utah Court of Appeals, 1993).

[https://digitalcommons.law.byu.edu/byu\\_ca1/5381](https://digitalcommons.law.byu.edu/byu_ca1/5381)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH COURT OF APPEALS

930459 CA

STATE OF UTAH, :  
Plaintiff/Appellee : Case No. 930459-CA  
v. : Priority No. 2  
SEAN MICHAEL O'BRIEN, :  
Defendant/Appellant :

BRIEF OF APPELLEE

-----  
APPEAL FROM CONVICTIONS OF FIVE COUNTS OF  
BURGLARY, THIRD DEGREE FELONIES, IN VIOLATION  
OF UTAH CODE ANN. § 76-6-202 (1990); FOUR  
COUNTS OF THEFT, CLASS B MISDEMEANORS, IN  
VIOLATION OF UTAH CODE ANN. § 76-6-404 (1990);  
AND FIVE COUNTS OF CRIMINAL MISCHIEF, CLASS C  
MISDEMEANORS, IN VIOLATION OF § 76-6-106  
(1992), IN THE FIFTH JUDICIAL DISTRICT COURT,  
IN AND FOR IRON COUNTY, STATE OF UTAH, THE  
HONORABLE J. PHILIP EVES, PRESIDING.

JULIE GEORGE (6231)  
Assistant Attorney General  
JAN GRAHAM (1231)  
Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1022

Attorneys for Appellee

FLOYD W. HOLM  
965 South Main, Suite 3  
P.O. Box 765  
Cedar City, Utah 84720  
Telephone: (801) 586-6532

Attorney for Appellant

**FILED**  
Utah Court of Appeals

**OCT 11 1994**

Marilyn M. Branch  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH,	:	
Plaintiff/Appellee	:	Case No. 930459-CA
v.	:	Priority No. 2
SEAN MICHAEL O'BRIEN,	:	
Defendant/Appellant	:	

---

BRIEF OF APPELLEE

- - - - -

APPEAL FROM CONVICTIONS OF FIVE COUNTS OF BURGLARY, THIRD DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (1990); FOUR COUNTS OF THEFT, CLASS B MISDEMEANORS, IN VIOLATION OF UTAH CODE ANN. § 76-6-404 (1990); AND FIVE COUNTS OF CRIMINAL MISCHIEF, CLASS C MISDEMEANORS, IN VIOLATION OF § 76-6-106 (1992), IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY, STATE OF UTAH, THE HONORABLE J. PHILIP EVES, PRESIDING.

JULIE GEORGE (6231)  
Assistant Attorney General  
JAN GRAHAM (1231)  
Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1022

Attorneys for Appellee

FLOYD W. HOLM  
965 South Main, Suite 3  
P.O. Box 765  
Cedar City, Utah 84720  
Telephone: (801) 586-6532

Attorney for Appellant

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES. . . . .	ii
JURISDICTION AND NATURE OF PROCEEDINGS. . . . .	1
STATEMENT OF ISSUES AND STANDARDS OF REVIEW . . . . .	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES . . . . .	2
STATEMENT OF THE CASE . . . . .	3
STATEMENT OF THE FACTS. . . . .	4
SUMMARY OF THE ARGUMENT . . . . .	6
ARGUMENT. . . . .	6
POINT I            BECAUSE DEFENDANT HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF HIS CLAIM THAT THE STATE HAS FAILED TO PROVE BY SUFFICIENT EVIDENCE DEFENDANT COMMITTED BURGLARY, THEFT AND CRIMINAL MISCHIEF, THIS COURT SHOULD REFUSE TO CONSIDER HIS CLAIM. . . .	6
POINT II           EVEN IF THIS COURT REACHES THE MERITS OF THE SUFFICIENCY CLAIM, DEFENDANT'S CONVICTION SHOULD BE AFFIRMED AS THE JURY'S VERDICT WAS SUPPORTED BY ABUNDANT EVIDENCE . . . . .	10
CONCLUSION. . . . .	17
ADDENDA	
Appellate Rule	
Jury Instructions	

## TABLE OF AUTHORITIES

### CASES CITED

	Page
<u>Brown v. State</u> , 816 P.2d 818 (Wyo. 1991) . . . . .	16
<u>Crookston v. Fire Ins. exchange</u> , 817 P.2d 789 (Utah 1991) . . . . .	2
<u>Saunders v. Sharp</u> , 806 P.2d 198 (Utah 1991) . . . . .	2
<u>State v. Aase</u> , 762 P.2d 1113 (Utah App. 1988) . . . . .	16
<u>State v. Chavez</u> , 840 P.2d 846 (Utah App. 1992), <u>cert. denied</u> , 857 P.2d 948 (Utah 1993) . . . . .	2
<u>State v. Ireand</u> , 773 P.2d 1375 (Utah 1989) . . . . .	2
<u>State v. Jiron</u> , No. 930640-CA (Utah App. Sept. 27, 1994) . . . . .	9
<u>State v. Johnson</u> , 774 P.2d 1141 (Utah 1989) . . . . .	2
<u>State v. Kinder</u> , 381 P.2d 82 (Utah 1963) . . . . .	16
<u>State v. Montes</u> , 804 P.2d 543 (Utah App. 1991). . . . .	16
<u>State v. Moore</u> , 802 P.2d 732 (Utah App. 1990) . . . . .	2
<u>State v. Pelton</u> , 801 P.2d 184 (Utah App. 1990) . . . . .	9
<u>State v. Petree</u> , 659 P.2d 443 (Utah 1983) . . . . .	2, 10
<u>State v. Pilling</u> , 875 P.2d 604 (Utah App. 1994) . . . . .	2, 7
<u>State v. Scheel</u> , 823 P.2d 470 (Utah App. 1991) . . . . .	9
<u>State v. Sherard</u> , 818 P.2d 554 (Utah App. 1991), <u>cert. denied</u> , 843 P.2d 516 (Utah 1992) . . . . .	2
<u>State v. Span</u> , 819 P.2d 329 (Utah 1991) . . . . .	10
<u>State v. Valdez</u> , 748 P.2d 1050 (Utah 1987) . . . . .	11, 17
<u>West Valley City v. Majestic Inv. Co.</u> , 818 P.2d 1311 (Utah App. 1991) . . . . .	7

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-6-106 (1992) . . . . .	1, 3, 5
Utah Code Ann. § 76-6-202 (1990). . . . .	1, 3
Utah Code Ann. § 76-6-404 (1990). . . . .	1, 3
Utah Code Ann. § 78-2a-3 (Supp. 1993) . . . . .	1

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH,	:	
Plaintiff/Appellee	:	Case No. 930459-CA
v.	:	Priority No. 2
SEAN MICHAEL O'BRIEN,	:	
Defendant/Appellant	:	

---

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions of five counts of burglary, third degree felonies in violation of Utah Code Ann. § 76-6-202 (1990); four counts of theft, class B misdemeanors, in violation of § 76-6-404 (1990) and five counts of criminal mischief, class C misdemeanors, in violation of § 76-6-106 (1992).

This Court has jurisdiction to hear the case pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF THE ISSUES AND STANDARDS OF APPELLATE REVIEW

There are two issues before this Court:

1) Did defendant properly marshal the evidence in support of the jury's guilty verdicts? Where defendant has failed to marshal the evidence in support of the jury's verdicts and then demonstrate that, even viewing such evidence in the light most favorable to the verdicts, the evidence is insufficient to support the verdicts, this Court may properly decline to review

defendant's sufficiency of the evidence claim. State v. Pilling, 875 P.2d 604, 607-8 (Utah App. 1994). See also Crookston v. Fire Ins. exchange, 817 P.2d 789, 799-800 (Utah 1991); Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991); State v. Chavez 840 P.2d 846, 848 (Utah App. 1992), cert. denied, 857 P.2d 948 (Utah 1993); State v. Moore, 802 P.2d 732, 738-39 (Utah App. 1990).

2) If defendant has met the marshaling requirement, was sufficient evidence introduced at the jury trial to prove defendant committed multiple counts of burglary, theft and criminal mischief? In reviewing defendant's convictions, this Court reviews all the evidence, and inferences from such evidence, in a light most favorable to the jury's verdicts. State v. Petree, 659 P.2d 443, 444 (Utah 1983); State v. Johnson, 774 P.2d 1141, 1147 (Utah 1989); State v. Sherard, 818 P.2d 554, 557 (Utah App. 1991), cert. denied, 843 P.2d 516 (Utah 1992). A jury verdict will only be reversed if the evidence "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt" that defendant committed the crimes. Johnson, 774 P.2d at 1147; State v. Ireand, 773 P.2d 1375, 1379 (Utah 1989); Petree, 659 P.2d at 444.

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant state and federal constitutional provisions are reproduced in the Addenda. Relevant state statutes are reproduced in the text of the brief. State rules of appellate procedure are reproduced in Addendum A.

### STATE STATUTES

#### **Utah Code Ann. § 76-6-202 Burglary (1990).**

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

#### **Utah Code Ann. § 76-6-404 Theft (1990).**

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

#### **Utah Code Ann. § 76-6-106 Criminal Mischief (1992).**

(1) A person commits criminal mischief if: . . .  
(c) he intentionally damages, defaces, or destroys the property of another. . .

### STATEMENT OF THE CASE

Defendant was charged in February of 1993, by amended information, with five counts of burglary, four counts of theft and five counts of criminal mischief (R. 29). The charges stemmed from a series of crimes involving five business locations in Cedar City (R. 26-9). Defendant was arraigned, pled not guilty to the charges and a one day jury trial was held in which defendant was found guilty of all counts (R. 36-7 & 66-9).

Defendant was sentenced to the Utah State Prison for zero to five (0-5) years, for each of the five burglary convictions, three of the five sentences to be served consecutively to the remaining two concurrent terms (R. 108-15). The trial judge stayed sentencing of the four theft and five criminal mischief convictions (R. 114-115).

Defendant filed a notice of appeal and then a motion to remand the case back to the trial court for determination of a

motion for new trial based on newly discovered evidence (R. 117 & Defendant's Motion for New Trial 1). Defendant alleged that State's witness, Steven A. Backus, had recanted his trial testimony which had implicated defendant in the burglaries (Def. Mt., Exhibit 1). This Court denied defendant's motion to remand the case to the trial court (Order, May 25, 1994), stating.

The case now proceeds in this Court with the sole issue for determination being a challenge to the jury verdict on the basis of sufficiency of the evidence (Appl. Br. 1).

#### STATEMENT OF THE FACTS

During the nighttime hours on the weekend of January 30, 1993, five businesses in Cedar City, Utah were burglarized with four of the five businesses having money and/or property stolen (R. 262-4).

The burglars entered the Fun and Games video arcade through the bathroom window by breaking the window open with large rocks and then stole the money in the cash register (R. 280-1). Zion Sun Floral was entered through a broken window, an unlocked filing cabinet had been pried open with hammers and money was stolen along with silk roses, of a type not known to be sold elsewhere in the town (R. 286-7 & 387-9).

Steve's Texaco was burglarized with entry gained through broken windows, an unlocked filing cabinet was pried open with a hammer, and cigarettes and money were stolen (R. 289-92).

Harding Glass shop was burglarized with entry gained through a broken window. No money was kept in the store and therefore,

none was stolen (R. 294-6). A freshly painted floor in the shop contained foot prints of the burglars (R. 294).

Tyner's Pet store was burglarized with entry gained through a window which was forced open, the cash register had been broken open and loose change was missing (no cash or checks were in the store at the time of the burglary) from the register (R. 299-303).

All five of the businesses were in close proximity of the Econo Lodge Motel, known as the Economy Apartments (R. 275-6). Police officers investigating the burglaries contacted two juveniles, Brian Tsosie and Todd Davenport, who confessed to the crimes (R. 261-273). Tsosie and Davenport implicated adults involved in the burglaries (R. 310-324 & 357-70). One of the adults implicated was defendant, Sean O'Brien (id.).

Four of the five stores were entered in a similar manner; however all of the businesses suffered property damage at the point of entry or break-in (R. 280-302). Steve's Texaco, Zion Sun Floral, Fun and Games video arcade and Harding Glass all had a window broken by rocks in order to gain entry (R. 264). Tyner's Pet Store had a small window forced open at the point of entry (R. 264). All of the stores, except one, had money stolen (R. 279-305).

Defendant denied participating in the burglaries and testified that he was asleep on Friday night and home alone on Saturday night and therefore, did not burglarize the stores (R. 397-410). However, in searching the apartment that defendant and

the other burglars lived in, the police found a dog chain taken from Tyner's Pet store the night of the burglary and a rose and figurines from Zion Sun Floral, also taken the night of the burglary (R. 316, 321, 361, 362, 364).

A jury found defendant guilty of five counts of burglary, five counts of criminal mischief and four counts of theft (R.435-40).

Specific facts elicited during direct and cross-examination of the State's witnesses will be discussed in detail, as they relate to the State's argument, in the body of this brief.

#### SUMMARY OF THE ARGUMENT

Defendant has failed to marshal the evidence that supports the jury's guilty verdicts. Instead, defendant merely reiterates the argument he made at trial, the very argument which the jury rejected. Therefore, this Court should refuse to review defendant's sufficiency of the evidence claim. Even if defendant had marshaled the evidence, the jury's verdicts render defendant's claim meritless as the guilty verdicts are supported by ample evidence.

#### ARGUMENT

##### POINT I

BECAUSE DEFENDANT HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF HIS CLAIM THAT THE STATE HAS FAILED TO PROVE BY SUFFICIENT EVIDENCE DEFENDANT COMMITTED BURGLARY, THEFT AND CRIMINAL MISCHIEF, THIS COURT SHOULD REFUSE TO CONSIDER HIS CLAIM.

Defendant's failure to comply with the marshaling requirement prevents further review of defendant's sufficiency of

the evidence claims. State v. Pilling, 875 P.2d 604, 607-8 (Utah App. 1994) ("In challenging the sufficiency of the evidence, defendant carries a heavy burden. Defendant must 'marshal all the evidence supporting the...verdict...and show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict.'") (citations omitted). In West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991), the marshaling requirement was explained in detail:

[T]he marshaling concept does not reflect a desire to merely have pertinent excerpts from the record readily available to a reviewing court. The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

Defendant alleges the State did not prove the elements of the burglaries. However, the two main witnesses for the State, Tsosie and Davenport, testified that defendant participated in all five of the burglaries, that entry was gained into four of the businesses by breaking the windows with rocks and boosting Todd Davenport through the holes, that the fifth business was entered by picking the lock on the back window, that a unique flower was taken from the floral shop, a dog chain was taken from the pet shop and such evidence was later found by police in the

defendant's apartment (R. 308-339 & 355-81). Although no finger prints were found, the State did try to match foot prints found in the glass shop with shoes of the defendant. However, Davenport testified that his mother, one of the burglars, insisted they throw away their shoes and buy new ones after the burglaries (R. 319). Although defendant and his mother threw their shoes away, defendant was unsure if anyone else did (R. 319).

Defendant's testimony was that he was asleep and home alone the nights in question and did not participate in the crimes (R. 400). On appeal defendant provides no justification for his allegations of insufficient evidence other than 1) the lack of finger prints or shoe print matches; 2) inconsistencies in the dates of the burglaries as testified to by Tsosie and Davenport and 3) the changed testimony of another witness, Steven Backus. Although defendant alleges Davenport admitted to lying, defendant fails to cite to the record in support of such an allegation (Appl. Br. 5). In fact, counsel refers to Davenport's answer which consisted of, "Yes. Not sure. Probably." When cross-examined at trial as to what was the correct answer, Davenport answered in the affirmative. Defense counsel stated, "So you were lying when--back at the preliminary hearing?" and Davenport answered, "I think I was," (R. 337). As Davenport did not previously answer "no," at the preliminary hearing, his affirmative answer in trial was not inconsistent with his earlier testimony.

Defendant has not shown how any of the testimony provided above is insufficient to support the verdicts, he merely states that there are inconsistencies in the witnesses' testimony and it is therefore it is "so inherently improbable that a reasonable person must have reasonably doubted." (Appl. Br. 5). Tsosie and Davenport, although confused about some details of the crimes, were not confused as to defendant's involvement in the crimes and stated so in the trial (R. 339 & 380-1).

"Where there is any evidence, including reasonable inferences that can be drawn from it, from which findings of all the elements of the crime can be made beyond a reasonable doubt, our inquiry is complete and we will sustain the verdict"...Reversal is warranted only when the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.

State v. Jiron, No. 930640-CA, slip op. at 7 (Utah App. Sept. 27, 1994) (citations omitted).

Having failed to properly marshal the evidence supporting the trial court's decision, defendant has not and cannot make the required showing that the evidence in question, viewed in the light most favorable to the verdicts, is against the clear weight of the evidence or that a mistake has been made. Id. See also State v. Pelton, 801 P.2d 184, 185 (Utah App. 1990). Defendant does not show how the evidence supporting the conviction is so flawed as to warrant reversal. Mere recitation of the facts which support his theory of the case are not the equivalent of an effort to muster the evidence favorable to the verdict and demonstrate its insufficiency. State v. Scheel, 823 P.2d 470,

472 (Utah App. 1991) (defendant must marshal the evidence, it is not the court's duty to sort through all of the evidence and decide what supports the conviction). Because defendant failed to marshal the evidence supporting the jury's verdict, this Court should refuse to address his claim of insufficiency of the evidence.

#### POINT II

EVEN IF THIS COURT REACHES THE MERITS OF THE SUFFICIENCY CLAIM, DEFENDANT'S CONVICTION SHOULD BE AFFIRMED AS THE JURY'S VERDICTS ARE SUPPORTED BY ABUNDANT EVIDENCE.

Defendant's convictions are amply supported by the evidence introduced at trial. The fact that the jury disbelieved defendant's version of his whereabouts on the nights in question does not constitute grounds for reversal of his conviction. The standard for a sufficiency of the evidence claim requires this Court to

review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable doubt that the defendant committed the crime of which he was convicted.

State v. Petree, 659 P.2d 443, 444 (Utah 1983); See also, State v. Span, 819 P.2d 329, 332 (Utah 1991). Defendant asserts that the jury erred by not accepting his testimony as more reliable than Tsosie or Davenport, the two juvenile defendants who implicated defendant. Such a claim ignores both the applicable jury instructions and law which address the issue.

In this case as in State v. Valdez, 748 P.2d 1050 (Utah 1987), the court stated that the State's evidence, "was vigorously controverted by the defense, which offered contradictory testimony...The mere existence of the contrary evidence does not warrant disturbing the jury's verdict. It was the jury's function 'to weigh the conflicting evidence presented and draw its own conclusions.'" Id. at 1053 (citations omitted).

In this case, the following evidence indicates that defendant committed the crimes charged:

Todd Davenport, a fourteen year-old who was adjudicated in juvenile court for his involvement in the burglaries, testified that while living with his mother in the Economy Apartments he was involved with defendant in burglarizing the five stores in question (R. 307). Davenport, his mother, Brian Tsosie, a man identified as Walter Schultz, a man identified as Berto and Berto's wife Jen and defendant lived in the apartment which was in close proximity to the crime scenes (R. 307-11). Davenport testified that he, as well as his mother, Walter, Tsosie and defendant broke into Steve's Texaco by breaking the window with a rock and then the others boosted Davenport through the window because he was the smallest in the group, he then went to a door and unlocked it to let the others inside (R. 311). Davenport testified that the others took money from the Texaco and that he was given a dollar by his mother for his participation in the burglary (R. 313). Davenport testified that a similar method was used to break into Zion Sun Floral where money was stolen (R.

314). Davenport received a dollar from his mother after the burglary (R. 315). Davenport also testified that the silk rose introduced at trial was the one he saw his mother take from the store and put inside her purse along with two small figurines of animals (R. 316). Davenport testified that he was confused about how many stores they broke into in one night but stated that he thought that they robbed the Texaco and the floral shop one night and the glass shop, pet shop and arcade the next night (R. 317-19). Davenport testified that the group entered Harding Glass by breaking a window and the others boosting him through the hole but he did not believe anything was taken from the shop (R. 319-20). The group then broke into the pet shop by picking the lock on the back window and boosting Davenport through the window (R. 320). Davenport's mother took a dog chain which she later put on Davenport's dog (R. 321). Davenport did not remember if any money was taken from the pet shop (R. 320). The group then went to the arcade named Fun and Games where they broke a window and boosted Davenport through the hole (R. 323). Davenport could not remember if any money was stolen but his mother later gave him two dollars in quarters for his participation (R. 324). Davenport testified that his mother bought him new shoes and that he and his mother threw away their old shoes (R. 319). Davenport testified that his mother had threatened to beat him up if he testified regarding the burglaries (R. 317).

Defense counsel thoroughly cross-examined Davenport and Tsosie regarding inconsistencies in their testimony. Davenport

was confronted with his testimony from the preliminary hearing and admitted that he was confused about which robberies occurred on which night (R. 328-40). Davenport testified, however, that while he was confused about some details as it had happened a long time before and he did not "remember that much--good," (R. 331), he was in no doubt that defendant was at every burglary and participated in the crimes (R. 328-40).

Brian Tsosie, a **seventeen year-old**, adjudicated in juvenile court for his participation in the crimes, testified to details which corroborated Davenport's testimony. Tsosie testified that while living with the Davenports, defendant and others in the apartment at the Economy motel participated in the five burglaries (R. 356-8). On Friday, January 29, 1993, Tsosie, defendant, the Davenports and an individual named Bobby Taylor broke into the Texaco and floral shop by breaking the windows and boosting defendant through the holes (R. 357-8). Todd Davenport unlocked the doors and let the others inside (R. 359). Tsosie testified that although he did not remember if money was stolen from the Texaco, pop and cigarettes were stolen (R. 359). At the floral shop, figurines and flowers were taken (R. 360-3). The next night Tsosie, Todd Davenport, defendant, Bobby Taylor and Walter Schultz, broke into the arcade taking comic books (R. 364-5). Tsosie did not remember any money being taken (R. 366). The group, then joined by Davenport's mother, Elizabeth, broke into the pet store taking a dog chain, animal food, dog balls and some t-shirts (R. 367). After that, the group, minus Elizabeth

Davenport, went to the glass shop and broke in (R. 369). It was about 2:00 a.m. and Tsosie testified that Todd Davenport was very tired (R. 369). No money was taken from the store but a piece of plexi-glass was taken by Walter (R. 370-2). Defense counsel brought out on cross-examination inconsistencies of Tsosie's preliminary hearing testimony. Tsosie had conflicting statements regarding whether or not Walter participated in all the crimes and whether all the burglaries took place on one night or over the period of two nights (R. 375-78). Tsosie was clear, however, that defendant participated in all the crimes (R. 379-81).

Stephen Backus, did not participate in the crimes but testified that on a New Year's Eve party on January 1, 1993, defendant discussed the plans to burglarize the stores and asked Backus if he wanted to participate (R. 340-44). On the weekend of the burglaries, Backus was using a pay phone at approximately 2:30 a.m. when he noticed a group of people at the Harding Glass shop, one which he could identify as the defendant due to defendant's red hair (R. 345-6). Towards the end of January defendant approached Backus and stated he had committed the burglaries (R. 347). Defense counsel cross-examined Backus regarding his possible motives for false testimony against defendant (R. 349-352) and the low probability that Backus could recognize defendant in the dark from a distance (R. 351-2). Defense counsel, in his motion to dismiss, articulated the deficiencies of Backus' testimony (R. 382-3). Defense counsel, in closing argument, addressed the inconsistencies in Tsosie and

Davenport's testimony as well as the deficiencies of Backus' testimony (R. 422-5).

Additionally, the jurors were given instructions on conflicting witness testimony providing:

[I]t is your duty... to determine which version of the evidence you will believe or not believe, based on the believability of the witness..other evidence in the case, and good reason...you should consider..bias or interest in the matter...motive...appearance and demeanor...reasonableness...truthfulness...capacity to remember... and determine the weight and credibility..to give to the testimony of the witness.

(R. 97-95).

Importantly, all witnesses were excluded from the courtroom before trial and were, therefore, unable to adapt their testimony to fit other testimony given at trial (R. 253). Davenport and Tsosies' testimony included all five burglaries, how entry was made, who participated, what was stolen. Backus testified primarily to the Harding Glass burglary, not witnessing the crime, but merely placing defendant in the area at the time of the burglary. Backus' testimony was not a vital piece of evidence but merely corroborative of the two accomplice's testimony.

In further support of the sufficiency of the evidence claim, defendant alleges that a State witness, Steven Backus, has recanted his trial testimony. In December 1993, nearly one year after the burglaries occurred, Backus filed an affidavit with

defense counsel recanting his trial statements.<sup>1</sup> Defendant attaches this affidavit in his addenda. However, defendant cannot make allegations in his brief supported by an affidavit which was not a part of the record below. State v Montes, 804 P.2d 543, 546 (Utah App. 1991) (affidavits which are not a part of the record below will not be considered on appeal). Nor, can defendant attempt to provide a factual basis for his sufficiency of the evidence claim by attaching a witness affidavit to his brief. State v. Aase, 762 P.2d 1113, 1117 (Utah App. 1988) ("affidavits which are not a part of the record below will not be considered unless they are juror affidavits and fall within well-delineated exceptions to the rule"). Therefore, in accordance with the State's Motion to Strike, filed separately with the Court, this Court should strike the affidavit from the defendant's addenda and strike portions of the defendant's brief

---

<sup>1</sup>Backus now claims that defendant did not tell him about the burglaries nor did Backus see defendant in the vicinity of the glass shop (Affidavit of Stephen Backus, page 2). However, Backus' "new" testimony, provided in his affidavit which recants his trial testimony does nothing more than corroborate defendant's testimony that he was not involved in the crimes. As stated in the State's reply to defendant's Motion to Remand, such testimony is insufficient for a motion for new trial and the State asserts that it is insufficient to warrant reversal on appeal.

Although this Court has not addressed the issue of recanted witness testimony on appeal, in State v. Kinder, 381 P.2d 82, 84 (Utah 1963), the Utah Supreme Court held that recanted alibi testimony given in a robbery trial should only be addressed by way of a motion for new trial to the trial court, not on appeal. See Brown v. State, 816 P.2d 818 (Wyo. 1991) (test for reversal of recanted testimony provides that new testimony is so material it would probably produce a different jury verdict if a new trial were granted and it is not cumulative of other evidence produced at trial). Here, Backus' testimony, merely being corroborative of the two main state's witnesses, would not affect a different result if recanted.

which rely on the improperly filed affidavit.

As for the properly raised sufficiency of the evidence claims, the jury apparently believed the evidence presented by the State's witnesses to be credible and chose not to accept defendant's version of the facts. See Valdez, 748 P.2d at 1053.

CONCLUSION

Defendant, by failing to marshal the evidence in support of his sufficiency of the evidence claim, deprives this Court of the opportunity to review the merits of that allegation.

Even if defendant had marshaled the evidence, he has failed to show that the evidence supporting his conviction is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that defendant committed burglary, theft or criminal mischief.

For these reasons the State respectfully requests that this Court affirm defendant's convictions.

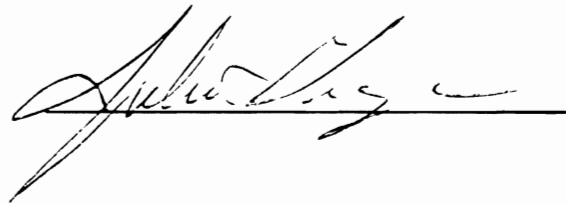
RESPECTFULLY SUBMITTED this 11<sup>th</sup> of October, 1994.

JAN GRAHAM  
Attorney General

  
JULIE GEORGE  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing motion was mailed, First-Class postage prepaid, to Floyd W. Holm, Attorney for Defendant, 965 South Main, Suite 3, P.O. Box 765, Cedar City, Utah 84720, this 11<sup>th</sup> day of October, 1994.



## **ADDENDA**

# **ADDENDUM A**

## **PROCEDURAL RULES**

RULES OF APPELLATE PROCEDURE

**Utah R. App. P. 24 (1994 AS AMENDED). Briefs.**

**(a) Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

...

(2) A table of contents, including the contents of the addendum, with page references.

...

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority, and

(A) citation to the record showing that the issue was preserved in the trial court; or

(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

...

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.

...

**(e) References in briefs to the record.**

References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

# **ADDENDUM B**

**JURY INSTRUCTIONS**

**INSTRUCTION NO. 3**

Part of the Court's duty is to decide on the admissibility of evidence in this trial. These decisions are made purely on the basis of law. You are not to be concerned with the reasons for the Court's rulings, either admitting or excluding evidence, and you should draw no inferences from those rulings.

In admitting evidence, the Court does not rule on the weight or convincing force of the evidence, nor does it pass on the credibility of the witness or party offering the evidence. These are matters for you to decide.

If any objection to a question is sustained by the Court, you should disregard the question and not speculate or guess as to what the answer might have been or the reason for the objection.

#### INSTRUCTION NO. 4

It often occurs in trials that there is a conflict in the testimony or evidence presented by the parties. When such conflicts arise, it is your duty, if possible, to reconcile those conflicts by the use of logic and reason. However, if you cannot reasonably reconcile the conflicts, then it is your duty, if possible, to determine which version of the evidence you will believe or not believe, based on the believability of the witness, the other evidence in the case, and good reason. There are no definite rules on deciding what evidence you believe or do not believe or how much weight you will give to any evidence, but you should make that decision carefully and conscientiously. You are not bound to believe all that the witnesses have said or any witness or class of witnesses unless the testimony is reasonable and convincing in view of all the facts and circumstances in the case. You may believe one witness against many or many as against a few, in accordance with your honest convictions.

If you believe a witness has willfully testified falsely as to any material fact, you may disregard his entire testimony or any part of it, or give it that reduced weight to which you feel it is entitled.

You are further instructed that in deciding the weight and believability of the testimony of any witness, you should consider his bias or interest in the matter, and any motive shown, or lack thereof, to testify in a particular way. You may also consider the appearance and demeanor of the witness, the reasonableness of his statements, his truthfulness, his opportunity to know, his ability to understand and communicate, his capacity to remember, and any other facts relevant to his desire or ability to present accurate testimony.

You may also consider whether the witness was contradicted by other evidence or whether he contradicted himself. From all these factors, you should determine the weight and credibility you will give to the testimony of the witness.