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State of Utah v. Seruka Tiliaia : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. SERUKA TILIAIA, Defendant/Appellant.	Case No. 20041030-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM CONVICTION, JUDGMENT, SENTENCE, AND ORDER FOR COMMITMENT, JANUARY 10, 2003, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE LESLIE A. LEWIS. APPELLANT IS INCARCERATED.

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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SUMMARY OF ARGUMENT

The critical evidence in this case was inconsistent. Witnesses' testimonies were materially different from each other and from what they told police immediately following the incident. Witnesses' recollections materially changed over time, and were influenced and thereby contaminated by tampering interviews (*see, e.g.*, Br. Appt. 10-13) and subsequent discussions with others. Therefore, any trial errors were particularly harmful and undoubtedly impacted the verdict in the context of this inconsistent evidence.

Thus, because of rulings that precluded Tiliaia from presenting his complete defense, false and inflammatory statements the prosecutor made during closing arguments, and ineffective assistance of counsel, Tiliaia was deprived of his right to a fair trial and is in prison today for crimes he likely would have been acquitted for otherwise.

The State has failed to demonstrate that Marco Etsitty was a surprise witness or that the State would have been prejudiced by his testimony. The State has also presented no argument to justify the severest sanction of witness preclusion for alleged discovery violations. The State's "failure to marshal" argument also does not apply in this context as the correct legal standard is "abuse of discretion." Moreover, if indeed defense counsel willfully committed discovery violations that resulted in preclusion of a critical witness, ineffective assistance of counsel is established.

The State's general accusation that Tiliaia failed to meet the marshaling requirement, which theme runs throughout the State's brief, is without merit. The State misapplies this legal standard in the context of specific arguments to which it does not apply. Where it does apply, Tiliaia has thoroughly met his burden. Indeed, Tiliaia`s Statement of Facts, wherein he was mindful of his burden and listed every fact material or even arguably relevant to his arguments, totaled twenty-three pages in his opening brief. In contrast, the State deigned to provide facts to this Court totaling less than eight pages.

The State misconstrues the evidence relative to James Storm's statement that he had just seen Zeke shoot Kehndra, claiming that the statement was not an excited utterance because it was in answer to a question and thus, not spontaneous. The evidence does not support this claim. Also, the trial court's ruling to exclude this evidence was incorrect, and its finding that there was "no evidence" to support its spontaneity is clearly erroneous. All of the material evidence demonstrated the statement's spontaneity.

Finally, the State has failed to meet its burden that the false and inflammatory statements made by the prosecutor during closing arguments were harmless beyond a reasonable doubt.

ARGUMENT

I. THE STATE FAILS TO SHOW THAT THE SEVEREST SANCTION OF EXCLUDING THE CRITICAL TESTIMONY OF DEFENSE WITNESS, MARCO ETSITTY, WAS NOT AN ABUSE OF DISCRETION.

A. The State knew about Marco Etsitty and his testimony.[1]

The State claims that the trial court correctly precluded Marco Etsitty from testifying in Tiliaia's defense because he was a surprise witness and defense counsel violated a discovery order in not disclosing him. Notably, the State does not claim that it would have been prejudiced by Etsitty's testimony. The State hardly acknowledges the undisputed fact that the State knew about Etsitty and the substance of his testimony even before the defense did (R504:442-53; R505:464, 471). The State also does not acknowledge the fact that Etsitty was disclosed by both parties on a jointly prepared jury questionnaire as a potential witness prior to trial (R504:442-53; R505:464, 471).

By definition, Etsitty was not a "surprise witness" even if the defense had wanted him to be. Indeed, the State sought to exclude Etsitty precisely because not only was Etsitty known to the State, but so was the substance of his testimony (R504:442-53;

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[1]Etsitty would have testified as an eyewitness in Tiliaia's defense that the person shooting toward the porch was not Tiliaia but a tall black man, and that Ezekiel House and Rafael Haney threatened to kill him if he went to the police (R505:480).

R505:464, 471). The State also has not and cannot demonstrate any tactical advantage Tiliaia would have gained from failing to disclose Etsitty to the State.

Therefore, assuming without agreeing that Tiliaia's trial counsel willfully failed to disclose Marco Etsitty as a witness for the defense, the State still cannot show that it would have been prejudiced by his testimony or that, if there was a discovery violation, Tiliaia might have gained some tactical advantage from it. Accordingly, the State can demonstrate no prejudice, and the sanction was disproportionate to the alleged violation.

B. The State does not, and indeed cannot, justify the severest sanction of precluding Tiliaia from presenting his only defense.

Assuming *arguendo* that omitting Marco Etsitty from the defense's formal witness list was a discovery violation, notwithstanding the fact that the State interviewed Etsitty, disclosed him to the defense, and listed him as a potential witness on a jury questionnaire, the State simply ignores the precedent cited in Tiliaia's opening brief holding that punitive restrictions against the right of the accused to present evidence in his defense are inappropriate except in the rarest of circumstances, and that alternative measures that do not compromise a criminal defendant's fundamental right to present evidence should be imposed. *See*, BRIEF OF APPELLANT ("Br. Appt."), 27-32.[2]

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[2]*E.g.*, *United States v. Scheffer*, 523 U.S. 303 (1998); *Mont v. Egelhoff*, 518 U.S. 37 (1996); *Michigan v. Lucas*, 500 U.S. 145 (1991); *Taylor v. Illinois*, 484 U.S. 400 (1988); *Crane v. Kentucky*, 476 U.S. 683 (1985); *Brown v. Louisiana*, 447 U.S. 323 (1980); *United States v. Nixon*, 418 U.S. 683 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967); *State v. Harding*, 635 P.2d 33 (Utah 1981); *Christiansen v. Harris*, 163 P.2d 314 (Utah 1945); *Astill v Clark*, 956 P.2d

Further, in light of the disputed and inconsistent nature of the evidence in this case, and the fact that Etsitty was threatened if he reported his testimony to the police, this evidence was not "merely cumulative." *See*, *Jensen v. Logan City*, 89 Utah 347, 349 (Utah 1936) ("[I]n a case where there is so much variation in testimony, the observations of more witnesses might be more than merely cumulative"); *State v. Martin*, 44 P.3d 805, 816 (Utah 2002) (holding that because evidence that the victim was irresponsible was not admitted during trial, the evidence was not merely cumulative).

The State's zeal to exclude the testimony of an eyewitness whose life was threatened if he told the truth, and who the State admittedly dismissed as having "no evidentiary value to the State" (R505:472) seems misplaced. *See*, *Berger v United States*, 295 U.S. 78, 88 (1935) (The prosecutor's duty "in a criminal prosecution is not that it shall win a case, but that justice shall be done").

However, it was an abuse of the trial court's discretion to exclude a witness who would have testified not only that he saw someone other than Tiliaia shooting towards the house, but that he was threatened if he reported this information to the police (R505:480). Accordingly, the State cannot show that precluding Etsitty's critical testimony was a justifiable sanction under the particular facts of this case.

1081 (Utah App. 1998); *United States v. Levy-Cordero*, 67 F.3d 1002 (1st Cir. 1995); *Bowling v. Vose*, 3 F.3d 559 (1st Cir. 1993); *Pulinario v. Goord*, 118 Fed. Appx. 554 (2nd Cir. 2004); *United States v. Gonzales*, 164 F.3d 1285 (10th Cir. 1999); *Walker v. Hood*, 679 F. Supp. 372 (D.N.Y. 1988).

C. The State's "failure to marshal" argument is misapplied.

The State also argues that Tiliaia failed to marshal the evidence relative to the trial court's ruling to exclude Etsitty from testifying. BRIEF OF APPELLEE ("Br. Appe."), 17-24. In doing so, the State misapplies an incorrect legal standard.[3] "Although the admission or exclusion of evidence is a question of law, a trial court's decision to admit or exclude specific evidence [is reviewed] for an abuse of discretion." *State v. Cruz-Meza*, 2003 UT 32, ¶8, 76 P.3d 1165.

In an abuse of discretion analysis, this court first determines if it was error for the trial court to exclude the evidence, and then if the error was harmful. *Salt Lake City v. Hoskins*, 2005 UT App 187. It is the proponent's burden to show he was prejudiced by the trial court's decision. *State v. Carlson*, 635 P.2d 72, 74 (Utah 1981); *Rehn v Rehn*, 1999 UT App 41, 974 P.2d 306, 314 (explaining that an error is harmful if "absent the error, there is a sufficiently high likelihood of a different outcome, undermining our confidence in the result" (quoting *State v. Honie*, 2002 UT 4, ¶54, 57 P.3d 977)). Further, it is an abuse of discretion if the trial court's decision to exclude a witness is "induced by a misperception of the law." *Walker v. Union Pac. R.R.*, 844 P.2d 335 (Utah App. 1992).

Tiliaia thoroughly demonstrated the trial court's abuse of discretion and resulting

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[3]The State relies on *ProMax Development Corp. v. Mattson*, 943 P.2d 247 (Utah App.), *cert. denied*, 953 P.2d 449 (Utah 1997), where this Court stated, "[W]e review the trial court's findings of fact for clear error, reversing only where the finding is against the clear weight of the evidence, or if we otherwise reach a firm conviction that a mistake has been made." *ProMax* has no relevance to the issue of witness preclusion.

prejudice in his opening brief. *See*, Br. Appt. at 27-35. Thus, the State's arguments miss the mark. The trial court abused its discretion in excluding Marco Etsitty because he was not a surprise witness (R504:442-53; R505:464, 471), he was critical to Tiliaia's defense (R505:480), and under these circumstances, the severest sanction of preventing Tiliaia from presenting his complete defense was harmful and inappropriate, violating his right to a fair trial by prevent him from developing all the relevant facts. *Taylor* at 408.

Therefore, Tiliaia was prejudiced by the trial court's abuse of discretion. In the context of much disputed and inconsistent testimony, Etsitty's testimony would have demonstrated that someone other than Tiliaia committed the crimes. In fact, Etsitty's description of the porch shooter matched Zeke House (R505:480), the one person who the State claimed had no gun and could not have committed the crimes, notwithstanding his apparent anxiety to get rid of the guns (R504:311-18, 375). Etsitty's testimony, therefore, would have planted reasonable doubt in the minds of the jurors that Tiliaia committed the crimes such that there is a high likelihood of a different outcome. Etsitty's additional testimony that Zeke threatened him if he went to the police with this evidence would almost certainly have resulted in a different verdict (R505:480).

Further, the trial court's reliance on *Taylor v. Illinois*, *supra*, (R505:468, 476) as legal justification for its decision is incorrect. *See*, Br. Appt. 30-32 (demonstrating that *Taylor* only supports witness preclusion in the rarest of cases where counsel's conduct is clearly blatant, willful, and unethical).

The State's claim that the facts in *Taylor* are "less egregious" than the facts here is puzzling. Br. Appe. at 27. Defense counsel in *Taylor* blatantly lied to the trial court when he averred that he was first informed of a defense witness during the State's case in chief. Not only had the prosecution in *Taylor* never heard of the witness before, but it was proven that defense counsel had met with the witness the week before trial and prior to filing an amended witness list, and had deliberately failed to disclose the witness to obtain a tactical advantage. Moreover, the witness's testimony was fabricated. These egregious facts led to the "inescapable" conclusion that the defense had violated ethical rules to gain a tactical advantage. *Taylor v. Illinois*, 484 U.S. at 403, 405.

In contrast, the State in this case knew about Etsitty and interviewed him prior to disclosing him to the defense (R504:442-53, 471). Unlike the witness in *Taylor*, Etsitty's testimony was not fabricated. Both parties had to prepare witness lists from over 150 potential witnesses – with the defense not knowing what evidence the State was going to present or what testimony they might need to impeach, and the State not knowing who it might need to call in rebuttal after the defense rested (R504:444-45; R505:464, 471).

Moreover, Defense counsel candidly informed the State the week before trial that she might call witnesses not explicitly disclosed on the witness list (R505:468), and **both** parties expressly and formally reserved the right to call additional witnesses not listed (R505:463; Br. Appt., Addendum B). This reservation makes sense in light of the sheer number of potential witnesses and the inconsistent and evolving testimonies. These

facts are not more "egregious" than those in *Taylor*, where defense counsel undisputably lied to obtain a tactical advantage, by any stretch of the imagination.

Unlike *Taylor*, defense counsel did not lie to the trial court or to the prosecution about when they discovered Etsitty as a witness. Indeed, the State knew about Etsitty and disclosed him to the defense and as a potential witness on the jury questionnaire jointly prepared by both parties (R504:442-53, 471; R505:463-64, 468, 471). Thus, the State's claim that these facts are more egregious than the blatant and proven lie promulgated in *Taylor* for the clear purpose of obtaining a tactical advantage, is untenable.

In its failure to marshal argument (that does not apply in determining whether the trial court abused its discretion), the State also fails to acknowledge the bases for the trial court's ruling. The court's findings and conclusions in support of that ruling were as follows:

1. The trial court relied on *Taylor v. Illinois*, 484 U.S. 400 (1988) (R505:468, 476) to justify witness preclusion.

2. Etsitty was subpoenaed by the defense on October 25, 2002, about three weeks prior to trial, so the defense knew it was going to call him as a witness (R505:468, 471, 476).

3. Because this was a homicide trial, there was an expectation that both sides would be well prepared (R505:477). The defense was "extremely well prepared, they have had their questioning and their total preparation very well handled, indicating that they have known all along how they wanted to try this case." *Id.* Therefore, it appeared that the defense's failure to disclose Etsitty on their witness list was "a choice", especially

since he was subpoenaed three weeks prior to trial. *Id.*[4]

The trial court's did not rely on the entire case history of discovery, as the State does. Br. Appe. 17-24. The trial court also made these findings and conclusions notwithstanding that the State knew about Etsitty and both the State and the defense expressly reserved the right to call additional witnesses not formally included on their respective witness lists (R505:463; Br. Appt. Addendum B), there were over 150 potential witnesses, and stories about key events were as varied as the number of witnesses (R504:442-453; R505:459-487).

Defense counsel argued that presentation of the defense depended in large part upon the State's case in chief; therefore, decisions about which witnesses to call and which to exclude were constantly being made (R504:442-453; R505:459-487). The State also admitted that it knew about Etsitty – that it had reviewed a transcript of Etsitty's interview with police, dismissed it as having "no evidentiary value to the State", and disclosed it to the defense (R505:472). The additional fact that defense counsel candidly disclosed to the State the week prior to trial that she might call additional witnesses not included on the witness list additionally supports a finding that the defense had no intent to surprise the State, but was simply unsure of how the evidence would unfold – as was

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[4]In an apparent although unsuccessful attempt to meet the high standard established in *Taylor*, the court made a 180 degree reversal here from its previous finding that defense counsels' preparation was "unprofessional" and last-minute (R505:477), finding that defense counsels' preparation was now "excellent" and "a choice."

the State (R505:468).[5] These facts, most of which the State does not acknowledge, show that the trial court abused its discretion in excluding Etsitty's testimony.

Further, even if the clearly erroneous standard applied here rather than the abuse of discretion standard, the facts relative to the entire pretrial "discovery procedure" (Br. Appe. at 18) "marshaled" by the State had no bearing on the trial court's decision to preclude Etsitty from testifying (R505:468, 471, 476). The trial court specifically stated that she was "very lenient about allowing late disclosure of witnesses", and that if defense counsel had formally disclosed Etsitty just the weekend prior to trial, her ruling would have been different (R505:475). The State ignores this fact.

The State further misrepresents the trial court's statements, claiming that the court "noted that defendant's original witness list appeared to have little meaning in that the defense intended to call only two of the 15 listed witnesses" Br. Appe. at 21; *compare*, R505:447-48 (the trial court states only that failure to provide a final updated witness list prior to trial suggests "preparation for trial was done the weekend before trial and that by the time of the pretrial back in early November, none of these decisions had been made"; this statement is obviously inconsistent with the trial court's subsequent finding that defense counsel were well prepared (R505:477)).

The State further misrepresents that the trial court "noted that over 150 potential

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[5]The State also fails to acknowledge the fact that initially, the trial court was persuaded that the parties' listing of Etsitty on the jointly-prepared jury questionnaire provided sufficient notice to the State that he might be called as a witness (R504:445).

witnesses were involved in the case, which required counsel to responsibly pare down its potential trial witnesses", and claims this "fact" was not marshaled. Br. Appe. at 21; *compare*, R505:471-72 (the trial court makes no such statement); *see also*, Br. Appt. at 22-4 (marshaling the fact that there were over 140 witnesses on the jury questionnaire).

Thus, many of the facts the State claims Tiliaia failed to marshal either were marshaled, are not "facts," or had no relevance to the trial court's decision; and all of the facts relied upon by the trial court in precluding Etsitty were presented in Tiliaia's opening brief, including many that the State claims Tiliaia failed to marshal, and others that the State ignored.[6] Accordingly, the State's failure to marshal argument not only has no application, but is without merit.

D. If trial counsel willfully committed a discovery violation, deficient performance is established.

The State wants it both ways. On one hand, it claims that Tiliaia's trial counsel strategically and improperly violated the trial court's discovery order, warranting the severe sanction of preclusion of a critical defense witness. Br. Appe. 16-28. On the other, it argues that a strategic decision to violate a court order is sound trial strategy. Br. Appe. at 30-1. Such convoluted reasoning would not only set poor precedent, but ignores the U.S. Supreme Court's holding cited in Tiliaia's opening brief that if a strategic decision is unreasonable, it constitutes deficient performance. *Roe v. Flores-Ortega*, 528

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[6]*See*, Br. Appt. at 21-24 for a detailed outline of the facts, law, and discussion surrounding the trial court's decision to exclude Etsitty.

U.S. 470, 480-81 (2000); Br. Appt. at 37. Under *Flores*, a strategic decision to violate a court's discovery order such that witness preclusion will result is not reasonable.

The State also argues that Tiliaia cannot establish prejudice, claiming Tiliaia would have to establish the outcome of trial "would have been different" if Etsitty had testified. Notwithstanding that the correct standard is not "would have been different" but a "reasonable probability of a different result" (*see*, Br. Appt. at 36; *i e* , *Kyles v Whitley*, 514 U.S. 419, 434 (1994)), and notwithstanding the additional fact that the State fought very hard to exclude a witness whose testimony the State now claims was "merely cumulative" (Br. Appe. 31), Tiliaia has already established prejudice under the abuse of discretion standard reiterated above. *See*, Br. Appt. 32-3; Sections I A-C, *supra*.[7]

II. THE TRIAL COURT'S LEGAL CONCLUSION THAT JAMES STORM'S STATEMENT WAS NOT AN EXCITED UTTERANCE WAS INCORRECT; AND ITS FINDING THAT THERE WAS "NO EVIDENCE" THAT THE UTTERANCE WAS SPONTANEOUS IS CLEARLY ERRONEOUS.

A trial court's legal conclusion about the admissibility of evidence is reviewed for correctness. *Salt Lake City v. Alires*, 2002 UT App 224, ¶8. The trial court's ruling will not be disturbed absent clear error. *State v. Cude*, 784 P.2d 1197, 1201 (Utah 1989).

Again, the State argues that Tiliaia did not marshal all the evidence relative to the trial court's ruling. Tiliaia did marshal all of the relevant facts (*see*, Br. Appt. 20-1),

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[7]The State's speculation about whether Etsitty would have "shown up" is irrelevant and improper at this juncture. The record is that Etsitty was precluded from testifying because of an alleged discovery violation, no more, no less.

notwithstanding the State's misplaced reliance on *ProMax Development*, *supra*, a case that does not involve the excited utterance exception to the rule against hearsay. Br. Appe. 32-5. The State's argument lacks both merit and legal support.

As the State concedes, the only issue is whether Storm made the statement while he "was under the stress of excitement caused by the event" (Br. Appe. 36, citing *West Valley City v. Hutto*, 2000 UT App 188). What the State fails to acknowledge is the evidence Tiliaia marshaled (Br. Appt. 20-1), and the trial court's finding that there was "no evidence" to show that the statement was spontaneous (R505:554). This finding is clearly erroneous and the trial court's ruling is incorrect.

The only evidence in support of the trial court's finding that the statement was not spontaneous was an unexplored discrepancy about when Storm made the statement (R505:543-44, 546, 549). Martinez testified that Storm called him 10-12 minutes after the shooting; but on cross examination, he admitted telling police that he did not speak with Storm until the day after the shooting. *Id.* However, this discrepancy was not explored – it was not allowed and Martinez was never given the opportunity to explain the discrepancy during the State's zealous efforts to keep out any evidence that someone besides Tiliaia had committed the crimes (R505:543-49).

And although the court found that Storm's statement was in response to a question and thus not spontaneous, the record does not support this finding and it is clearly erroneous. The relevant exchange relied upon by both the trial court and the State

was as follows:

COUNSEL: The conversation that you had with James Storm, was it calm and collected?

MARTINEZ:No.

Q: Was he making relaxed statements or was he blurting things out?

A: He was blurting things out.

Q: Were you asking him questions?

A: I just – yeah, he just – yeah. Yes.

Q: Did he tell you what had excited him?

A: Yes.

. . .

Q: What did he tell you had excited him?

MS. WISSLER: Objection, your Honor, calls for hearsay –

THE COURT: Sustained.

(R505:548).

This exchange does not show that Storm's utterance that he saw Zeke shoot Kehndra was made in response to a question. Contrary to the State's questionable interpretation of the foregoing unenlightening exchange (Br. Appe. 37) and the trial court's finding, the fact that Martinez asked Storm questions does not mean that he was asked, "What excited you?"

If a person blurts out, "I just saw John shoot Jane!", the person to whom that

statement is made will naturally ask questions. Martinez never testified that he asked Storm, "What excited you?" Despite the trial court's ruling and the State's misrepresentation that Martinez asked Storm why he was so excited (Br. Appe. 37), the evidence does not support this finding or interpretation. Neither does common sense.

Martinez testified that Storm sounded upset, startled, and was stuttering – which was not normal for Storm (R505:545). Martinez further testified that Storm did not sound like himself and was "screaming, yelling" (R505:546). Screaming and yelling suggests substantial stress and excitement. It also suggests spontaneity. Storm had not only just witnessed a traumatic event where several people were hurt and one person was killed, but he saw the perpetrators commit the crimes. Even if this statement was made the following day, which does not appear to be the case,[8] Storm was arguably still under the stress and excitement of the shooting even then. Yet the trial court inexplicably ruled Storm's utterance was not made under the stress or excitement of the shooting (R505:554-55).

The State's seeming lackadaisical recitation of the facts on this point suggest that the shooting was not traumatic to the eyewitnesses because of their sheer number; and therefore, because 50 or so people had just witnessed a shooting, they did not

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[8]The call was made 10-12 minutes (R505:543-44, 546) after the shooting and Storm was "walking away from the party and needed someone to pick him up" (R505:553). Storm was "screaming" and "yelling" (R505:546). Martinez was never given the opportunity to explain the time discrepancy (R505:549-50).

experience any stress or excitement, but "just wanted to leave." Br. Appe. 37. Without citing to the record, the State claims Storm was asked "why he was so excited (a strange question if indeed Martinez fled the same shooting only minutes before)". *Id.* As noted above, the record does not support this misinterpretation of the evidence.

Finally, the State argues that Tiliaia "presented no evidence establishing Storm's actions during the [12-minute] interval" after the shooting. Br. Appe. 38. This argument is disingenuous. It ignores the State's zealous and successful efforts to prevent any facts about what Storm said or did from coming into evidence (R505:543-49). Defense counsel was simply not permitted to elicit this information. The State cannot now benefit from a purported lack of evidence that it is responsible for. Moreover, the fact that Storm had the presence of mind to call his cousin does not show that he was not still under the stress and excitement of the shooting. *See*, Br. Appe. at 38.

Based on the record evidence and the applicable law cited herein and in Tiliaia's opening brief, the trial court erred in excluding Storm's statement.

III. THE STATE HAS FAILED TO MEET ITS BURDEN THAT THE PROSECUTOR'S MISSTATEMENT OF THE EVIDENCE WAS HARMLESS BEYOND A REASONABLE DOUBT.

It is the State's burden to show that prosecutorial misconduct was harmless beyond a reasonable doubt. *State v. Tarafa*, 720 P.2d 1368, 1373 and n.21 (Utah 1986). Further, all reasonable doubts must be resolved in the defendant's favor. *State v. Eaton*, 569 P.2d 1114, 1116 (Utah 1977). Because the State incorrectly presumes that there was

no prosecutorial misconduct, it does not even attempt to meet this burden. Consequently, the State's argument on this point fails.

Tiliaia's defense in this case was that after he and his friends left the house, Ezekiel House, who had demanded that Tiliaia give him the gun as they were walking outside (R503:196-97, 200), grabbed the gun and started shooting back toward the porch. There were many witnesses who all gave conflicting testimony regarding these events However, one fact that was clear from the evidence is that Tiliaia and his friends were all outside when they were then followed by several people who stayed on or near the porch as Tiliaia and his friends left.[9]

Nonetheless, the prosecutor told the jury that as Tiliaia walked out the door, Zeke "went the other way. *That is absolutely critical.* Lindsay (sic) told you [Tiliaia] went out of the house, *the other guy came back in. They went in completely opposite directions.*" (R506:740) (emphasis added). Clearly, even Lindsey's notably inconsistent testimony (R503:182-184-86,190, 192-95, 213; R505:509, 512-17) does not support even

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[9]*See, e.g.*, R504:393 (Tiliaia and his friends were all pushed outside"); R503:128-29 (Tiliaia left with three other men at the same time); R503:195-98 (Lindsey Isakson testified that Tiliaia and his friends left together); R503:129-30, 180, 196, 198, 206-07 (after Tiliaia and his friends left, Joe Valdez walked to Kehndra to make sure she was okay, then Joe, Kehndra, Lindsey, and Shane Alvera followed Tiliaia and his companions out the door); R504:279-80 (Tiliaia and Zeke exited the residence together); R504:236 (Shane Alvera saw Joe Valdez escort Tiliaia and Zeke to the door); R504:233, 267, 269 (Tiliaia and Zeke left the house and "we all followed them out the door"); R505:577, 580-81 (a black man with "poofy hair" and an afro with a pick in it (Zeke; *see*, R505:529, 532, 551-52) jumped down the porch stairs "in a hurry", turned around and shot directly back toward the porch).

this misrepresentation of the facts. *See*, Br. Appe. at 40 (citing Lindsey's testimony that "[t]he guy [Zeke] was still in the house at the time when he [Tiliaia] had run out there."

The State cites *State v. Larsen*, 2005 UT App 201, 113 P.3d 998, in support of what it characterizes as a prosecutor's ability to "summarize evidence and its inferences from his or her viewpoint." Br. Appe. at 41. However, there is a fundamental difference between summarizing evidence from one's viewpoint and creating facts favorable to one's position that the evidence does not support, which the prosecutor did here.

Moreover, even the *Larsen* court emphasized the fact that "a prosecutor cannot allude to outside, unadmitted evidence" (*Id.* 1002), which is precisely what the prosecutor did in this case when she claimed that Zeke went back into the house and he and Tiliaia "went in completely opposite directions" (R506:740).

This misrepresentation was critical because it went right to the heart of Tiliaia's defense. After several days of the jury hearing disputed facts and inconsistent testimony, the prosecutor made up her own version of events, telling the jury that Zeke not only went in the opposite direction from Tiliaia, but that he went back inside the house. This was patently false. The effect of this false evidence was to persuade the jury that Zeke could not have been the shooter, when based on the evidence, he could have been.

Thus, not only is there a reasonable probability that the jurors were influenced by the prosecutor's statements, but the State simply cannot establish beyond a reasonable doubt that they were harmless. In addition to the many disputed facts and inconsistent

testimonies, many critical witnesses developed their recollections of events only after the passage of time and after comparing stories with others (*see*, *e.g.*, R503:149-51, 190; R504:261-63; R505:523). Considering this inconsistent and disputed nature of the evidence, the prosecutor's misrepresentation about Zeke's inability to grab the gun was particularly misleading and harmful. Indeed, the State has not cited one case where a similarly blatant misconstruction of the evidence has been allowed. Br. Appe. 39-41.[10]

Particularly in light of the serious nature of the charges in this case, the State cannot simply brush this prosecutorial misconduct aside. At the most fundamental level, Tiliaia was entitled to a fair trial, and the prosecutor's statements constituted misconduct and compromised that right. Therefore, this matter should be remanded for a new trial.

IV. THE STATE HAS FAILED TO MEET ITS BURDEN THAT THE PROSECUTOR'S INCORRECT INSTRUCTION REGARDING THE JURY'S ROLE WAS HARMLESS.

It is universally recognized that statements made to inflame the passions and prejudices of the jury constitute misconduct. *See*, *e.g.*, *United States v Manning*, 23 F.3d 570, 574 (1st Cir. 1994); *People of Territory of Guam v. Quichocho*, 973 F.2d 723, 737 (9th Cir. 1992), *cert. denied*, 506 U.S. 1067 (1993); *United States v. Duffaut*, 314 F.3d

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[10]Because the State has summarily dismissed Tiliaia's related claims of ineffective assistance and plain error on the ground that the prosecutor's statement was not misconduct, Tiliaia relies upon his previous arguments and incorporates the same herein by reference. Br. Appt. 35-7, 38-40, 46-8.

203, 211 (5th Cir. 2002); *United States v. Smith*, 930 F.2d 1081, 1089 (5th Cir. 1991).[11]

The prosecutor in this case told the jury that they were "selected to act as the voice and conscience of the community," and if they did not convict Tiliaia, "it is as true to say there has been no crime . . . please don't tell Kehndra Isakson that there's been no crime" (R506:747). Both of these statements, particularly the latter, were specifically designed to inflame the passions of the jury and to mislead them about their role as impartial triers of fact. Although they are sufficient, standing alone, to warrant remand for a new trial, the damage they caused was compounded by the prosecutor's misrepresentation of the evidence set forth in the previous section.

In response to Tiliaia's claim of prosecutorial misconduct in this context, the State claims that defense counsel invited the improper and inflammatory statements by telling the jury that they could find the defendant "not guilty" either because they did not believe he had committed the crimes, or because the State had not met its burden of proof. Br. Appe. 44 (citing R506:735-36).

The State makes a strange argument. Defense counsel's statements regarding the jury's role as impartial arbiters of fact and the State's burden of proof are true statements of the law. The jury in fact should have found Tiliaia "not guilty," if they

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[11]Rather than respond to the law cited in Tiliaia's opening brief in support of his position (Br. Appt. 49), the State merely dismisses it as having "little relevance here." Br. Appe. 43. The State's argument is conclusory, neglecting to explain why the case law purportedly has "little relevance." Therefore, it should be ignored.

were going to, either because they believed he did not commit the crimes or because the State did not meet its burden of proof. On the other hand, it was improper for the jury to reach a "guilty" verdict because they were the "voice and conscience of the community," or because failing to do so would send a message that no crime had been committed.

Therefore, it does not follow that proper statements regarding the jury's role "invited" an improper inflammatory response. Br. Appe. 44. It makes as much sense to say that appropriately arguing the evidence from one's point of view invites blatant misrepresentations about what the evidence is.

Moreover, as argued in Tiliaia's opening brief, the trial court's ruling that these statements were what the State construes as "rhetorical" is erroneous and incorrect. Br. Appe. 44. Not only did the trial court conclude that the statements were merely argument, but she further concluded that they were not misstatements of the law (R506:750-51, 754). These conclusions are incorrect, as noted above. Based on the law cited both in Tiliaia's opening brief and herein, the trial court incorrectly determined that the prosecutor's untrue statements were no different than what defense counsel said about a "not guilty" verdict, that the statements were just argument (R506:751-54).

Further, the State cannot establish that the prosecutor's statements were harmless beyond a reasonable doubt (*State v. Tarafa*, 720 P.2d at 1373), particularly when all

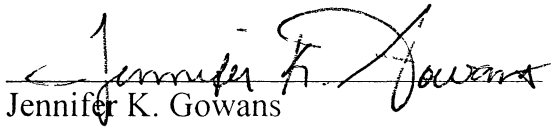
reasonable doubts are resolved in Tiliaia's favor (*State v. Eaton*, 569 P.2d at 1116).[12] Therefore, this matter should be remanded for a new trial.

CONCLUSION

Based upon the foregoing facts and law, Mr. Tiliaia respectfully requests that his convictions be vacated and this matter remanded for a new trial.

Respectfully submitted this 11th day of April, 2006.

FILLMORE SPENCER, LLC



Jennifer K. Gowans
Attorneys for Appellant

[12]The State makes the conclusory statement that Tiliaia "fails to marshal the facts establishing the context of the comment"(Br. Appe. 45), but then neglects to cite what facts are not marshaled. Accordingly, Tiliaia does not address the State's unbriefed argument, particularly in light of the proper standard of review. *See*, Br Appt 2-3

MAILING CERTIFICATE

I hereby certify that on this 11 day of April, 2006, I caused to be mailed by United States mail, postage prepaid, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** to the following:

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