

2006

Utah v. Donald Millard : Brief of Appellee

Utah Court of Appeals

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Ryan D. Tenney; assistant attorney general; Mark L. Shurtleff; attorney general; Gary K. Searle; David C. Cundick; attorneys for appellee.

David Drake; attorney for appellant.

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Case No. 20060336-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Donald Millard,
Defendant/Appellant.

Brief of Appellee

Appeal from conviction for conspiracy to commit aggravated murder, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Randall Skanchy presiding.

RYAN D. TENNEY (9866)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

DAVID DRAKE
6905 South 1300 East # 248
Midvale UT 84047

Counsel for Appellant

GARY K. SEARLE
DAVID C. CUNDICK
Tooele County Attorney's Office

Counsel for Appellee

Oral Argument Requested

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Counsel for Appellant

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Case No. 20060336-CA

IN THE
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State of Utah,
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vs.

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Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for conspiracy to commit aggravated murder. This Court has jurisdiction under Utah Code Annotated § 78A-4-103(2)(j) (West 2008).

STATEMENT OF THE ISSUES

1. Was trial counsel ineffective for not calling certain witnesses who had been tangentially mentioned during the opening statement?
2. Was trial counsel ineffective for speaking as if the State's allegations were true when arguing a mid-trial motion to dismiss for lack of evidence?
3. Was trial counsel ineffective for informing Defendant of his right to testify, but failing to specify that the right came from the Constitution?
4. Was trial counsel ineffective for stipulating to the admission of Defendant's phone records, where the State had witnesses available who could establish the authenticity of those records?

5. Was trial counsel ineffective for not objecting when a witness said that one of Defendant's friends had told him that Defendant wanted to kill his ex-wife, where that witness also testified about similar conversations that he had with Defendant himself?

6. Was trial counsel ineffective for deciding not to call a series of other witnesses, where counsel testified that there was a strategic basis for each decision?

Standard of Review for Issues 1-6. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

7. Was there sufficient evidence to support the rule 23B court's factual findings?

Standard of Review. "In ruling on an ineffective assistance claim following a Rule 23B hearing, 'we defer to the trial court's findings of fact.'" *State v. Bredehoft*, 966 P.2d 285, 289 (Utah App. 1998) (citation omitted). The 23B court's findings are accordingly affirmed unless a defendant shows that they are clearly erroneous. *See State v. Vos*, 2007 UT App 215, ¶ 9, 164 P.3d 1258.

8. Did the trial court err by not recording all the sidebar conferences at trial?

Standard of Review. This issue is unpreserved and inadequately briefed. No standard of review applies.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

There are no determinative constitutional provisions, statutes, or rules.

STATEMENT OF THE CASE

Defendant was charged with two counts of conspiracy to commit aggravated murder. R. 54-55. A jury convicted Defendant on both counts. R. 375.

Defendant obtained new counsel and timely appealed. R. 458. On Defendant's motion, this Court remanded for a limited evidentiary hearing under rule 23B, Utah Rules of Appellate Procedure. R. 824-27. Following the rule 23B hearing, the court issued findings of fact and conclusions of law. R. 996-1004.

STATEMENT OF FACTS¹

Defendant married Susan Hyatt in 1992, but the two divorced in 1997. R. 503: 583-84. After several years of Defendant failing to pay his support obligations, Susan sued Defendant in 2004 to collect the support arrearages. R. 503: 584, 602. On August 9, 2004, the two entered a stipulated settlement, under which Defendant agreed to pay approximately \$20,000 in back support, as well as submit to an evidentiary hearing to address his "contempt in failing to timely pay" his obligations. R. 1031: 95-98; Addendum A.²

Defendant hires Ben Desvari to kill Susan

Defendant managed an apartment complex in the "slums" of Midvale. R. 503: 444. He also had a side business purchasing run-down homes, fixing them up, and selling them

¹ The State recites "the evidence and all reasonable inference in a light most favorable to [the jury's] verdict." *State v. Winfield*, 2006 UT 4, ¶ 2, 128 P.3d 1171 (quotations and citation omitted).

² Addendum A was introduced as Exhibit 1 during the rule 23B hearing. These exhibits are in a non-paginated manila folder in the record.

for a profit. R. 504: 685. Through these businesses, Defendant often met people who did not have “the savoriest backgrounds.” R. 502: 249. One of these people was Ben Desvari.

Ben met Defendant in the spring of 2004 through his brother, Davey Desvari. R. 502: 282-83. Davey was about to report to prison, and Ben agreed to look after his belongings while he was away. R. 502: 283-85. Before leaving, Davey gave Defendant’s contact information to Ben, and he then told Ben that Defendant would help him. R. 502: 282-85.

As promised, Defendant helped Ben with Davey’s property. R. 502: 285. Defendant also began helping Ben with Ben’s own problems. In addition to supporting his wife and two children, Ben was supporting Davey’s children. R. 502: 288-89, 304. Defendant began loaning Ben money and employing him on his remodeling projects. R. 502: 290, 351-52.

As Defendant and Ben grew closer, Defendant began talking about his feelings towards Susan. R. 502: 290-92. In July 2004, the two had “numerous” conversations in which Defendant told Ben that his children were “unhappy” and “miserable” living with Susan. R. 502: 287, 291. Defendant said that he “was just tired of taking the kids back to a place where the kids weren’t happy.” R. 502: 290. Defendant also mentioned his child support problems. R. 502: 288.

Defendant soon began talking about “taking care of his ex-wife to get her out of the picture so he could take care of the kids.” R. 502: 290. Defendant told Ben that the only way he could get custody would be if Ben killed her. R. 502: 292. This “caught [Ben] off guard.” R. 502: 292. But as Defendant kept talking about it, Ben “started believing that he

actually meant it.” R. 502: 292. About the time Defendant stipulated to the \$ 20,000 support judgment, he offered Ben \$5000 to kill Susan. R. 502: 292. Ben had recently lost his full-time construction job and needed money, so he accepted Defendant’s offer. R. 502: 292-93.

Susan lived in Grantsville. R. 502: 295. Because Ben did not know Susan or where she lived, Defendant picked Ben up from work one day and drove him to her house. R. 502: 295. Ben then drove out there several times by himself, “studying” the area in anticipation of his attack on Susan. R. 502: 296.

Defendant told Ben that he wanted to be on vacation when Susan was killed, so as to alleviate any suspicion that he was involved. R. 502: 298-99. Defendant was going to be out of town on August 16, so Ben agreed to kill her on that day. R. 502: 297-98.

On the afternoon of August 16, Ben drove to Grantsville. R. 502: 300. He had a pair of gloves and a small socket wrench to break in through a window. R. 502: 301. He planned on either strangling Susan or breaking her neck. R. 502: 345. Ben knocked on the door, but nobody answered. R. 502: 303. He went to the back of the house to enter a back door or window. R. 502: 303. But a neighbor noticed him and called the police. R. 502: 304. As Ben looked through Susan’s backyard, Grantsville police showed up. R. 504: 649-51. Ben told them he was looking for snakes and lizards in the field behind her home. R. 502: 304. The officers cited him for trespassing and let him go. R. 504: 649-51. Ben decided that he would not try to kill Susan again. R. 502: 307-08.

Defendant tries to convince Ted Anthony to kill Susan

Melody Oliver was a tenant in the apartment complex that Defendant managed. R. 503: 434. After she was sent to jail, her boyfriend Ted Anthony went to her apartment to move her belongings out. R. 503: 434. When he arrived, he found Idrese Richardson, who was temporarily staying there. R. 503: 436. Anthony and Idrese spent the evening talking and sharing stories. R. 503: 436-37. One of Anthony's stories involved a man who he described as a "fixer." R. 503: 437-39. When Idrese pressed for details, Anthony explained that his contact was actually a hit man from the east coast. R. 503: 439-40.

Idrese then mentioned that he and Defendant needed someone to "take care of" Defendant's ex-wife. R. 503: 439-40. The next morning, Anthony met with Defendant. R. 503: 439-41. Defendant asked Anthony to find out whether his hit man contact would be willing to kill Susan. R. 503: 441. Defendant explained that he needed her killed "because she was draining his other bank accounts." R. 503: 441. He further explained that "he had someone previously try and go out to her house," but that he "had been caught outside before they even got in." R. 503: 444. Over the next week, Defendant contacted Anthony "relentless[ly]" asking him to contact the hit man. R. 503: 444.

Rather than acceding to Defendant's request, Anthony instead contacted a police officer who had recently arrested him on unrelated crimes. R. 503: 445. About a week later, detectives asked Anthony to wear a wire. R. 503: 446. Although initially hesitant, Anthony

finally agreed. R. 503: 447. But when he approached Defendant again, Defendant told him he had “changed [his] mind” and did not need Anthony’s hit man anymore. R. 503: 447.

Defendant convinces James Brinkerhoff to kill Susan

Around the same time that Anthony was talking to police, James Brinkerhoff met Defendant while looking for work. R. 502: 375. Brinkerhoff had just been released from jail, and a fellow inmate had told him that Defendant might hire him for a remodeling project. R. 502: 375-76. Brinkerhoff met Defendant in the parking lot of Granger High School. R. 502: 376.

Ben Desvari lived around the corner from Brinkerhoff in Midvale and often bought methamphetamine from him. R. 502: 313. When Brinkerhoff arrived at the Granger High parking lot, Ben was there as well. R. 502: 376-77.

The conversation initially focused on potential construction projects. R. 502: 376-77. Brinkerhoff had pending federal charges and needed money to pay his legal bills. R. 502: 376, 78. The conversation then turned to the possibility of Brinkerhoff killing Defendant’s ex-wife. R. 502: 377. At first, Brinkerhoff thought Defendant was joking. R. 502: 377. But when Defendant explained “how he wanted it done and the timeframe he was talking about,” Brinkerhoff realized that Defendant was serious. R. 502: 377. After some discussion, the two agreed that Brinkerhoff would kill Susan; in exchange, Brinkerhoff would receive an

“undisclosed amount of money,” some help on personal remodeling projects, and employment while Brinkerhoff was “fighting [his] federal charges.” R. 502: 377-78.³

In the following days, Ben helped Brinkerhoff prepare to kill Susan. R. 502: 378. Ben drove Brinkerhoff to Susan’s home and “told [him] what schedule the lady had, her work schedule and stuff.” R. 502: 378, 380.

On September 11, 2004, Brinkerhoff drove to Grantsville to kill Susan. R. 502: 380. When he knocked on her front door at about 7:00 p.m., Susan answered. R. 502: 380; 503: 586. Brinkerhoff told her that he was a private investigator trying to reach her ex-husband. R. 503: 586, 588. Susan told Brinkerhoff that Defendant was not there but would be later that evening. R. 502: 382; 503: 588. Brinkerhoff said he would just call Defendant instead, but then claimed to have forgotten his cell phone. R. 503: 588. Susan offered to let Brinkerhoff borrow hers, invited him in, dialed Defendant’s number, and stood back while Brinkerhoff spoke to Defendant for approximately 30 seconds. R. 503: 588-89. When the call ended, Brinkerhoff suddenly “lunged” towards the front door, shut it “real quickly,” and “pulled out a knife.” R. 503: 589. He then attacked Susan, trying to stab her chest or neck. R. 503: 589.

³ Ben gave conflicting testimony at trial, testifying that Defendant had not agreed to pay Brinkerhoff for killing Susan. R. 502: 312. Any discrepancies are irrelevant, however, because Ben and Brinkerhoff both ultimately agreed on the pivotal points: that this meeting occurred and Brinkerhoff agreed to kill Susan. R. 502: 311-12, 377. But even if the difference were material, it still would not matter because this Court “assume[s] that the jury believed the evidence supporting the verdict.” *State v. Holbert*, 2002 UT App 426, ¶ 68, 61 P.3d 291 (quotations and citation omitted).

Susan managed to get a partial hold on the knife, and the two wrestled for control of it. R. 503: 589. During the struggle, Brinkerhoff pushed Susan down a short flight of stairs, got on top of her, and snapped her head “back and forth a number of times,” apparently trying to break her neck. R. 503: 590-91. But Susan got control over the knife in the process, and she then tried stabbing Brinkerhoff. R. 503: 591.

After Susan tried stabbing him, Brinkerhoff backed off and told her that he had “changed his mind.” R. 503: 592. After initially demanding money, Brinkerhoff left. R. 503: 592-94. Susan locked the doors, called 911, and waited for police. R. 503: 595.

Responding officers saw finger marks on Susan’s neck and cuts on her hands. R. 503: 596. In the following days, latent bruises appeared all over her body, particularly on her neck and hips. R. 503: 596-97. Susan had difficulty moving her neck, and she was subsequently diagnosed with a permanent injury to her rotator cuff. R. 503: 597. One doctor told her that her injuries were similar to those suffered by people in car accidents. R. 503: 597.

The 9:08 phone call

After leaving Susan’s home, Brinkerhoff drove to his sister’s house in Magna. R. 502: 385. He then called Ben and told him what had happened. R. 502: 385. After hearing Brinkerhoff’s account, Ben impulsively called Susan’s home to “see what was going on out there.” R. 502: 317. When police answered, Ben hung up. R. 502: 317. Ben then called Defendant and told him about Brinkerhoff’s failed attack. R. 502: 318. Defendant called Brinkerhoff back at his sister’s home in Magna and arranged a meeting. R. 502: 385. Phone

records subsequently confirmed that Defendant called the Magna number at 9:08 p.m., with the conversation lasting six minutes. State's Exhibits 19 & 20.

The investigation

Defendant was out of town the week before the attack on vacation with his children and his parents. R. 504: 689-90. He was supposed to have brought the children home earlier that week, but he had called Susan during the week to tell her that they had decided to go on a cruise. R. 503: 585-86. Defendant agreed to drop the kids off at Susan's house at 7:00 p.m. on September 11, R. 503: 585, but he then called her early that morning to tell her that there had been another delay. R. 504: 690. Susan accordingly agreed that the children could spend the night with Defendant's parents and come home the next morning. R. 504: 690.

After the attack, however, Susan immediately suspected that Defendant was involved. R. 502: 277. She informed the lead detective of her suspicions during their initial interviews. R. 502: 270-71. At his request, she called Defendant and asked him to bring the children home that night. R. 504: 691-92.

When Defendant arrived with the children, he was taken by police to the Grantsville police station. R. 504: 693. He was interviewed at approximately 10:30 p.m. that night. R. 502: 260. Defendant acted surprised when told that Susan had been attacked. R. 502: 276. When given a description of the attacker, Defendant said that it sounded like a person he knew named "Brad." R. 502: 261. Subsequent testimony revealed that Brinkerhoff often used the name Brad. R. 502: 310, 321.

Though officers were initially unaware of the identity of Susan's attacker, the investigation eventually led to Ben Desvari and James Brinkerhoff. Ben and Brinkerhoff both ultimately received immunity for testifying against Defendant. R. 502: 324, 405-06.⁴

Trial⁵

Defendant was charged with two counts of conspiracy to commit aggravated murder. R. 54-55. At trial, he was represented by Wally Bugden and Tara Isaacson, with Judge Randall Skanchy presiding. R. 41-42, 375. The defense strategy was apparent from the outset. In the opening statement, Isaacson acknowledged that Defendant had business relations with both Ben and Brinkerhoff. R. 502: 248-49. But she claimed that there was no proof that Defendant had anything to do with the plot to kill Susan. R. 502: 255-57. While acknowledging that the State would present testimony to the contrary, Isaacson stressed that this testimony would come from a series of meth-using criminals who had received immunity in exchange for their testimony. R. 502: 249-55. Isaacson accordingly asked the jury to conclude that the State's witnesses were not credible.

This theory was repeatedly emphasized throughout the trial. Testimony showed that the State's witnesses were all convicted criminals (R. 502: 373-74, 394-95; 503: 450-56), and heavy drug users (R. 502: 330-31, 336, 418-19; 503: 462). Testimony also showed that

⁴ Ben received full immunity for his testimony, while Brinkerhoff received the opportunity to plead to reduced charges. R. 502: 324, 405-06.

⁵ Defendant raises a large number of claims in his brief. For clarity and economy, this discussion only summarizes the major points. Additional facts relating to individual claims will be discussed in the Argument section below.

all of the State's witnesses had given conflicting statements (R. 502: 333-34, 355-56, 411-16; 503: 472-73), and that all were now seeking leniency from the State for their testimony (R. 502: 324-25, 397, 406-08, 417; 503: 459, 477).

In addition, defense counsel also asked the Court to dismiss the second charge at the close of the State's case, arguing that the evidence only supported a finding of a single conspiracy. R. 339-43. Following argument, the trial court denied that motion. R. 504: 733.

The jury convicted Defendant on both counts. R. 375. Defense counsel moved to arrest judgment prior to sentencing, however, again arguing that the State had only proven that a single conspiracy existed. R. 415-24. The trial court now agreed and arrested judgment on the second count. R. 450-56; 507: 17-18.

The rule 23B findings

Defendant obtained new counsel and appealed. R. 458. Through appellate counsel, Defendant requested a rule 23B remand, alleging 11 different ineffectiveness claims. R. 824-27. This Court granted a remand on four of those claims. R. 824-27.

During the rule 23B hearing, Judge Mark Kouris heard testimony from Bugden, Isaacson, and Defendant. R. 962-63; 1031: 4-237. Judge Kouris subsequently issued Findings of Fact and Conclusions of Law. R. 1007-1022 (Addendum B).

Judge Kouris first found that Bugden and Isaacson were "completely credible witness[es]" whose testimony was "fully corroborated" by "other trial testimony and evidence." R. 1019-20 (¶¶ 5, 10). By contrast, Judge Kouris found that Defendant's rule 23B

affidavit was “riddled with numerous inconsistencies and contradictions when compared with the hearing testimony and the trial transcript.” R. 1015 (¶ 33).

After examining Defendant’s various claims in detail, Judge Kouris concluded that “all of the issues” identified by Defendant “were thoroughly investigated by the experienced defense team,” and that there was a “reasonable basis for all of the tactical decisions they made.” R. 1008 (¶ 2). Judge Kouris further concluded that the “defense team did not perform deficiently in any of the challenged areas,” but that its performance had “significantly exceeded” “an objective standard of reasonable” assistance. R. 1008 (¶¶ 3, 5). Finally, Judge Kouris concluded that there was “no reasonable probability that a change in any or all of the tactical decisions made by the defense team might have resulted in a different outcome.” R. 1008 (¶ 4).

SUMMARY OF ARGUMENT

Issue I: Defendant did not receive ineffective assistance when his trial counsel did not call certain witnesses who had been mentioned during the opening statement. Under *Strickland*, defense counsel’s mid-trial decisions about which witnesses to call were reasonable strategic decisions. Although Defendant now asks this Court to adopt a bright-line rule that would require a finding of ineffective assistance in such cases, the proposed standard is contrary to the flexible inquiry set forth in *Strickland*. But even if defense counsel did perform deficiently, Defendant has not shown prejudice. The promised witnesses

would only have addressed tangential matters, and Defendant has not shown that the result of his trial would have been any different if the promised testimony had been offered.

Issue II: Defendant did not receive ineffective assistance when his trial counsel spoke as if the State's allegations were true during a mid-trial motion to dismiss for lack of evidence. In the context of that particular motion, defense counsel was required to assume that the State's evidence was true, and defense counsel's statements therefore do not qualify as admissions of fact. In any event, Defendant was not prejudiced, due to the fact that the trial court ultimately granted the motion at issue.

Issue III: Defendant did not receive ineffective assistance of counsel when his counsel repeatedly informed him that he could choose to testify, but did not tell him that this choice derived from the Constitution. The evidence presented at the 23B hearing showed that his decision not to testify was the result of surprise testimony offered by one of Defendant's co-conspirators at trial. Defendant has not shown that his decision would have been any different had he known the constitutional origins of his rights.

Issue IV: Defendant did not receive ineffective assistance when his counsel stipulated to the admission of Defendant's phone records. The record below shows that the State had witnesses available who could establish the authenticity of those records. As such, any objection would have been futile.

Issue V: Defendant did not receive ineffective assistance when his counsel did not challenge Ted Anthony's account of the conversation with Idrese about Defendant's efforts

to kill Susan. Although defense counsel repeatedly attempted to explain this decision during the 23B hearing, Defendant's appellate counsel actively prevented him from offering the explanation. Given this, Defendant has not met his burden of showing that the decision not to object was unreasonable. In any event, Anthony also testified about a series of conversations he had with Defendant during which Defendant specifically asked for help finding someone to kill Susan. Defendant has not challenged the admissibility of those conversations; thus, he cannot show a reasonable probability of a different result without the challenged testimony.

Issue VI: Defendant did not receive ineffective assistance when his counsel failed to call the witnesses identified in Point VI of Defendant's brief. As indicated in the 23B court's ruling, trial counsel made reasonable strategic decisions regarding each prospective witness.

Issue VII: Defendant has failed to show that the 23B court's findings were not supported by sufficient evidence. Not only has Defendant failed to properly marshal the evidence, but the record also shows that each finding was supported by sufficient evidence.

Issue VIII: Defendant has failed to show that the trial court erred in not recording the sidebar conferences. Defendant fails to point to any rule requiring the court to record all sidebar conferences, nor does he identify any sidebar conference from this case that he thinks should have been recorded. This claim is unpreserved and inadequately briefed.

ARGUMENT

Defendant raises seven issues, six of which allege ineffectiveness of trial counsel. To demonstrate ineffective assistance, a defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under that test, a defendant “must show: (1) that counsel’s performance was objectively deficient, and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial.” *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162. “Failure to satisfy either prong will result in our concluding that counsel’s behavior was not ineffective.” *State v. Diaz*, 2002 UT App 288, ¶ 38, 55 P.3d 1131.

I.

DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE WHEN HIS COUNSEL DID NOT CALL ALL OF THE WITNESSES WHO WERE MENTIONED IN THE OPENING STATEMENT

Defendant claims that his trial counsel “promise[d] the jury” during the opening statement that certain witnesses would be called. Aplt. Br. 20-21. Defendant then argues that his counsel performed deficiently by not calling those witnesses. Aplt. Br. 20-21. This claim should be rejected.

A. There was no deficient performance.

To prove deficient performance, a defendant must show that his “trial counsel’s representation fell below an objective standard of reasonable professional judgment.” *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989). “In evaluating defense counsel’s strategy under an ineffective-assistance analysis, we give trial counsel wide latitude in making tactical

decisions and will not question such decisions unless there is no reasonable basis supporting them.” *State v. Bloomfield*, 2003 UT App 3, ¶ 30, 63 P.3d 110 (internal quotations and citation omitted).

1. This Court should reject Defendant’s request for a categorical rule relating to counsel’s failure to call every witness who was mentioned in the opening statement.

As noted by Defendant, no published Utah decision deals with the question of a defense attorney who mentions potential witnesses during the opening statement, but then does not call those witnesses. Apl’t. Br. 20-21. Defendant now asks this Court to hold that such failures should be categorically regarded as deficient performance unless “unforeseeable” or “unexpected events” caused the change in strategy. Apl’t. Br. 20-21. This proposed standard should be rejected for three reasons.

First, it is at odds with *Strickland*. As noted above, *Strickland* set forth a two-part test for assessing the alleged ineffectiveness of trial counsel. *See* 466 U.S. at 687. In setting forth that test, the Supreme Court emphasized that the inquiry is both flexible and case-specific. According to the Court, “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Id.* at 688-89. After setting forth the basic test, the Court held that “[m]ore specific guidelines are not appropriate,” because any “such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in

making tactical decisions.” *Id.* at 688, 689. The Court therefore stressed that when “adjudicating a claim of actual ineffectiveness of counsel,” lower courts “should keep in mind that the principles we have stated *do not establish mechanical rules*. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 696 (emphasis added).

This Court’s unpublished decision in *State v. Heil*, 2005 UT App 117U (Addendum C) is illustrative. In *Heil*, the defense attorney told the jury during the opening statement that an expert witness would be called to support his self-defense claim. *Id.* at *1. But defense counsel subsequently “discovered that the testimony actually would be contrary to his client’s case,” and decided not to call the witness. *Id.* On appeal, this Court did not impose the per se “unforeseeable event” requirement requested by Defendant here. Instead, this Court analyzed the case under the flexible approach mandated by *Strickland*, thereby concluding that the decision not to call the witness could not “be questioned because it can be reasonably considered a tactical decision.” *Id.*

Several courts from other jurisdictions have similarly applied *Strickland* to claims like this one. In *United States v. McGill*, 11 F.3d 223, 226-28 (1st Cir. 1993), the First Circuit held that an attorney did not perform deficiently by failing to call an expert witness, even though the attorney had specifically discussed the witness’s potential testimony during the opening statement. The court held that this “tactical decision” was appropriate because: (1)

trial counsel had subsequently decided that the witness would “easily be impeached,” and (2) defense counsel had managed to elicit “much the same opinion evidence” during his cross-examinations of the government’s own witnesses. *Id.* at 227-28. The First Circuit accordingly suggested that an attorney’s mid-trial decision not to call a witness should ordinarily be insulated from an ineffective assistance challenge: “Knowing when to quit is often a hallmark of commendable courtroom advocacy. Thus, having proved his point through the prosecution’s witness, defense counsel can scarcely be faulted for deciding to leave well enough alone.” *Id.* at 228.

The Fourth Circuit likewise concluded that an attorney’s mid-trial decision not to call a particular witness is ““virtually unchallengeable.”” *Turner v. Williams*, 35 F.3d 872, 904 (4th Cir. 1994) (citing *Strickland*, 466 U.S. at 690), *overruled on other grounds by O’Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996). The Fourth Circuit refused to require attorneys “to continue to pursue a trial strategy even after they conclude that the original strategy was mistaken or that the client may be better served by a different strategy.” *Id.* Other courts have agreed with this approach, thereby rejecting ineffective assistance challenges as long as there was a reasonable strategic basis for the decision not to call the promised witness. *See United States ex rel. Schlager v. Washington*, 887 F.Supp. 1019, 1026-27 (N.D. Ill. 1995); *Dunlop v. Colorado*, 173 P.3d 1054, 1075-76 (Colo. 2007), *cert denied*, 128 S.Ct. 882 (2008); *Commonwealth v. McMahon*, 822 N.E.2d 699, 712-13 (Mass. 2005); *In re Benn*, 952 P.2d 116, 130-32 (Wash. 1998).

Second, Defendant's proposed rule also fails to give appropriate deference to a defense attorney's need for mid-trial flexibility. It ultimately rests on the idea that once a defense attorney makes a claim during an opening statement, she should be locked into that claim unless something unexpected or unforeseeable happens. Depending on the circumstances, however, any number of foreseeable or expected events might happen mid-trial that would support a change in strategy. For example, a defense attorney might conclude that one of the State's witnesses was seriously weakened during cross-examination. Even if the defense counsel had believed all along that she would be able to undercut the witness, her observations of such subtleties as the witness's demeanor during questioning or the body language of particular jurors might reasonably convince the attorney not to call an anticipated rebuttal witness. Similarly, a defense attorney in a lengthy trial might sense that the jury is becoming weary. Even if such jury-fatigue could have been foreseen or expected, the defense attorney might still reasonably decide that the defendant's interests would still be better served with a pared-down, compact case, thus causing counsel not to call certain planned witnesses.

If this Court adopts the categorical rule proposed by Defendant, however, attorneys would now be locked into an original strategy, regardless of its continued desirability. Thus, Defendant's rule would paradoxically force defense attorneys to "continue to pursue a trial strategy even after they conclude that the original strategy was mistaken or that the client

may be better served by a different strategy.” *Turner*, 35 F.3d at 904. Such an approach is not consistent with *Strickland*.

Third, this rule is simply unnecessary. *Strickland* already accounts for the perceived problem by requiring attorneys to have a reasoned basis for their strategic decisions. *See, e.g., State v. Hales*, 2007 UT 14, ¶¶ 70-71, 152 P.3d 321. This approach is better-suited to handling claims like Defendant’s, because it allows courts to not just look to the fact of the broken promise, but also to the nature of the promise itself.

The D.C. Court of Appeals recognized this in *Edwards v. United States*, 767 A.2d 241, 248 (D.C. 2001). Noting that ineffective assistance claims are “necessarily fact-based,” the court concluded that the resolution of claims like this one depends on such things as

the nature and extent of the promises made in opening statement, any strategic justifications for the subsequent decision not to produce the evidence, the explanation provided the jury for the failure to produce the evidence, the presentation of other evidence supporting the promised theory, and . . . the impact upon the defense at trial and upon the jury.

Id. (quotation and citation omitted). Given this, “[n]o particular set of rules can be established to define effective assistance, as hard-and-fast rules would inevitably restrict the independence and latitude counsel must have in making tactical and strategic decisions.” *Id.* (quotation and citation omitted). The court thus “reject[ed] any *per se* rule that unfulfilled promises by defense counsel during opening statement will result automatically in a finding of deficient performance of counsel and prejudice to a defendant.” *Id.*

The Massachusetts Supreme Court adopted a similar approach in *Commonwealth v. Duran*, 755 N.E.2d 260 (Mass. 2001). There, the court “reject[ed] any suggestion that trial counsel’s failure to produce evidence to which counsel alludes during opening statement constitutes, in and of itself, ineffective assistance of counsel in all cases.” *Id.* at 271. Instead, the court held that “in each case the defendant must demonstrate that counsel’s unfulfilled promise” actually fell below the appropriate standard. *Id.* As in *Edwards*, the *Duran* court looked to such case-specific factors as “the nature and extent of the promise made in the opening statement, any strategic justifications for the subsequent decision not to produce the evidence, and the likely impact on the jury of the failure to produce the promised evidence.” *Id.*

In short, the flexible, case-specific analysis dictated by *Strickland* is already sufficient to address the perceived problem. This Court should therefore reject Defendant’s request for a *per se* rule of deficiency when defense counsel fails to produce a witness who was mentioned in the opening statement.

2. Defendant has not shown deficient performance.

Defendant complains of his counsel’s failure to fulfill two particular statements made during the opening argument. Aplt. Br. 20-21.⁶ But he has not shown deficient performance with respect to either statement.

⁶ Defense counsel’s full opening argument is found at R. 502: 247-57, and is included as Addendum D to this brief.

In the first statement, defense counsel told the jury that “you’ll hear testimony that the family felt—meaning [Defendant] and his parents—felt like Susan was being very reasonable.” R. 502: 255. Contrary to Defendant’s claim, defense counsel did not break this alleged promise. Defendant’s father testified that Susan let Defendant’s parents see the grandkids “frequently,” and he further testified that she let the children stay overnight at the grandparents’ home during visits. R. 504: 684. Defendant’s father also said that “we were all spending a lot of time with them,” R. 504: 687, as evidenced by the fact that Defendant and his parents were returning from a week-long vacation with the children at the time of the September 11 attack. R. 503: 585; 504: 688-89.

While Defendant now insists that this statement was a promise that Defendant and both of his parents would testify, Aplt. Br. 21, his counsel did not say that. Instead, she only said there would be “testimony” on the issue, but she did not elaborate on who it would come from. Thus, the testimony from Defendant’s father fulfilled this statement. No promise was broken.

But even if the statement did imply that Defendant and his mother would also testify on the issue, defense counsel could still have reasonably decided that duplicative testimony on this tangential issue was unnecessary, *cf. Loose v. State*, 2006 UT App 149, ¶ 34, 135 P.3d 886, particularly given the length of this trial. The failure to produce such testimony therefore was not objectively unreasonable.

The second statement identified by Defendant had to do with his anticipated testimony regarding his relationship with Davey Desvari. During the opening statement, defense counsel explained that Defendant had been introduced to Ben Desvari through Ben's brother Davey. R. 502: 250. In passing, counsel stated that "Don will tell you, he considered Davey Desvari a good friend. He'd known him for years." R. 502: 250. Defendant now claims that this statement constituted a promise for Defendant to testify. Aplt. Br. 20-21.

As discussed more fully below in Point III, Defense counsel originally intended for Defendant to testify, but later decided not to call him after Brinkerhoff testified that he had spoken with Defendant within 2 hours of the September 11 attack. R. 1031: 23-25, 33, 176-79. This was a reasonable decision and is therefore "virtually unchallengeable" under *Strickland*, 466 U.S. at 690.

But even under Defendant's proposed rule, this would still not be deficient performance because the change in strategy resulted from unforeseen or unexpected events. At the 23B hearing, defense counsel specifically testified that Brinkerhoff's testimony was unexpected. R. 1031: 23-25, 33, 176-79. Thus, even under the more exacting standard proposed by Defendant, this decision would still be insulated from attack.

B. There was no prejudice.

Under the prejudice prong, the defendant must show that "a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial." *Clark*, 2004 UT 25, ¶ 6. Even if this Court concludes that defense

counsel's decision not to call these witnesses was deficient performance, Defendant's claim still fails because he has not shown prejudice.

Defendant cites four cases in support of his claim of prejudice. Aplt. Br. 20-21. None of these cases help Defendant, however, because each involved promises that were much more significant than those at issue here. In *Ouber v. Guarino*, 293 F.3d 19, 22 (1st Cir. 2002), defense counsel "promised-not once, but four times-that the [defendant] would testify," and then specifically told the jury that the case would hinge on the credibility of the defendant's anticipated testimony. In *United States v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003), defense counsel promised testimony from the defendant, as well as specific testimony showing that defendant was not part of the gang responsible for the murder at issue. In *State v. Zimmerman*, 823 S.W.2d 220, 221-22 (Tenn. Crim. App. 1991), defense counsel promised testimony from the defendant, as well as from a psychologist. And in *People v. Briones*, 816 N.E.2d 1120, 1122 (Ill. App. 2004), defense counsel promised that the defendant would "get up here on this witness stand and he's going to testify and he's going to subject himself to rigorous cross-examination by the State and he's going to do that because he's going to tell you the truth."

The two statements at issue here pale in comparison. These two isolated comments are drawn from a 10-page opening statement that was focused on the larger issues in this case. R. 502: 247-57 (Addendum D). When read in context, these are perhaps two of the least important things that Isaacson said. Neither statement said anything about Defendant's

relationship with Susan's attackers or about the credibility of any key witness. Neither statement said anything about the attack or the subsequent investigation. Neither statement said anything about where Defendant was on September 11 or what explanations he might have for his extensive contacts with the attackers. Neither statement made any claim regarding any particular defense or any particular alibi. Instead, both statements were merely directed at tangential issues. The first had to do with the relationship between Defendant's family and his ex-wife, while the second had to do with Defendant's relationship with a man who was never a part of any conspiracy at issue.

Given this, there was no reasonable probability that the result of this case would have been different had either statement been corroborated. Defendant's claim should be rejected.

II.

DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY MOVED TO DISMISS THE SECOND CONSPIRACY CHARGE

Defendant argues that defense counsel was ineffective for offering an "admission" that Defendant was guilty of a single count of conspiracy. Aplt. Br. 22-26. According to Defendant, this "admission was not made *arguendo*," but was instead a "forthright statement of fact." Aplt. Br. 25. This claim is based on a misreading of the record.

A. Procedural Background.

As noted, Defendant was charged with two counts of conspiracy to commit aggravated murder. R. 54-55. The first count centered on Defendant's initial agreement

with Ben Desvari, while the second count centered on the subsequent agreement between Defendant, Ben, and James Brinkerhoff. R. 504: 616.

On the evening of the second day of trial, defense counsel filed a written motion to dismiss the second conspiracy charge. R. 339-43. The motion argued that adding Brinkerhoff was not sufficient to terminate the first conspiracy, and that the State had therefore only produced evidence of a single continuing conspiracy. R. 339-43. The motion did not include any factual admission, but instead referred to “the alleged plan” and the facts produced in “the State’s case.” R. 342-43. The motion stressed that the “*evidence presented by the State* supports one conspiracy which did not end.” R. 340 (emphasis added).

The next morning, the judge held an in-chambers discussion with the attorneys to discuss that day’s schedule. R. 504: 611-22. The State indicated that it would only call one more witness before resting. R. 504: 612. Given this, the court suggested that the parties argue Defendant’s motion then, rather than after the jury had been recalled to hear a single witness. R. 504: 612. Both parties agreed. R. 504: 612.

As in the written motion, defense counsel argued that the facts produced in the State’s case could only establish one conspiracy, not two. R. 504: 612-16. Defense counsel began by pointing to “the evidentiary picture.” R. 504: 612. Defense counsel then repeatedly referred to the evidence as presented by the State’s witnesses. R. 504: 612 (“Mr. Desvari acknowledges, and his testimony is . . .”); 504: 613 (“And Mr. Desvari further testified that

. . . “); 504: 613 (“And, according to Mr. Brinkerhoff . . .”); 504: 614 (“Then Mr. Desvari, according to the testimony . . .”). Defense counsel then summed up his factual analysis:

And the idea that the State would make this into two different conspiracies, I think, is *contrary to the evidentiary picture* and contrary to the law.

I think there was a conspiracy. The goal of the conspiracy was to harm Ms. Hyatt. And Mr. Desvari was enlisted for that purpose in the beginning and was unsuccessful. He continued to work with Mr. Millard and work with Mr. Brinkerhoff and Mr. Desvari continued to have a role.

R. 504: 614 (emphasis added).

B. The challenged statement did not constitute deficient performance.

Defendant’s claim is based on the fact that his counsel said “I think there was a conspiracy” while arguing the motion to dismiss. Aplt. Br. 23-26. According to Defendant, this was an impermissible “admission” of fact that prejudiced him. Aplt. Br. 23-26.

While the statement might seem like an admission when read in isolation, it is not an admission when read in context. In context, this statement was clearly part of defense counsel’s overall discussion of the testimony that had been presented. As defense counsel explained in his motion and again in the argument, he was doing nothing more than summing up “the evidentiary picture” that had been presented to that point. R. 340-43, 504: 614.

More importantly, while defense counsel spoke as if the State’s testimony was true, the procedural posture required him to do so. When a defendant moves to dismiss at the close of the State’s case, the question is whether the State produced “believable evidence of all the elements of the crime charged.” *State v. Hamilton*, 2003 UT 22, ¶ 40, 70 P.3d 111

(quotations and citation omitted). “Evidence is sufficient, and denial of a motion to dismiss proper, if the evidence and all inferences that can be reasonably drawn from it establish that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt.” *State v. Spainhower*, 1999 UT App 280, ¶ 5, 988 P.2d 452 (quotations and citation omitted).

When defense counsel was asked about the statement at the rule 23B hearing, he correctly explained that because he was “making a motion to dismiss at the close of the State’s case,” the question was simply whether the State had “made a prima facie case of conspiracy.” R. 1031: 145. As such, he could not argue that there had been no conspiracy at all, due to the fact that Ben Desvari had specifically said there was. R. 1031: 145-46. But he could argue that, even accepting the State’s evidence as true, there was still no proof of a second conspiracy. R. 1031: 145-46.

In sum, counsel’s statement was not an admission of fact, but instead a legal argument that was tailored to the governing legal standard. This was not deficient performance.

C. Defendant has not shown prejudice.

Even if counsel somehow performed deficiently, Defendant has not shown prejudice.

To show prejudice, Defendant must show that a “reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial.” *Clark*, 2004 UT 25, ¶ 6. Here, Defendant agrees that the alleged “admission” at issue occurred outside the presence of the jury, Aplt. Br. 23-26, and he points to no place in the

record where any similar statement was made to the jury itself. Thus, regardless of what defense counsel said to the judge in chambers, Defendant cannot show that the jury's decision was influenced by the comment.

But more importantly, Defendant received a direct benefit from his counsel's argument. At the conclusion of the trial, the jury convicted him of both counts. R. 375. Before sentencing, however, defense counsel renewed his argument in a motion to arrest judgment. R. 415-24. As in the mid-trial motion, defense counsel argued that the State had only proven one conspiracy. R. 415-24. This time, the court agreed. R. 450; 507: 17-18. As a result, Defendant was only sentenced to one term of 5-to-life, not two. R. 450; 507: 21-22. Thus, this very argument ultimately resulted in his sentence being cut in half.

In response, Defendant first suggests that prejudice should be presumed because his counsel had a conflict of interest. Aplt. Br. 26. In support, Defendant relies on *State v. Holland*, 921, P.2d 430, 435-36 (Utah 1996). Aplt. Br. 26. In *Holland*, the supreme court held that a defense attorney created a conflict of interest when he argued to a jury that one of his clients "was a prime candidate for the death penalty," but another client was not. *Holland*, 921, P.2d at 435-36. Nothing similar occurred in this case. Unlike *Holland*, defense counsel's alleged "admission" in this case was not to a jury, but to the court in an in-chambers motion hearing. Unlike *Holland*, this was a conditional "admission" that was mandated by the particular motion at issue. And unlike *Holland*, defense counsel was clearly

acting in Defendant's interest, with this very motion ultimately cutting Defendant's prison sentence in half. *Holland* is inapposite.

Defendant also argues that his counsel's argument prejudiced him by informing the State about its evidentiary deficiencies, thereby allowing the State to cure the defect by recalling several witnesses. Aplt. Br. 23 n.3. Nothing in the record supports this claim. Following the argument on the motion to dismiss, the State recalled three witnesses for the very limited purpose of establishing a lack of prior connections between Anthony and Defendant's two co-conspirators. *See* R. 504: 623 (Brinkerhoff testifying that he did not know Ted Anthony); R. 504: 625 (Anthony testifying that he did not know Ben or Brinkerhoff); R. 504: 626 (Ben Desvari testifying that he did not know Ted Anthony). Contrary to Defendant's claim, however, the State did not ask any of these witnesses any questions about whether the conspiracy between Defendant and Ben terminated in August 2004, or whether it instead continued through the September 11 attack.

In short, the record shows that this very argument ultimately resulted in a substantial reduction in his sentence. Defendant thus has not shown prejudice from the alleged error.

III.

DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE WHEN HIS COUNSEL ADVISED HIM NOT TO TESTIFY

Defendant claims that his counsel was ineffective by either (1) affirmatively preventing him from testifying, or (2) failing to inform him of his constitutional right to testify. Aplt. Br. 26-31.

A. Defendant's counsel did not prevent him from testifying.

Defendant first claims that although his counsel initially prepared him to testify, they later changed their minds and “would not allow him to testify.” Apl't. Br. 28. The record contradicts this claim.

At the 23B hearing, Bugden and Isaacson both unequivocally testified that they did not prevent Defendant from testifying, but instead only recommended that he not do so. According to Bugden, “we said over and over again to [Defendant] that it was ultimately his decision.” R. 1031: 26. When asked whether they told Defendant that he could not testify, Bugden testified that “we absolutely did not.” R. 1031: 124. Bugden further asserted that “it is a categorical lie that we told [Defendant] on Tuesday night you can't testify, we will not permit you to testify.” R. 1031: 124. According to Bugden, he and Isaacson “definitely, positively, unequivocally” let Defendant know that it was his choice. R. 1031: 126.

Isaacson corroborated Bugden's account. She explained that “I told him from the beginning, we are going to prepare you to testify,” but that this “is a decision that ultimately you are going to make with our input.” R. 1031: 181. When asked whether she had “ever prohibit[ed Defendant] from testifying,” she responded: “Absolutely not.” R. 1031: 180. When asked whether she ever “commanded [him] not to testify,” she responded: “I never commanded [Defendant] about testifying or not testifying. It was ultimately his decision. I made a recommendation, and he followed it, he agreed to follow it.” R. 1031: 180.

Bugden and Isaacson's testimony was corroborated by a letter that Isaacson sent to Defendant a few days before trial, and which was subsequently submitted to the 23B court as an exhibit. Addendum E. In that letter, Isaacson said that at "this point, we are *recommending* that you testify. *It is ultimately your decision*, but there are too many explanations that can only come from you. We will continue to prepare you for this experience." (Emphases added).

In its findings, the 23B court specifically found that Bugden and Isaacson were credible. R. 1019-1020. The 23B court also found that Bugden and Isaacson had "never told the defendant he was not going to testify." R. 1017. As shown in Point VII of this brief, Defendant has not shown that those factual findings are clearly erroneous. As such, Defendant has not shown that his counsel was ineffective in this regard.

B. Defense counsel were not ineffective for failing to inform Defendant that his right to testify was derived from the Constitution.

Defendant next claims that even if his counsel did not affirmatively prevent him from testifying, they were at least ineffective for not advising him that his right came from the Constitution. Aplt. Br. 26-27. This claim should be rejected.

Although Defendant is generally correct when he claims that a defendant must knowingly and voluntarily waive a constitutional right, *see Salazar v. Warden*, 852 P.2d 988, 991 (Utah 1993), he is incorrect when he claims that a waiver of a constitutional right is invalid unless the defendant was specifically informed of the right's constitutional origins. Defendant cites no authority in support of this rule, and the State has found none.

Moreover, Defendant's proposed rule stands in contrast to accepted constitutional norms. In *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), for example, the United States Supreme Court set forth a series of warnings that must be given to a suspect before police can proceed with an interrogation. The Court required officers to inform the suspect that he "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* Once given the warnings, suspects are entitled to waive their constitutional rights and proceed with the interrogation. See *State v. Barrett*, 2006 UT App 417, ¶ 11-12, 147 P.3d 491.

In light of Defendant's suggestion here, however, it is significant that *Miranda* does not require the officer to also inform the suspect of the particular constitutional rights that are being waived. In other words, *Miranda* does not also require the officer to preface the warnings with an explanation that the rights are derived from the Fifth and Sixth Amendments. Instead, the warnings only require an explanation of the choice itself.

Similarly, rule 11, the Utah Rules of Criminal Procedure, insures that before pleading guilty, a defendant is apprised of the constitutional rights that he is waiving. See generally Utah R. Crim. P. 11(e). Like *Miranda*, however, rule 11 does not require the court to specifically inform the defendant that these are "constitutional rights," let alone identify the particular constitutional provisions at issue.

Here, Bugden “definitely, positively, [and] unequivocally” let Defendant know that he had the option of testifying if he so chose. R. 1031: 126. Isaacson reinforced this by telling “him from the beginning, we are going to prepare you to testify,” but then stressing that this “is a decision that ultimately you are going to make with our input.” R. 1031: 181. Together, Bugden and Isaacson “clearly communicated the concept that it was ultimately his decision, and not his trial lawyers’ decision.” R. 1031: 26. Defendant therefore has not shown deficient performance.

In any event, Defendant also has not shown prejudice from his counsel’s alleged failure. During the rule 23B hearing, Bugden testified that in his 31 years of practice, he has never prepared a defendant to testify more thoroughly than Defendant. R. 1031: 124-25. Despite this, Bugden and Isaacson ultimately advised Defendant not to testify for several reasons.

First, they believed Defendant would not be a very good witness. In preparing for trial, Isaacson did “dozens” of mock-examinations with Defendant, often followed by cross-examinations from Bugden. R. 1031: 16-17, 171. Defendant sometimes “did okay,” but other times he would “not do well.” R. 1031: 17. Although counsel repeatedly advised him to avoid discussing certain issues, Defendant still had a tendency to “ramble and get into areas” that could cause him trouble at trial. R. 1031: 17. This was particularly troubling to defense counsel because the Tooele County prosecutor was known to be “a good lawyer and a tough cross examiner.” R. 1031: 19.

More importantly, defense counsel were also concerned about the substance of Defendant's testimony. During the months of pretrial preparation, Isaacson was primarily responsible for working with Defendant. During that time, she had gone through the phone records with Defendant and repeatedly asked him to identify every number that he could. R. 1031: 174-77. Isaacson and Defendant went over those records "probably two dozen times" before trial. R. 1031: 192. Working off the information Defendant provided, Isaacson made charts and timelines to track the phone calls. R. 1031: 172-75.

Despite this, Bugden and Isaacson never heard that Defendant called Brinkerhoff at 9:08 p.m. on September 11 until Brinkerhoff testified to that effect on the second day of trial. R. 1031: 22-23, 177. Defense counsel were extraordinarily concerned by this revelation. Coupled with Brinkerhoff's call to Defendant immediately before the attack, this call appeared to prove Defendant's complicity in the attack. Bugden later referred to it as the "smoking gun." R. 1031: 22.

When Bugden and Isaacson confronted Defendant about the phone call after court and asked him for an explanation, Defendant got a "deer in a headlight" look and said that he did not have one. R. 1031: 22-23, 109, 177-78. Defendant then said he needed to sleep on it. R. 1031: 105-07. When Defendant returned the next morning, he explained that he now remembered he had actually been home on the night of September 11 with Davey Desvari, and that Davey had borrowed his phone around 9 p.m. and made the call. R. 1031: 22-23,

109, 177-78. This was the first time that defense counsel had heard this story, and they found it inherently unbelievable. R. 1031: 22-23, 28-29, 177-78.

More importantly, this newfound claim was eminently impeachable. Defendant was interviewed at the Grantsville police station sometime after 10 pm on the night of the attack. R. 502: 260. While Defendant was being interviewed, Ben Desvari called him on his cell phone; at the detective's urging, Defendant answered.⁷ While speaking with Ben, Defendant told him that "I'm trying to get home. *I haven't even made it to my place yet. Just my parents.*" Addendum F at *25. Thus, when Defendant told his counsel midway through the trial that he had actually been with Davey at his house and that Davey had made the 9:08 call, defense counsel knew that this new claim was directly contradicted by Defendant's own recorded statement to his erstwhile friend on the night of the attack itself.⁸

Given this, defense counsel were not only concerned that the jury would not believe this story, but also that it would open the door to a perjury charge. R. 1031: 23. In short, Bugden believed that Defendant's newfound explanation for the call "was so self-serving and sort of preposterous that we believed that [it] would sink the ship." R. 1031: 33. This concern was compounded by Defendant's demonstrated lack of skill at handling tough

⁷ The full interview transcript is located in a non-paginated manila folder in the record. The State has reprinted pages 24-25 as Addendum F to this brief.

⁸ When confronted with this discrepancy at the rule 23B hearing, Defendant claimed that he had been lying to Ben during the call. R. 1031: 229-30.

questions during pretrial preparations. Counsel were thus convinced that Defendant would “self-destruct on the stand” if he testified. R. 1031: 106-07.

Thus, while Defendant now suggests that his decision not to testify was somehow a product of his lack of understanding about his constitutional rights, the record shows that his decision was based on legitimate concerns about what would happen if he testified in this case. Defendant simply fails to show how those realistic concerns would be alleviated if he had understood the constitutional nature of the decision that he already knew his attorneys were letting him make. Defendant’s ineffective assistance claim fails.

IV.

DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE WHEN HIS COUNSEL DID NOT OBJECT TO THE ADMISSION OF THE PHONE RECORDS

Defendant raises two claims relating to the phone records that were introduced at trial. First, Defendant claims that the phone records were never properly admitted. Aplt. Br. 31-35. Second, he claims that his trial counsel were ineffective for stipulating to their admission. Aplt. Br. 36-41. Both arguments should be rejected.

A. The phone records were properly admitted.

Defendant argues that the phone records were not properly admitted. Aplt. Br. 31-35. This argument should be rejected for two reasons.

First, it is unpreserved. As evidenced by Defendant’s own argument, he never objected to the admission of the records below. Thus, he can only prevail by arguing plain error or exceptional circumstances. *See State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. But

Defendant has not argued that either standard applies. *See generally* Aplt. Br. 31-35. Thus, this claim is not properly before this Court. *See State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995) (“Because Pledger does not argue that exceptional circumstances or plain error justifies a review of the issue, we decline to consider it on appeal”); *accord State v. Pinder*, 20005 UT, ¶ 45, 114 P.3d 551.

Second, even if properly before this Court, Defendant’s claim is based on a false factual premise. Toward the close of the second day of trial, the prosecutor said that, “pursuant to stipulation by counsel, we move for the admission of all the phone records.” Aplt. Br. 34 (citing R. 503: 600). Defendant argues that this is the “only” statement on the record regarding this stipulation, and he claims that the statement was ambiguous as to whether the stipulation was to authenticity, admissibility, or both. Aplt. Br. 34-35.

Contrary to Defendant’s claim, this was not the only time the admissibility of the records was discussed at trial. During a recess earlier that day, the prosecutor had informed the court that although it had witnesses ready to testify about the phone records, those witnesses were unnecessary because “Mr. Bugden and Ms. Isaacson . . . stipulated to the admission of the phone records.” R. 503: 485-86. Bugden did not dispute this claim, but instead agreed with it and made scheduling suggestions based on it. R. 503: 485-86.

In addition, Bugden referred to this stipulation during his closing statement while arguing that the State had not proven that particular numbers were linked to particular people. *See generally* R. 504: 833-35. Specifically, Bugden claimed that “there was a

stipulation that the telephone records would come in. I believe we agree that that's true. But there is no proof of who a particular number is assigned to." R. 504: 834.

Thus, Defendant is incorrect when he claims that there was any ambiguity as to the scope of the stipulation. Instead, the record plainly shows that the stipulation was to admissibility as well as to authenticity.⁹

B. Defense counsel were not ineffective for stipulating to the admission of the phone records.

Defendant next argues that his counsel were ineffective for stipulating to the admission of the phone records. It is well established, however, that trial counsel is not required to make futile objections. *See, e.g., State v. Kelley*, 2000 UT 41, ¶ 26, 1 P.3d 546; *State v. Whittle*, 1999 UT 96, ¶ 34, 989 P.2d 52. In this case, the prosecution had witnesses who would testify to the authenticity of the phone records. R. 503: 485-86. As indicated in the State's pre-trial witness disclosure list, those witnesses would have been: (1) a "[C]ustodian of records for Leap Wireless International, Inc. (Cricket Communications)" and (2) a "[C]ustodian of records for Sprint Spectrum, L.P." R. 238.

⁹ Defendant also contends that even if the stipulation covered admissibility, the phone records were not properly admitted because the trial court did not accept them on the record. Aplt. Br. 31-35. While it is true that the trial court did not verbally utter the word "received" or "accepted," Defendant points to no authority requiring a trial court to do so. In this case, the court's written record shows that the trial court did accept the phone records. Specifically, the court's official exhibit list indicates that the records were marked, identified, offered, and received. R. 372. Although Defendant now speculates that this notation came from the court's clerk and not the judge himself, Aplt. Br. 35, Defendant offers no support for this assertion. Thus, the written record in this case only supports the conclusion that the trial court did accept the documents.

Defendant points to no evidence suggesting that these records were inauthentic, but instead merely speculates that defense counsel might somehow have been able to challenge the veracity of the records. But to prove ineffective assistance, Defendant must do more than speculate. Instead, he must show that his claim is based on a “demonstrable reality and not a speculative matter.” *State v. Perry*, 2009 UT App 51, ¶ 12, 204 P.3d 880 (quotations and citation omitted). Defendant’s claim therefore fails.¹⁰

V.

DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE WHEN HIS COUNSEL DID NOT OBJECT TO ANTHONY’S STATEMENTS ABOUT HIS CONVERSATION WITH IDRESE

Defendant claims that his trial counsel were ineffective for not objecting to Ted Anthony’s testimony about his conversations with Idrese Richardson. Aplt. Br. 42-43. This claim should be rejected for two reasons.

First, Defendant has not met his burden of proving that trial counsel performed deficiently. *Clark*, 2004 UT 25, ¶ 6. Although Defendant first raised his claim regarding the Anthony/Idrese conversation as part of his request for a rule 23B remand, this Court did not grant Defendant a remand on this particular issue. R. 826. In spite of this, David Drake, Defendant’s appellate counsel, asked Bugden about the decision twice during the 23B hearing. In both instances, Bugden stated that he had a reason for not objecting, but in both cases, Drake prevented Bugden from explaining that reasoning.

¹⁰ Defendant also charges the prosecutor with “prosecutorial misconduct” for referring to the records. Aplt. Br. 41. In light of the above discussion, that claim is frivolous.

The first exchange occurred as follows:

Drake: So you felt your cross examination of Mr. Anthony was stellar, then?

Bugden: I did.

Drake: And allowing him to make hearsay statements about Idrese Richardson is stellar, without any objection from you? Just yes or no.

Bugden: I can't answer that one yes or no.

R. 1031: 15-16. Drake then changed the subject without allowing explanation. R. 1031: 16.

The second exchange was even more direct:

Drake: Ted Anthony at the prelim talked about Idrese Richardson, didn't he?

Bugden: I don't remember everything he said at the prelim, but he could have.

Drake: He went along at the prelim, and he talked in hearsay Idrese told me this, Idrese told me that, and you never objected, did you?

Bugden: I don't, because at prelim—

Drake: Just yes or no.

Bugden: I did not for a reason.

Drake: He testified that way at trial, didn't he, without objection from you?

Bugden: I don't remember that.

Drake: You never made one objection for hearsay at trial. So why didn't you file a motion in limine, knowing how he testified at the prelim, to file a motion in limine prior to the trial to get him so he wouldn't testify to Idrese Richardson's hearsay statements?

Bugden: At trial I think there may have been a single statement about Idrese, and the theory with Ted—I'm answering your question, sir.

Drake: No, my question is, you never filed a motion in limine—

Bugden: Didn't you say, why didn't I?

Drake: No, I said, yes or no, did you file a motion in limine?

Bugden: No.

R. 1031: 76-77. Drake again changed the subject without allowing Bugden to explain. R. 1031: 77.

When pressing an ineffective assistance claim on appeal, however, a defendant “bear[s] the burden of proof.” *State v. Litherland*, 2000 UT 76, ¶ 17, 12 P.3d 92. To meet this burden, the defendant “must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Strickland*, 466 U.S. at 489. Moreover, a defendant also “bears the burden of assuring the record is adequate.” *Litherland*, 2000 UT 76, ¶ 16. “Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively.” *Id.* at ¶ 17.

Defendant has wholly failed to satisfy these burdens in this case. While the record shows that Bugden made a deliberate decision not to object to the challenged testimony, the record does not show what that reason actually was. And the reason for that silence is Defendant's effort during the rule 23B hearing to prevent Bugden from actually explaining his thinking. This approach is incompatible with Defendant's burden of overcoming the presumption in favor of the reasonableness of Bugden's decision. *Bullock*, 791 P.2d at 159-60; *State v. Marble*, 2007 UT App 82, ¶ 11, 157 P.3d 371. This claim should be rejected for this reason alone.

Second, even if the claim were properly before this Court, Defendant's claim still fails because he has not established prejudice. Anthony's testimony about his conversation with Idrese was perhaps the least damning aspect of his account, because Anthony also testified about the conversations he had with Defendant himself about the plot to kill Susan. R. 503: 441-42. During their initial conversation, Defendant told Anthony that "he wanted [Susan] taken care of, he wanted her killed, because she was draining his other bank accounts." R. 503: 441. Afterwards, Anthony spoke with Defendant "almost daily." R. 503: 442. During those conversations, "the first thing that would always be mentioned or always be brought up" was whether Anthony could find a hitman to kill Susan. R. 503: 442.

Defendant has not argued that his counsel should have objected to these statements as well, instead confining his argument to the conversation between Idrese and Anthony. Given this, Anthony's account of the Idrese conversation was both cumulative and harmless.

Moreover, even if defense counsel had successfully objected to this account, the jury would have still heard the firsthand accounts of the conspiracy from Ben and Brinkerhoff, and it still would have had the corroborating phone records.

Defendant thus has not shown that the result of this trial would have been different if the jury had not heard about Anthony's single conversation with Idrese. This claim fails.

VI.

DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE WHEN HIS COUNSEL DID NOT CALL CERTAIN WITNESSES

In Point VI, Defendant raises five different claims. In the first four, he argues that trial counsel were ineffective for failing to call Glenda Millard, Melody Oliver, Idrese Richardson, or Davey Desvari; in the fifth, he argues that his counsel should have asked Brinkerhoff certain questions about his post-attack meeting with Defendant. Aplt. Br. 43-47. These claims should each be rejected.

A. Trial counsel properly investigated Glenda Millard's claims.

In her rule 23B affidavit, Glenda Millard, Defendant's mother, claimed that she was part of a post-arrest conversation in a Murray park in which Ben Desvari told her that Defendant was innocent. R. 546-51, 901-02. But the rule 23B court found that "the defense team did not use the alleged park meeting at trial [because] the defense team believed it to be self-serving and completely unbelievable." R. 1013 (Finding 47).

Defendant argues that trial counsel failed to "investigate" Glenda's account of the Murray park meeting. Aplt. Br. 44. In Point VII of his brief, Defendant also argues that

Findings 44, 47, and 48 (which each relate to Glenda Millard) are not supported by the evidence. Aplt. Br. 55-56. The record refutes these claims.

At the rule 23B hearing, Bugden testified that during the pre-trial investigation, defense counsel “met with the parents, explained our theory of the case, asked them for whatever ideas they had, whatever factual information they had, that might be helpful.” R. 1031: 159. During these meetings, Defendant’s parents told counsel about the alleged Murray park meeting. R. 1031: 50-51, 115. After hearing their account, defense counsel made a “strategic” decision not to advance that claim at trial. R. 1031: 52. When questioned by the prosecutor about this decision at the 23B hearing, Bugden explained:

[Glenda Millard] told us about the meeting with Ben in the park, where Ben exonerated [Defendant] and said that the police were putting pressure on him to implicate [Defendant]. . . . We found it completely self-serving, and [thought] that it would be unbelievable. You know, we believed that the jury would believe and that you would argue to the jury that [Defendant] had put Ben up to telling the father that [Defendant] is innocent, [Defendant] wasn’t involved, . . . so his parents would stand behind him. So we thought it was completely unbelievable, self-serving, and so for that reason we did not present that evidence to the jury. *We were aware of it, and believed it was completely unbelievable.*

R. 1031: 115 (emphasis added). Thus, Defendant is incorrect in Point VI when he claims that his counsel failed to investigate this claim. Bugden’s testimony establishes that they did.

Defendant is also incorrect in Point VII when he claims that the 23B court’s findings regarding Glenda’s proposed testimony are unsupported by the evidence. While Defendant may believe in hindsight that “Glenda would have made a much better witness than the meth-using Ben,” Aplt. Br. 56, this disagreement is not a sufficient basis for concluding that

the 23B court's findings are not supported by the evidence. Instead, the findings should only be overturned if, when viewing the evidence in the light most favorable to the court's ruling, the findings "so lack support as to be against the clear weight of the evidence." *State v. Gamblin*, 2000 UT 44, ¶ 17 n.2 (quotations and citation omitted). And here, there is competent evidence to support each challenged finding. Specifically, Finding 44 is supported by R. 1031: 127, 178. Finding 47 is supported by R. 1031: 50-51, 115. Finding 48 is supported by R. 1031: 51-57, 159-60. Defendant's claim should therefore be rejected.¹¹

B. Trial counsel properly investigated Melody Oliver, and the decision not to call her as a witness was reasonable.

Defendant next claims that his counsel performed ineffectively by not investigating Melody Oliver, as well as by failing to call her as a witness. Aplt. Br. 44-45. According to Defendant, Oliver's testimony would have shown that Anthony was motivated by jealousy over Oliver's alleged relationship with Defendant. Aplt. Br. 44-45.

First, with respect to the investigation, testimony at the 23B hearing showed that defense counsel's investigator spoke with Oliver about her knowledge of these events and about her relationship with Ted Anthony, and that the investigator then discussed these

¹¹ Defendant does not directly claim that his counsel was also ineffective for failing to present this theory at trial, instead only basing his claim regarding Glenda Millard on an alleged failure to investigate. Aplt. Br. 43-45. To the extent that Defendant has implicitly raised this claim, it likewise fails. As noted above, a deficient performance claim is rejected when there is any conceivable strategic reason for the decision. Here, counsel explained that he did not call Glenda Millard because, after meeting with her, he concluded that the jury would not believe her story. R. 1031: 115. Defense counsel later emphasized that this was a deliberate, "strategic" decision. R. 1031: 52. As such, this was not deficient performance.

issues with defense counsel. R. 1031: 63-66, 119. Thus, contrary to Defendant's claim, defense counsel did investigate Melody Oliver.

Second, defense counsel did not perform deficiently by choosing not to call Oliver. Utah courts have repeatedly concluded that if defense counsel conducts an adequate investigation, a decision not to call the witness is not deficient performance so long as there was a reasonable basis for it. *See, e.g., State v. Leber*, 2007 UT App 273, ¶ 19, 167 P.3d 1091; *State v. Huggins*, 920 P.2d 1195, 1198-99 (Utah App. 1996).

Here, although it initially looked like Oliver might be a helpful witness, R. 1031: 119, 131-32, Bugden subsequently made what he referred to as a "strategic decision" not to call her. R. 1031: 64. Bugden gave three reasons for this decision. First, defense counsel learned that Defendant was giving Oliver rides to her probation officer and "money for urinalysis" while his case was pending. R. 1031: 64. Defense counsel was thus initially concerned that it would look like Oliver had been "bought and paid for" by Defendant. R. 1031: 64. Second, as trial approached, Oliver became a "hostile witness." R. 1031: 65. She "wouldn't come into our office and meet with us, or meet with us as trial approached." R. 1031: 64. She stopped answering the investigator's phone calls, but then let counsel know that she might be willing to help the defense if they paid her. R. 1031: 64-65, 119-20, 131. And third, during Ted Anthony's cross-examination, defense counsel Anthony admitted that he was initially upset with Defendant because of the relationship, R. 1031: 65, thereby allowing counsel to make the jealousy argument without Oliver's testimony. R. 504: 821.

The record therefore not only shows that defense counsel did investigate Melody Oliver's claims, but also that counsel made a reasonable strategic decision not to call her.¹²

C. Trial counsel made a reasonable decision not to call Idrese Richardson.

Defendant claims that his trial counsel should have called Idrese to testify. Aplt. Br. 44-45. Defendant claims that “[h]ad Idrese been called, the testimony of Ted would have been discredited, again creating reasonable doubt.” Aplt. Br. 45.

At the 23B hearing, Bugden explained why defense counsel did not call Idrese. Their investigation showed that Idrese “was virtually a homeless person who seemed absolutely crazy,” that he was “completely unstable,” and that he was “completely unreliable.” R. 1031: 148. Moreover, Idrese believed that Defendant “was going to pay for a music contract so he could become a recording artist” and had been “promised inducements” by Defendant. R. 1031: 148. Thus, defense counsel believed that Idrese had “a huge financial bias to testify” and would be impeachable on that basis. R. 1031: 148. Given this, the decision not to call Idrese was a reasonable strategic decision.

D. Trial counsel properly investigated Davey Desvari, and the decision not to call him as a witness was reasonable.

Defendant claims that his trial counsel “never investigated Davey Desvari and his witness potential.” Aplt. Br. 44. Defendant also claims that at the 23B hearing, his counsel

¹² In Point VII, Defendant challenges the 23B court's finding that “as trial approached, Ms. Oliver began to refuse to attend defense team meetings and stopped answering or returning their phone calls.” Aplt. Br. 56 (challenging Finding 55). As noted above, this finding was supported by R. 1031: 64-65, 119-20, 131-32.

“admitted they never investigated Davey and his witness potential.” Aplt. Br. 44 (citing R. 1031: 46).

This claim is misleading. In the cited passage, Bugden testified that he was “not sure if . . . our investigator, talked to [Davey] or not. I’m not positive on that.” R. 1031: 46. But throughout the remainder of the hearing, Bugden specifically refuted the claim that they had not “investigated Davey and his witness potential.” Aplt. Br. 44. To the contrary, Bugden testified that they discussed Davey with Defendant on “numerous occasions.” R. 1031: 39. But Defendant “gave us very, very little reason to ever believe that Davey Desvari had any information that would be helpful to the [D]efense.” R. 1031: 39. Defendant “never gave us a reason why Davey would be an essential witness. We included him on the list to be as expansive and protective as possible, so that he wouldn’t be barred, should it turn out that Davey actually had something relevant. But [Defendant] had never given us anything or given Doug, our investigator, any reason to believe that Davey had any relevant information regarding this case.” R. 1031: 39-40; *see also* R. 1031: 122 (“Davey was always someone completely on the periphery. [Defendant] never insisted we call Davey. He just thought that because Davey was Ben’s brother that maybe he had something relevant.”).

Despite this, Defendant now claims that Davey’s testimony would have been helpful because it would have established that Davey owned the phone that Ben used during the summer of 2004. Aplt. Br. 44-45. But the ownership of the phone was never in doubt. At trial, Ben testified that he was using Davey’s phone while Davey was in jail, and he also said

that nobody else had that number. R. 502: 283-84, 289-90. And at the 23B hearing, Bugden confirmed that defense counsel did not further investigate this issue because Defendant had told them that “Ben was using the phone the whole time.” R. 1031: 48.

Defendant also suggests that if Davey had been called as a witness, he would have testified that he, not Defendant, made the phone call to Magna at 9:08 p.m. on September 11. Aplt. Br. 44-45. But Defendant points to no place in the record where Davey has ever testified to that effect. Defendant’s claim is therefore purely speculative and self-serving.

More importantly, Bugden and Isaacson repeatedly testified that Defendant never told them that Davey had made the 9:08 p.m. phone call from his house until the morning of the third day of trial. R. 1031: 23, 28-29, 176-78, 195-96. This last-minute explanation contradicted his earlier statements to them, R. 1031: 192, and it also contradicted the recorded statement he made to Ben Desvari on the night of the attack. R. 1031: 28-29, 104-05; Addendum F at * 25. Thus, defense counsel made a reasonable strategic decision to not introduce testimony regarding this self-serving, impeachable claim.

Moreover, even if Defendant had timely told his attorneys about this claim, there was still a sound strategic reason for not calling Davey Desvari. Defendant’s overall strategic problem was that three different witnesses were willing to testify that Defendant had solicited their help in trying to kill his ex-wife. R. 1031: 148-49. Bugden explained to Defendant from the outset that while he had “had cases with one informant and sometimes been able to secure an acquittal,” he was “not sure [he] had ever won a case where there were

two informants, or there were two people to corroborate the allegations against the defendant,” let alone three different corroborating witnesses. R. 1031: 13. Given these difficulties, Bugden later testified that “if [Defendant] was acquitted it would have been great, but it also would have been sort of amazing.” R. 1031: 151.

Despite this, Defendant chose to go to trial, thereby necessitating a defense strategy focused on discrediting Ben, Brinkerhoff, and Anthony, the State’s three main witnesses. Evidence presented at trial showed that all were drug users with criminal records. *See, e.g.*, R. 502: 330-31, 373-74, 394-95, 418-19; 503: 450-56, 462.

Given this strategy, it would have been counter-productive for the defense to have then called Davey Desvari as a supporting witness. R. 1031: 38. Like the State’s witnesses, Davey had an extensive criminal record; in fact, he was a known drug dealer who spent part of 2004 in federal prison for dealing methamphetamine. R. 502: 314; 1031: 38, 57-58. Given that Defendant and Davey were “like brother[s],” R. 1031: 58, this relationship would have allowed the State to taint Defendant with the very same brush that defense counsel was using to try and discredit his accusers.

Thus, the record shows that defense counsel did investigate Davey Desvari, but then made a reasonable strategic decision to not call him.¹³

¹³ In Point VII, Defendant also attacks Findings 60 and 63 from the 23B court on this issue. Finding 60 is supported by R. 1031: 40, 122. Finding 63 is supported by R. 1031: 58, 122. These claims should be rejected.

E. Counsel were not ineffective for not asking Brinkerhoff certain questions.

Finally, in Point VI(b), Defendant claims that his counsel “failed to effectively cross-examine Brinkerhoff” about the sequencing surrounding his September 11 phone call with Defendant. Aplt. Br. 47. Defendant’s argument rests on the assumption that Brinkerhoff “would have established an alibi” for Defendant by pointing out that Defendant did not have time to have met him in Magna following the 9:08 p.m. phone call. Aplt. Br. 47.

At the 23B hearing, Defendant’s counsel asked Bugden why he had failed to ask Brinkerhoff these questions. R. 1031: 30-31. Bugden responded that he made a “strategic decision” to not ask them, because “Brinkerhoff could have further corroborated and made himself more reliable and believable by giving the details of the face-to-face meeting with [Defendant].” R. 1031: 31.

This strategic decision was eminently reasonable. Brinkerhoff testified as a witness for the State under an agreement that largely immunized him for trying to kill Susan with a knife. R. 502: 406-08, 417. If defense counsel believed that Brinkerhoff was lying about the conspiracy and about the attack, then it stands to reason that Brinkerhoff would have been willing to lie about the post-attack meeting with Defendant as well. Thus, there was no reason to think that Brinkerhoff would have “established an alibi” for Defendant, Aplt. Br. 47, given that Brinkerhoff’s own freedom apparently depended on his inculpatory testimony against Defendant.

“In short, the foregoing claims involve counsel’s decisions as to the line of questioning. The decision of whether to pursue a certain line of questioning is entrusted to the judgment of counsel.” *Fernandez v. Cook*, 870 P.2d 870, 876 (Utah 1993).

VII.

THE RULE 23B COURT’S FINDINGS ARE SUPPORTED BY THE RECORD

In Point VII of his brief, Defendant challenges the sufficiency of the evidence for 33 different findings entered by the 23B court. Aplt. Br. 47-60. The State has responded to six of those challenges in Points VI(A), (B), and (D). The State offers the following response to the remaining challenges.

A. The 23B Court’s findings regarding Defendant’s decision not to testify were supported by the evidence.

Defendant challenges the following findings from the 23B court which relate to his decision not to testify: Finding 13, 14, 15, 16, 17, 20, 23, 29, 33, 34, 37, 38. Aplt. Br. 50-54.¹⁴ These factual challenges should be rejected for two reasons. First, Defendant has failed to marshal the supporting evidence. And second, Defendant has not shown that any of these findings are against the great weight of the evidence.

¹⁴ Given the number of challenges at issue, the State will not recite the content of each finding prior to addressing its evidentiary support. As noted above, however, the 23B court’s ruling is attached as Addendum B to this brief.

1. Defendant has failed to marshal.

Under Rule 24(a)(9) of the Utah Rules of Appellate Procedure, a “party challenging a fact finding must first marshal all record evidence that supports the challenged finding.” “At its core, the duty to marshal evidence contemplates that an appellant present ‘every scrap of competent evidence introduced at trial which supports the very findings the appellant resists’ and then ‘ferret out a fatal flaw in the evidence,’ becoming a ‘devil’s advocate.’” *In re E.H.*, 2006 UT 36, ¶ 64, 137 P.3d 809 (emphasis added) (quoting *State v. Green*, 2005 UT 9, ¶ 28, 108 P.3d 710). This ultimately requires the defendant to present a “structured, realistic, and skeptical appraisal of [the] facts.” *Id.*

The requirement is “not satisfied,” however, when parties “simply rehash the arguments on evidence they presented at trial.” *Kimball v. Kimball*, 2009 UT App 233, ¶ 21, 217 P.3d 733 (quotations and citation omitted). Instead, marshaling “can only logically be done by summarizing . . . whatever evidence there is that *supports* each challenged finding. We emphasize that only the *supportive* evidence is legally relevant and is all that counsel should call our attention to.” *Id.* at ¶ 20 n.5 (emphasis in original).

In this case, none of Defendant’s many factual challenges even explain what the challenged finding said, let alone identify a fatal flaw in the supporting evidence. Appt. Br. 47-60. Instead, Defendant simply offers a series of single citation sentences, bereft of any discussion or even parenthetical support, followed by his own extensive discussion of the contrary evidence. Appt. Br. 47-60.

But the record regarding these issues was far more extensive than Defendant indicates. Bugden and Isaacson's testimony at the 23B hearing comprises over 200 pages of transcript, R. 1031: 7-209, at least 50 of which specifically address Defendant's decision not to testify. *See* R. 1031: 16-29, 32-33, 105-13, 123-26, 134-35, 170-82, 189-96, 207-09. Defendant does not even attempt to "present" or "summarize" this extensive array of testimony, *In re E.H.*, 2006 UT 36, ¶ 64, let alone show that in spite of it, any particular finding was "lacking evidentiary support." *Kimball*, 2009 UT App 233, ¶ 20 n.5.

Given these marshaling failures, this Court should assume that the evidence supports all of the challenged findings. *State v. Green*, 2005 UT 9, ¶ 13, 108 P.3d 710. Defendant's factual challenges should be rejected for this reason alone.

2. The evidence supports the 23B court's findings regarding Defendant's decision not to testify.

"In ruling on an ineffective assistance claim following a Rule 23B hearing, 'we defer to the trial court's findings of fact.'" *State v. Bredehoft*, 966 P.2d 285, 289 (Utah App. 1998) (citation omitted). The 23B court's findings are accordingly affirmed unless a defendant shows that they are clearly erroneous. *State v. Vos*, 2007 UT App 215, ¶ 9, 164 P.3d 1258.

Defendant challenges 12 different findings from the rule 23B court. Contrary to his claim, evidence supports each of the challenged findings as follows:

- **Finding 13:** R. 1031: 21-22, 33, 106-09, 176-77, 191-92.
- **Finding 14:** R. 1031: 22-23, 28-29, 123-24, 176-78.
- **Finding 15:** R. 1031: 22-23, 28-29, 123-24, 176-78.

- **Finding 16:** R. 1031: 23, 28-29, 123-24, 176-78.
- **Finding 17:** R. 1031: 22-23, 28-29, 33, 106-11, 123-24, 176-78, 195-96.
- **Finding 20:** Finding 20 states that the defense team “unequivocally informed the defendant of his right to testify.” R. 1017. Both defense attorneys acknowledged that they never informed the Defendant that he had the “constitutional right” to testify. R. 1031: 26-27, 207. But both attorneys also insisted that they informed Defendant that it was his decision whether to testify. R. 1031: 24-26, 123-26, 180-81, 207.
- **Finding 23:** R. 1031: 215.
- **Finding 29:** R. 1031: 229-30.
- **Finding 33:** Defendant acknowledges that two inconsistencies exist. Aplt. Br. 53. Discussion of additional inconsistencies between Defendant’s testimony and other evidence is found at R. 1031: 20-21, 28-29, 106-07, 110-11, 124-26, 134-35, 198-99, 229-31.
- **Finding 34:** Defendant acknowledges that this finding is supported by the evidence. Aplt. Br. 53.
- **Finding 37:** R. 1031: 24-26, 123-26, 180-81, 207.
- **Finding 38:** R. 1031: 24-26, 109-11, 123-26, 180-81.

B. This Court should not overturn the 23B court’s credibility findings

In Findings 5, 6, 9, 10, 30, 32, 35, and 36, the 23B court made credibility findings regarding Bugden, Isaacson, and Defendant. R. 1014-20. But it is well settled that it “is the trial court’s role to assess witness credibility, given its advantaged position to observe testimony first hand, and normally, we will not second guess the trial court’s findings in this regard.” *Markham v. Bradley*, 2007 UT App 379, ¶ 30 n.10, 173 P.3d 865 (quotations and citation omitted); *see also State v. Levin*, 2006 UT 50, ¶ 42, 144 P.3d 1096 (stating that “credibility determinations” and “other subtle factual determinations . . . are the prerogative of the trial court”).

In this case, the 23B court had the opportunity to personally observe Bugden, Isaacson, and Defendant while each testified. As discussed throughout this brief, the 23B court’s findings regarding their testimony reflected an extensive review of the trial court record and of the alleged discrepancies at issue in Defendant’s ineffective assistance claims. Given this, this Court should not overturn the trial court’s credibility determinations.

C. This Court need not resolve the challenge to the 23B court’s finding regarding Diane Martin

Defendant also challenges the 23B court’s Finding 41, Aplt. Br. 54-55, in which the 23B court found that the “defense team’s investigation of [Diana Martin] was reasonable and was sufficient to support their tactical decision not to call her to testify at trial.” R. 1014.

In his appellate brief, Defendant has not fully briefed any claim relating to his counsel's failure to call Diana Martin. As such, this Finding is not at issue in this appeal, and this Court need not resolve this challenge.

In any event, the finding is supported by the record. At the 23B hearing, defense counsel specifically testified that after personally meeting with Diana Martin, they concluded that she did not know anything that would assist their case. R. 1031: 50, 100-02, 183-85. This supported the challenged finding.

D. This Court need not resolve the challenge to the 23B court's legal conclusions.

Finally, Defendant challenges "Findings" 2, 3, 4, 5, 6, and 7 from the 23B court's conclusions of law. Aplt. Br. 56-59. "In ruling on an ineffective assistance claim following a Rule 23B hearing, 'we defer to the trial court's findings of fact, but review its legal conclusions for correctness.'" *State v. Mecham*, 2000 UT App 247, ¶ 19, 9 P.3d 777 (citation omitted).

Although the 23B court labeled these as findings, R. 1008-09, these are more appropriately treated as conclusions of law. In *Fernandez*, 870 P.2d at 874-75, the supreme court explained that when "reviewing a lower court's findings of fact and conclusions of law, we disregard labels attached to them and look to the substance. Therefore, we review findings of fact that are in actuality conclusions of law for correctness and not under the clearly erroneous standard." *See also Bishop v. Gentec, Inc.*, 2002 UT 36, ¶ 28, 48 P.3d 218 ("[I]t is the substance, not the labeling, of a motion that is dispositive in determining the

character of the motion.”). In this instance, these findings each set forth the 23B court’s conclusions of law regarding Defendant’s ineffective assistance claims. R. 1008. As such, they are appropriately referred to as conclusions of law, rather than findings of fact.

As set forth above in Points I-VI, Defendant did not receive ineffective assistance. This court need not resolve Defendant’s fact-based challenge to the 23B court’s legal conclusions.

VIII.

DEFENDANT HAS NOT SHOWN ANY ERROR REGARDING THE SIDE-BAR CONFERENCES

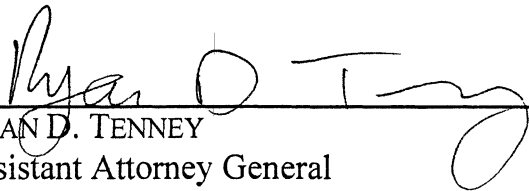
In Point VIII of his brief, Defendant complains that “[d]uring the course of the trial, there were many side-bar conferences, without a court reporter present making an accurate record.” Aplt. Br. 60. Under rule 24(a)(9), Utah Rules of Appellate Procedure, a party must support an argument “with citations to the authorities, statutes, and parts of the record relied on.” In this case, however, Defendant does not identify any particular side-bar conference that he deems important, let alone cite to any per se rule requiring trial courts to make an accurate record of all side-bar conferences. This claim is therefore inadequately briefed and should not be considered. Utah R. App. P. 24(a)(9).

CONCLUSION

For the foregoing reasons, the Court should affirm Defendant’s conviction.

Respectfully submitted January 7, 2010.

MARK L. SHURTLEFF
Utah Attorney General



RYAN D. TENNEY
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on January 7, 2010, two copies of the foregoing brief were ☒ mailed

☐ hand-delivered to:

David Drake
6905 South 1300 East # 248
Midvale UT 84047

A digital copy of the brief was also included: ☒ Yes ☐ No

Melissa Freyer

Addenda

Addendum A

FILED DISTRICT COURT
Third Judicial District

AUG 09 2004

SALT LAKE COUNTY

By _____
Deputy Clerk

STACIE M. SMITH (6988)
STACIE M. SMITH & ASSOCIATES, INC.
ATTORNEY FOR PETITIONER
6955 UNION PARK CENTER, SUITE 420
MIDVALE, UTAH 84047
TELEPHONE: (801) 352-1400

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

SUSAN HYATT MILLARD,)	
)	ORDER AND JUDGMENT
Petitioner,)	
vs.)	
DONALD DUANE MILLARD,)	
)	Civil No. 984903630DA
Respondent.)	Judge L A Dever
)	Comm. Susan Bradford

This matter came before the Court on Petitioner's Verified Motion for Order to Show Cause. The parties have entered into a Stipulation to Entry of Judgment and such has been filed in this matter. The Petitioner is represented by Stacie M. Smith; the Respondent is represented by David J. Friel. Having received and approved the stipulation of the parties, having reviewed the file in this matter, and good cause appearing:

IT IS HEREBY RECOMMENDED AND ORDERED:

1. Judgment is hereby entered against Respondent and in favor of Petitioner in the

amount of \$12,949.73 in child support arrears through February, 2004 and previously awarded attorneys fees and \$6,021.25 in daycare expenses and medical insurance payments through February, 2004.

2. The issue of Respondent's contempt in failing to timely pay his child support, medical expenses, and daycare expenses is hereby certified for evidentiary hearing before Judge Dever.

3. Judgment is hereby entered against Respondent for the amount of Petitioner's costs and expenses incurred for the necessity of addressing the issue of Respondent's failure to pay his support obligations, said amount being \$923.95.

4. The judgments entered in this matter shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgments.

RECOMMENDED this 9 day of 6, 2004.

BY THE COURT:

Susan Bradford
DOMESTIC RELATIONS COMMISSIONER

ORDERED this 9 day of Aug, 2004.

BY THE COURT:

151 WBB
~~L. A. Dever~~ William B. Bohle,
DISTRICT COURT JUDGE

Approved as to form and content:

D. J. Friel
David J. Friel
Counsel for Respondent

Addendum B

GARY K. SEARLE
DOUGLAS HOGAN
TOOELE COUNTY ATTORNEY'S OFFICE
Tooele County Courthouse
74 South 100 East, Suite #26
Tooele, Utah 84074
Counsel for Plaintiff
Telephone: (435) 843-3120

THIRD DISTRICT COURT-TOOELE
2009 FEB 17 AM 9:34

FILED BY

IN THE THIRD JUDICIAL DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH

STATE OF UTAH,

 Plaintiff,

vs.

DONALD MILLARD,

 Defendant.

RULE 23B: FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Case No. 041300401
App. Case No. 20060336-CA

JUDGE MARK S. KOURIS

Pursuant to Rule 23B, Utah Rules of Appellate Procedure, the Utah Court of Appeals remanded this case for an evidentiary hearing on the following claims of ineffective assistance of counsel:

1. The defense team's alleged failure to notify defendant of his constitutional right to testify and the fact that only he could waive that right;
2. The defense team's failure to present the testimony of defendant, Diane Martin, Glenda Millard, and Melody Oliver relating to claims of bias and potentially exonerating conversations concerning

- the defense team's failure to present testimony from Davey Desvari and Bill Penrod at trial;
- the defense team's failure to call a methamphetamine expert at trial;

- the defense team’s failure to challenge the nature of the victim’s injuries; and
- the defense team’s failure to subpoena records from the Office of Recovery Services regarding defendant’s unpaid past child support.

In compliance with that order, an evidentiary hearing was conducted on October 2, 2008. At the hearing, defendant Donald Millard was represented by his counsel, Mr. David O. Drake and Mr. Peter W. Guyon. The State was represented by Mr. Gary K. Searle and Mr. Douglas Hogan, from the Tooele County Attorney’s Office.

At the hearing, defendant Millard waived his attorney/client privilege with respect to his trial counsel as to his claims of ineffective assistance of counsel. The Court then heard testimony from defendant and from defendant’s trial counsel Mr. Walter Bugden and Ms. Tara Isaacson [“defense team”]. In addition, exhibits were admitted, including the affidavits of defendant, Glenda Millard, Melody Oliver, and Diane Martin.

The Court notes that pursuant to Utah Rule of Appellate Procedure 23B(e), the burden of proving a fact is upon the proponent of the fact. The standard of proof is a preponderance of the evidence.

Prior to the evidentiary hearing, the defense submitted a written memoranda summarizing its view of the facts and the law concerning the issues. The defense also filed proposed findings of facts and conclusions of law. Following the hearing, the defense was permitted to supplement the hearing

record with an exhibit. Based on the testimony, evidence, and memoranda, the Court now enters the following factual findings:

**THE EXPERIENCE AND CREDIBILITY
OF THE DEFENSE TEAM**

Walter Bugden:

1. Mr. Walter Bugden has practiced law in the Utah legal community for 31 years.

2. Mr. Bugden has completed 216 criminal trials, of which 81 were felonies.

3. In the 5 years preceding the trial in this matter, Mr. Bugden competed 26 trials and received 23 not guilty verdicts.

4. In 2006, Mr. Bugden was counted as one of a select group of attorneys that were inducted into the American College of Trial Lawyers.

5. While testifying in this matter, Mr. Bugden's testimony was completely corroborated by other trial testimony and evidence and was fully corroborated by Ms. Isaacson's testimony.

6. The content of Mr. Bugden's testimony, along with his demeanor, temperament and actions while testifying on the stand, causes this Court to conclude that Mr. Bugden was a completely credible witness.

Tara Isaacson:

7. Ms. Tara Isaacson has practiced law in the Utah legal community for 12 years.

8. Ms. Isaacson has completed 38 jury trials either by herself or as co-counsel with Mr. Bugden.

9. While testifying in this matter, Ms. Isaacson's testimony was completely corroborated by other trial testimony and evidence and was fully corroborated by Mr. Bugden's testimony.

10. The content of Ms. Isaacson's testimony, along with her demeanor, temperament and actions while testifying on the stand, causes this Court to conclude that Ms. Isaacson was a completely credible witness.

**DEFENDANT'S KNOWLEDGE OF HIS RIGHT TO
TESTIFY AND HIS ABILITY TO WAIVE THAT RIGHT**

11. Prior to trial, the defense team carefully prepared the defendant to testify at trial.

12. The team conducted multiple mock trials where the defendant was repeatedly subjected to trial examinations (R at 16: 14-16). Knowing the lead prosecutor was a good cross-examiner, Mr. Bugden personally subjected the defendant to rigorous cross-examination to prepare him for trial (R. at 19: 5-9).

13. The defendant was set to testify at his trial on Wednesday, December 14, 2005. However, on Tuesday, surprise testimony changed this plan. The State's witness, Don Brinkerhoff, testified that after he attempted to kill the victim, he spoke with the defendant via telephone. Phone records corroborated this claim (R. at 22: 13-20).

14. That evening, the defendant attended a meeting at the defense team's office. The defense team explained to the defendant that this surprise phone call was a "smoking gun" and must be explained to the jury (R. at 22: 23-24).

15. The defense team observed that the defendant looked "like a deer in headlights" and had no response. Defendant then asked the team to allow him to think about it overnight (R. at 23: 6-9).

16. The next morning, the defendant explained to his counsel for the first time that, prior to his interview with the police on the night of the attack on the victim, the defendant went to his apartment to unload his luggage from his truck. Davey Desvari met him at the apartment, and defendant handed his phone to Mr. Desvari. The communication with Mr. Brinkerhoff then went to Mr. Desvari and not to the defendant (R. at 23: 10-18).

17. The defense team found this explanation to be completely unbelievable and inconsistent with the defendant's prior rendition of facts (R. at 23: 19-22).

18. The defense team also was concerned that this testimony would be perjurious and that the jury would find it unbelievable (R. at 23: 24-25; 24: 1-3). They explained to the defendant that this explanation was inherently unbelievable, and they recommended that he not testify (R. at 24: 6-9).

19. The defense team concedes that they did not have the defendant execute a formal waiver of his right to testify at his trial (R. at 27: 1-6). Neither did the defense team use the term "constitutional right" when informing him of his right to testify (R. at 26: 4-7).

20. However, the defense team insists that on dozens of occasions, they unequivocally informed the defendant of his right to testify (R. at 126: 16-19; 134: 21-24). Additionally, they never told the defendant he was not going to testify (R. at 134: 25; 135: 1-3).

21. Additionally, the defense team sent a letter to the defendant prior to trial, dated 2 December 2005, stating, "At this point, we are recommending that you testify. It is ultimately your decision." State's Exhibit 21.

22. The defendant's version of facts as to this point is markedly different. The defendant agrees that the defense team met with him at their office on Tuesday night during the trial. The defense explained to him the gravity of Mr. Brinkerhoff's testimony and the corroborating phone records. Defendant claims he then retreated to his truck and returned with his zippered black book (R. at 215: 13-16).

23. The defendant testified that he looked through the book for the date in question. He testified that his notes indicated that Davey Desvari met him at his apartment after defendant returned from his trip on the night of the attack. As the defendant unloaded his truck, Mr. Desvari used defendant's phone. While Mr. Desvari was still on the phone, the defendant retrieved another load from the truck and brought it to his apartment (R. at 215: 17-24).

24. Mr. Desvari was at the defendant's apartment because Mr. Desvari had recently been released from jail and wanted to see the defendant about a construction project they were working on together (R. at 216: 9-14).

25. The defendant testified that he explained this to Ms. Isaacson and showed her the journal entry. Ms. Isaacson looked at it for a brief moment and told the defendant that she didn't believe it to be true and was sure that there was no way "in hell" the jury would believe it (R. at 218: 22-24).

26. The defendant then testified that Ms. Isaacson told him that since they could not explain the phone call or what it meant, the defendant was not going to testify. He claimed that she stated, "That's all there is to it. You will not testify" before she ushered him out of the office (R. at 219: 1-4, 6-7).

27. The following day at trial, the defendant did not testify. He now claims that the defense team did not apprise him of his right to testify or his right to do so over their objections and, further, that they told him in no uncertain terms that he would not be allowed to testify.

28. However, a number of factors bear adversely on defendant's credibility with respect to this claim.

29. The night of the attack on the victim, Susan Hyatt, the defendant participated in a taped interview with the police. The defendant's cell phone rang during the interview, and he answered the call. The interview transcript reveals that the defendant told the person on the phone, "I'm trying to get home. I haven't even made it to my place yet. Just my parents. I got all the luggage in the back of my truck." Interview Transcript at 25. Yet in the defendant's latest affidavit and in his hearing testimony, he claims he went to his apartment and unloaded the luggage prior to the police interview.

30. This factual change appears to be the vehicle by which the defendant places his cell phone in Mr. Desvari's hand prior to the damning call with Mr. Brinkerhoff.

31. At the hearing, when the State pressed the defendant on this inconsistency, the defendant indicated that he was lying to the person on the other end of the phone, but was telling the truth at the hearing. The defendant provided no motive to lie about his trip to the apartment while on the phone, but he has a clear motive to lie in this proceeding.

32. It is also difficult to believe that the defendant would record in his written journal a momentary handing off of his phone to a friend.

33. Additionally, the defendant's affidavit is riddled with numerous inconsistencies and contradictions when compared with the hearing testimony and the trial transcript. For example, his affidavit states that the only direct evidence of the defendant's \$20,000 debt to the victim was the victim's testimony at trial. Affidavit of Donald Millard at 5. The affidavit also states that this \$20,000 is "very inflated." *Id.* at 6.

34. In contrast, the defense team testified at the hearing that prior to trial they obtained a copy of a court judgment that had been entered against the defendant for \$20,000 based on his child support payment arrearages.

35. All disputed issues testified to by the defendant lack corroboration.

36. The content of the defendant's testimony and affidavit, together with a very careful examination of his demeanor, temperament and actions while on the

stand, causes this Court to conclude that the defendant was not a credible witness.

37. This Court finds very credible evidence, and therefore concludes, that the defense team, on several occasions, orally and in writing, informed the defendant of both his right to testify and his right to make the final decision on the matter.

38. Further, based upon an unexpected trial development, the defense team made a reasonable tactical decision and recommended that the defendant not testify. The defendant chose to follow this advice.

FAILURE TO CALL DIANA MARTIN AS A TRIAL WITNESS

39. Defendant challenged the defense team's decision not to call Ms. Diana Martin to testify at the trial.

40. The defense team interviewed Ms. Martin prior to trial. During their discussions with her, she provided only positive character evidence for the defendant. She provided no exculpatory evidence prior to the trial (R. at 102: 14-20).

41. The defense team's investigation of Ms. Martin was reasonable and was sufficient to support their tactical decision not to call her to testify at trial.

42. That decision was a reasonable one under the circumstances.

FAILURE TO CALL GLENDA MILLARD AS A TRIAL WITNESS

43. Defendant challenged the defense team's decision not to call Ms. Glenda Millard to testify at the trial.

44. The defense team interviewed Ms. Millard prior to trial. During their discussions with her, Ms. Millard made no mention of knowing of or participating in any phone calls that took place on the evening of the attempted murder (R. at 178: 9-19).

45. The defense team knew about the alleged meeting in the park between Don Millard, Ben Desvari, Glenda Millard and Duane Millard. (R. at 115: 2-20).

47. The defense team did not use the alleged park meeting at trial as the defense team believed it to be self-serving and completely unbelievable (R. at 115: 2-20).

48. The defense team's investigation of Mrs. Millard was reasonable and was sufficient to support their determination that her testimony was of little or no value in the trial.

49. Consequently, they made a reasonable tactical decision not to call her to testify.

FAILURE TO CALL MELODY OLIVER AS A TRIAL WITNESS

50. Defendant challenged the defense team's decision not to call Ms. Melody Oliver to testify at the trial.

51. The defense team interviewed Ms. Oliver prior to trial. The defendant and Ms. Oliver were very close friends.

52. During some of their discussions, Ms. Oliver would claim that her boyfriend, State's witness Ted Anthony, was jealous of the relationship between Ms. Oliver and the defendant. She also explained that Mr. Anthony believed the

defendant and Ms. Oliver were engaged in a sexual relationship (R. at 119: 16-21).

53. The defense team believed that they could put Mr. Anthony's credibility at issue in the trial by implying that he was motivated by jealousy to testify against the defendant.

54. However, the defense team also learned that the defendant gave Ms. Oliver rides to her probation visits and that he paid for her required urinalysis tests (R. at 64: 14-20; 131: 6-9). The defense team was concerned that this activity could lead the jury to believe that Ms. Oliver's testimony was bought and paid for by the defense, thus eliminating any credibility she may have had (R. at 64: 8).

55. Additionally, as trial approached, Ms. Oliver began to refuse to attend defense team meetings and stopped answering or returning their phone calls (R. at 64: 24-25; 65: 1).

56. Finally, after ceasing all communication with the defense investigator, Ms. Oliver demanded payment to meet with the defense team at their office (R. at 131: 9-14).

57. As a tactical consideration, the defense team's practice is to not call a witness to the stand at trial unless they are convinced that the witness will not damage their case. The defense team believed Ms. Oliver to be a "wild card" and chose not to call her as a witness because they were unsure of her impact on their case (R. at 131: 15-22).

58. The defense team's decision not to call Ms. Oliver to the stand was a reasonable tactical decision under the circumstances.

FAILURE TO CALL DAVEY DESVARI AS A TRIAL WITNESS

59. Defendant also challenged the defense team's failure to call Mr. Davey Desvari to testify at the trial.

60. After having several conversations with defendant, the defense team determined that he had not provided any information that suggested that Mr. Desvari would be an essential or helpful witness at trial (R. at 39: 15-20; 40: 1-6; 121: 25; 122: 1-8; 139: 12-13).

61. All of the investigation they conducted concerning Mr. Desvari indicated that he was involved in criminal behavior and possessed no exculpatory information (R. at 122: 9-16).

62. Further, the defendant described going to Mr. Desvari's house and discovering that it was filled with stolen property and guns (R. at 57:23-25).

63. The defense team's investigation was sufficiently thorough to support their reasonable tactical decision not to call Mr. Desvari as a witness because it would establish that the defendant associated with individuals who had ties to the underworld and might damage defendant's credibility with the jury (R. at 58: 1-16).

FAILURE TO CALL BILL PENROD AS A TRIAL WITNESS

64. Defendant also challenged the defense team's decision not to call Mr. Bill Penrod to testify at the trial.

65. Mr. Penrod was said to have committed crimes with Ted Anthony, one of the State's witnesses. Mr. Penrod's testimony about that association might damage Mr. Anthony's credibility, to the benefit of the defense (R. at 120: 6-12).

66. The defense team interviewed Mr. Penrod and learned that he suffered from a bi-polar disorder and was a member of the Third District Court's mental health program.

67. Further, during some of the defense team interviews, Mr. Penrod would be completely lucid and coherent, while in other interviews, he would be suffering from his mental condition and would be unaware of his surroundings and completely confused (R. at 120: 13-21).

68. Based on its investigation, the defense team made a reasonable tactical decision not to call Mr. Penrod to testify because the risk that he would damage their case with unanticipated testimony outweighed any benefit his testimony could provide (R. at 120: 22-25; 121:1).

FAILURE TO USE A METHAMPHETAMINE EXPERT AT TRIAL

69. Prior to trial, the defense team retained the services of Dr. Kathey Verdeal, who is a methamphetamine expert.

70. The defense team hired Dr. Verdeal in hopes that she would be able to testify that the use of methamphetamine by a number of the State's witnesses would adversely affect their memories and perception of the facts at issue, thereby placing their credibility at issue (R. at 117: 3-9).

71. However, Dr. Verdeal informed the defense team that methamphetamine use does not make you more unreliable, unbelievable or incredible (R. at 117: 10-17). Further, Dr. Verdeal revealed that, if properly examined, she would testify that methamphetamine might cause the opposite result and enhance the adverse witnesses' memories (R. at 118: 2-5).

72. After thoroughly investigating this issue, the defense team made a reasonable tactical decision to use Dr. Verdeal to assist them in preparing for cross-examination and to provide a resource of useful knowledge, but not to call her to testify at trial (R. at 117: 20-25).

FAILURE TO CHALLENGE THE NATURE OF THE VICTIM'S INJURIES

73. Defendant challenged the defense team's failure to employ a medical professional or to subpoena Susan Hyatt's medical records to establish that her injuries may have been self-inflicted (R. at 136: 1-9).

74. The defense team characterized this suggested strategy as "ridiculous" and believed that it would have offended the jury and damaged the defense team's credibility (R. at 67: 17-18; 137: 13-22).

75. The defense team also found no similar claim or corroboration for this assertion from State's witnesses who would have greatly benefitted if the injuries were proved to be self-inflicted (R. at 136: 11-17).

76. Drawing upon their experience in defending numerous cases involving physically injured victims, the defense team made a reasonable tactical decision

to characterize and treat Ms. Hyatt as a brave heroine who was lucky to be alive (R. at 135: 23-25; 136: 1).

FAILURE TO SUBPOENA RECORDS FROM THE OFFICE OF RECOVERY SERVICES

77. Another claim at the hearing was that the defense team failed to subpoena records from the Office of Recovery Services ["ORS"] to establish the amount of defendant's unpaid past child support.

78. During trial preparation, the defendant told the defense team that his past child support payments were years, not months, past due (R. at 73: 20-24; 97: 6-13; 99: 7).

79. In addition, the defense team contacted the defendant's divorce attorney and obtained a copy of a \$20,000 court judgment that had been entered against the defendant for his child support arrearages (R. at 73: 13-14; 96: 22-25; 97: 1-2).

80. Because of the defendant's admissions and the court judgment, there was no potential tactical benefit to be achieved by subpoenaing the ORS records.

RULE 23B(e) FINDINGS ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

1. With the exception of informing the defendant of his right to testify, all of the challenged decisions involved in this hearing were tactical decisions made by the defense team.

2. Without exception, all of the issues were thoroughly investigated by the experienced defense team, and this Court finds a reasonable basis for all of the tactical decisions they made.

3. Based on the evidence and the above findings of fact, the Court finds that the defense team did not perform deficiently in any of the challenged areas.

4. There is no reasonable probability that a change in any or all of the tactical decisions made by the defense team might have resulted in a different outcome.

5. The defense team's trial preparation and performance did not fall below an objective standard of reasonable professional judgment but instead significantly exceeded that standard.

6. In no way did the defense team's performance or strategic and tactical decisions prejudice the defendant.

7. The defendant's constitutional right to testify at his own trial was not violated. The defense team made it clear to him that he had that right and could exercise it. Ultimately, based upon the defense team's recommendation, the defendant chose not to testify.

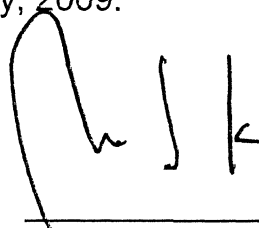
**RULE 22B(e) FINDING OF GOOD CAUSE
FOR REASONABLE DELAY**

8. The court recognizes that the remand proceedings were not completed within the ninety days provided by rule 23B(e), Utah Rules of Appellate Procedure.

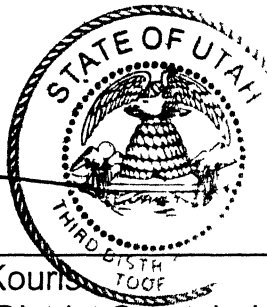
9. Pursuant to the rule, the court finds the delay beyond the ninety-day period to be reasonable.

10. The court further finds the delay to be justified by good cause due to the recusal of Judge Stephen L. Henriod and the need to reassign the matter to a new judge, scheduling difficulties, the need to accommodate a one-day evidentiary hearing, and the time required to obtain a hearing transcript before preparation of the written findings required under the rule.

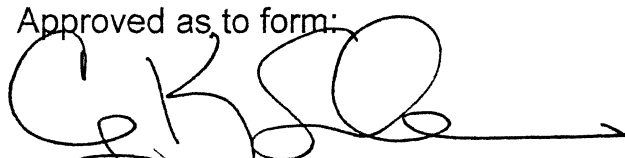
DATED this 10 day of February, 2009.



Judge Mark S. Kouris
Presiding Third District Court Judge



Approved as to form:



Gary K. Searle
Douglas Hogan
Attorneys for Plaintiff

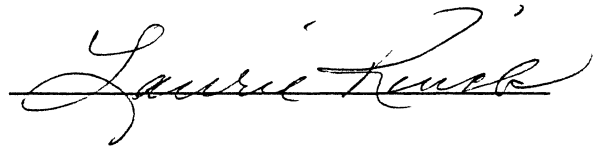
CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February, 2009, I served a copy of the foregoing [proposed] **RULE 23B: FINDINGS OF FACT AND CONCLUSIONS OF LAW**, by causing the same to be mailed, via first class mail, postage prepaid, to the following:

Mr. David O. Drake (#0911)
6905 South 1300 East #248
Midvale, Utah 84047

Mr. Peter W. Guyon (#1285)
614 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

Counsel for defendant/appellant Millard

A handwritten signature in cursive script, appearing to read "Laurie Kusch", written over a horizontal line.

Addendum C

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,

Plaintiff and Appellee,

v.

Jeffrey Alan Heil,

Defendant and Appellant.

MEMORANDUM DECISION
(Not For Official Publication)

Case No. 20020738-CA

F I L E D
(March 10, 2005)

2005 UT App 117

Fifth District, Cedar City Department

The Honorable Robert T. Braithwaite

Attorneys: Jeffrey T. Colemere, Murray, for Appellant

Mark L. Shurtleff and Karen A. Klucznik, Salt Lake City, for Appellee

Before Judges Bench, Greenwood, and Orme.

BENCH, Associate Presiding Judge:

Defendant Jeffery Heil appeals the trial court's denial of his motion for a new trial from a conviction of aggravated assault, a second degree felony. See Utah Code Ann. § 76-5-103 (2003). First, Heil contends that a new trial should be granted because the trial court committed plain error by allowing Dr. Declore's unsigned, out-of-court statement into evidence. On appeal, he asserts that the statement is inadmissible hearsay and that the admittance of the statement violated his fundamental constitutional right to confront and cross-examine an adverse witness. At trial, however, defense counsel agreed to have Dr. Declore's statement read to the jury, and did not object when the court confirmed the stipulation in open court. Heil's plain error argument is therefore precluded by the invited error doctrine. See State v. Hall, 946 P.2d 712, 716 (Utah Ct. App. 1997).

Second, Heil asserts a new trial should be granted because defense counsel rendered ineffective assistance. An ineffective assistance claim is a "mixed question of law and fact," and this court "defer[s] to the trial court's findings of fact, but review[s] its legal conclusions for correctness." State v. Classon, 935 P.2d 524, 531 (Utah Ct. App. 1997). "To establish an ineffective assistance of counsel claim, defendant must show, first, that counsel rendered a deficient performance that fell below an objective standard of reasonable professional judgment, and second, that counsel's deficient performance prejudiced

defendant." State v. Villarreal, 857 P.2d 949, 954 (Utah Ct. App. 1993), aff'd, 889 P.2d 419 (Utah 1995).

Heil contends that defense counsel failed to adequately investigate by not contacting Dr. Declore prior to trial, and therefore, did not meet the required standard of reasonable professional judgment. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691 (1984). "[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether." Id. Based on Heil's representation that Dr. Declore's testimony would be supportive of defendant's self-defense theory, defense counsel made a reasonable decision that further investigation was not necessary.⁽¹⁾

Heil also contends that counsel was ineffective by not objecting to Dr. Declore's written statement. This court gives "trial counsel wide latitude in making tactical decisions," including a decision not to object to a particular piece of evidence, "and will not question such decisions unless there is no reasonable basis supporting them." State v. Bloomfield, 2003 UT App 3, ¶30, 63 P.3d 110 (quotations and citations omitted). In its opening statement, the defense asserted that Dr. Declore's testimony would support Heil's self-defense claim. Later, defense counsel discovered that the testimony actually would be contrary to his client's case. In an effort to minimize the effect of this testimony, the defense stipulated to the written statement rather than to risk addressing the potentially more harmful live testimony. Defense counsel's choice cannot be questioned because it can be reasonably considered a tactical decision. See id. We conclude that defense counsel's actions in this case did not fall below the standard of reasonable professional judgment. Thus, Heil's claim of ineffective assistance fails.

Third, Heil claims prosecutorial misconduct where the prosecution submitted and did not disclose on the record that the Iron County Attorney prepared Dr. Declore's statement. This court "will not reverse a trial court's [ruling] on prosecutorial misconduct absent an abuse of discretion." State v. Pritchett, 2003 UT 24, ¶10, 69 P.3d 1278 (quotations and citation omitted).

Though the county attorney prepared the Declore statement, both the prosecution and the defense, after talking via speaker phone to Dr. Declore, stipulated to the statement and agreed that it could be offered to the jury. There was no fraud on the court or fabrication of evidence where both parties agreed that the statement accurately portrayed Dr. Declore's opinion. Heil contends that the prosecution inappropriately offered inadmissible hearsay evidence to the jury by presenting the Declore statement. Where defense counsel strategically stipulated to the statement, it cannot be argued that the prosecution erred in presenting the statement to the jury. Heil did not show that the prosecution called matters to the jurors' attention that "they would not be justified in considering." State v. Tuckett, 2000 UT App 295, ¶14, 13 P.3d 1060 (quotations and citations omitted). The trial court therefore did not abuse its discretion in its ruling on the claim of prosecutorial misconduct.

Accordingly, the judgment of the trial court is affirmed.

Russell W. Bench,

Associate Presiding Judge

I CONCUR:

Pamela T. Greenwood, Judge

ORME, Judge (dissenting):

I agree with Heil that defense counsel was remiss for not objecting to the admission of Dr. Declore's written statement and not insisting that Dr. Declore appear pursuant to subpoena and offer his testimony in person. I can conceive of no sound tactical basis for such decisions, and the prejudice is obvious.

Had Dr. Declore appeared and been subject to live examination, it would have been easy for defense counsel to obtain the concession that even though medical experts would immediately know that Heil's kind of fracture was caused by punching rather than defending, a lay person would not ordinarily have that keen insight.

Such a concession may well have preserved Heil's credibility in the eyes of the jury. Heil always admitted that he punched the "victim" several times in an effort to resist his attack, while also insisting that the physical encounter began when the "victim" tried to strike him with a tool--a blow that Heil says he fended off with his forearm.

In the hands of competent counsel, Heil's misunderstanding about which part of the fray resulted in his fracture would have been shown to be no big deal. Thus, Dr. Declore's testimony, properly adduced, would have rehabilitated Heil's credibility rather than destroyed it, as the written statement, in context, did.

I would reverse the conviction and give Heil a new trial.

Gregory K. Orme, Judge

1. Heil's reliance on State v. Templin, 805 P.2d 182 (Utah 1990), is not well founded because defense counsel ultimately contacted Dr. Declore and fully intended to call him to testify. See id. at 187-88.

Addendum D

1 home; in waiting in the backyard with latex gloves in the
2 pocket; in coming to the home on September 11th; in parking
3 down the street and pacing, trying to decide, Can I do this;
4 in avoiding cameras in the Chevron; in the phone calls that
5 were made immediately after the event, immediately after the
6 attack; phone calls to this defendant who then pretends and
7 plays, I don't know what you're talking about, I'm looking for
8 the smallest detail.

9 Well, you're not going to find the smallest details
10 in his statement, and we'll present that to you. You won't
11 find those smallest details there because he forgets about
12 everything.

13 Again, you're not going to hear from the savoriest
14 of characters, and that shouldn't be a surprise. Because when
15 you're looking to have your ex-wife murdered, that's who
16 you've got to find. But their statements are backed up by the
17 evidence we'll present. Thank you.

18 *THE COURT:* Miss Isaacson.

19 *MS. ISAACSON:* Divorce is a modern reality. As we
20 were picking the jury, we looked through your questionnaires
21 and saw some about your background and your life experience.
22 And I think it's fair to say that most of you, and most of us
23 probably in this room, either ourselves have had experience
24 with divorce, had a family member go through a divorce,
25 coworker, someone that you're close to.

1 And any time there's a divorce with children, and
2 there are issues of custody, visitation, child support, it's
3 not unusual for there to be frustration, for there to be some
4 conflict. And, certainly, we've all heard others complain or
5 talk about the frustration with their ex-spouse. But that
6 experience, or having frustration or having some issues with
7 child support or custody is a long way from agreeing to have
8 your ex-spouse murdered.

9 Now, in this case, you may feel sympathy for Susan
10 Hyatt, hearing about her experience, what happened at her
11 home. And you may not be thrilled with Mr. Millard's failure
12 to pay child support. You may have an emotional reaction to
13 both of those things.

14 But the reason why we pick a jury from the community
15 and the reason why we spent so much time on Friday talking to
16 you, trying to learn about you, was because it's important
17 that we have people who can step away from the emotion of the
18 situation, they're not involved in the situation, who can be
19 neutral and evaluate the evidence. And that's what you have
20 to do in this case.

21 You can't be swayed by passion, prejudice, sympathy
22 for any party. You have to focus on the evidence. And we
23 believe that the evidence will show a number of things.

24 First of all, Don Millard at the time, in 2004, was
25 working as a manager of a fairly large apartment complex in

1 Midvale. Through the course of his work, he came into contact
2 with a lot of potential tenants, and he was responsible to
3 make sure that the apartments were maintained. So, through
4 the course of his work, he came into contact with a fair
5 number of people and he needed to hire people to do work there
6 at the complex.

7 And, frankly, this complex, Midvale Plaza
8 Apartments, it's not the nicest place, not the most glamorous
9 place. And pretty low-income people, and people with maybe
10 not the savoriest backgrounds lived there. So Don came into
11 contact with a number of this type of people.

12 At the same time, he was also doing work on a home
13 in West Valley. You'll hear evidence that Don has a
14 background as a handyman, likes to work with his hands and for
15 years, really, has done work rehabbing houses and preparing
16 them for resale. So he was always on the lookout for people
17 who could do that kind of work.

18 Now, counsel for the State has told you that some of
19 the witnesses you're going to hear from are not the savoriest
20 characters. Well, I want you to bear in mind that that
21 doesn't begin to tell the half of it. These are people who,
22 on a regular basis, use methamphetamine. They will tell you,
23 some of them, that they have used it for years and years.
24 They would snort it, smoke it, and inject it into their veins.

25 Now, as you can imagine, that sort of long-term drug

1 abuse affects you physically. It affects your mind. And it
2 affects all aspects of your life: Your employment, your
3 family, all of those sorts of things.

4 So when these people come walking into court,
5 cleaned up for court, bear in mind that they're not like you
6 and me. Their brains are not like you and me. And they will
7 testify that, during all of these critical events, most of
8 them were high. Most of them were using drugs during these
9 conversations and these sorts of things. You have to keep
10 that in the back of your mind as you evaluate what they have
11 to say and why they say it.

12 Ben Desvari, James Brinkerhoff and Ted Anthony are
13 not reliable sources. Ben Desvari, the reason why he came to
14 know Don was because his brother, Davey, had gone to jail.
15 And Ben was just a mess. He needed help with Don's son who
16 didn't have anyone to care for him, so Don helped him out.

17 Don will tell you, he considered Davey Desvari a
18 good friend. He'd known him for years. Davey had done a lot
19 of work for him; he was an electrician. He had been a tenant.
20 And so when things went bad for Davey and he went to jail, Ben
21 got in touch with Don and said, Hey, I need help with some of
22 these things; can you help me with them?

23 And then Don found out that Ben also was a
24 construction worker. He was able to do framing. So the
25 relationship evolved where Ben was helping him with some

1 issues with Davey and he was also having Ben do some work for
2 him.

3 But, unfortunately, Ben, as you will hear, is a
4 completely unreliable witness. I want you to pay close
5 attention to the crazy stories that he's going to tell you
6 here in court. Pay close attention to what he says he's going
7 to do, even when he decides to cooperate. The story doesn't
8 get any better. I want you to closely evaluate the things
9 that he says -- even once he's given full immunity -- evaluate
10 closely what he says and see if he's a reliable source of
11 information.

12 Now, with respect to James Brinkerhoff, he's
13 testified that he didn't think Don was serious. That he knew
14 about Don's ex-wife, heard grumblings, or however he describes
15 it. But he really didn't think it was serious.

16 Brinkerhoff, again you'll hear some strange
17 descriptions from him about what was going on there at the
18 house. He, too, was given a deal to cooperate. You have to
19 take that into account when you evaluate what he has to say.
20 He was promised a benefit by pointing a finger at Don.

21 One thing that counsel for the State says, We went
22 to Ben Desvari and we just said, Hey, we just want the
23 stabber. Well, you're going to see evidence, and you're
24 actually going to see the handwritten Immunity Agreement
25 between the State and Ben Desvari. That Immunity Agreement

1 doesn't say, Tell us the name of the stabber and you're off
2 scot-free. The language of the agreement is, If you testify
3 about Don Millard's involvement in this case, you get full
4 immunity.

5 And I'll talk a little bit more about the police
6 investigation in a moment.

7 Then we come to Ted Anthony. I talked a little bit
8 about the apartments, the Midvale Plaza Apartments. In those
9 apartments was a young woman by the name of Melody Oliver.
10 And she got to know Don and they kind of became friends. And
11 she, herself, was sort of a handy woman. And she moved into
12 the apartments and would exchange doing work on the apartments
13 in exchange for rent.

14 Well, her boyfriend, or ex-boyfriend -- the
15 testimony differs -- was Ted Anthony. And Ted Anthony thought
16 that there was something going on between Don and Melody. He
17 did not like Don Millard at all. And Ted will tell you, he
18 was so upset about it that he confronted Don.

19 So Ted Anthony comes into the situation with an axe
20 to grind with Don. And of course, as you've heard, he's got a
21 pile of charges he needs help with. So when you hear his
22 testimony, when you evaluate what he's up to, what he's
23 getting out of this situation, take those factors into
24 account.

25 Now, one big piece of this case, from our

1 perspective, is the police investigation. Detective
2 Chamberlain from moment one thought Don was behind it. Moment
3 one. In his interview with Don, he tells Don, We've got the
4 stabber; he's cooperated against you. Make a deal.

5 This is the first night. This is the interview.
6 He's already made a decision that Don is involved. And when
7 he executes the agreement with Ben Desvari, before he even
8 knows what Ben is going to say, he says, I want you to point
9 at Don Millard.

10 Now, in the process of trying to ferret out the
11 truth in this matter, it's going to be important for
12 Mr. Bugden and I to ask a lot of questions, a lot of detailed
13 questions. And you're going to hear little pieces of evidence
14 that you may think, Why is she wasting time with that? Why is
15 she focused on that issue? Why is Mr. Bugden asking these
16 questions?

17 Now, the way that this process works is, once I sit
18 down, then the State starts their case and they put on their
19 witnesses. We're able to ask them questions. And then we
20 have a chance to put on our case. And then we have a chance
21 at the end to tell you how we think it all fits together.

22 And so as you're hearing these different pieces, as
23 we're asking a lot of detailed questions, I would just ask you
24 to try to be patient. We'll try to go through this as quickly
25 as we can. But it's important for us to try to put the pieces

1 together so that it makes sense, so that it all makes sense to
2 you. So I just wanted to warn you about that process.

3 Back on the issue of the police investigation, we
4 feel like there was a real rush to judgment and a real focus
5 on -- or a tunnel vision. And there was never -- there was
6 never a real attempt by Detective Chamberlain to corroborate
7 really basic things that he could have corroborated with these
8 various witnesses: With Desvari, with Anthony and with
9 Brinkerhoff. And we're going to try to go through those with
10 Detective Chamberlain and try to lay out for you the problems
11 that we see in the police investigation and why we think that
12 they came to the wrong conclusion.

13 Don Millard went in voluntarily and spoke with
14 Detective Chamberlain. He answered all his questions. He
15 came to the police station. He answered every question that
16 was put to him by the officer. He could have -- you know, he
17 didn't have to do that. He did that.

18 Then when he got a call later, he still answered the
19 questions. He still tried to provide information to the
20 detective. He was very cooperative throughout all this
21 investigation.

22 And I wanted to talk a little bit about the divorce
23 and the situation with Susan. This divorce took place a
24 number of years ago. And, initially, there were some issues
25 with custody. But things had sort of evolved into a situation

1 where Susan had custody and Don had visitation. He would have
2 them -- kind of the standard visitation -- every other weekend
3 and those sorts of things.

4 And, over time, you'll hear testimony that the
5 family felt -- meaning Don and his parents -- felt like Susan
6 was being very reasonable. They were taking extended trips.
7 They were spending extended time with the children. And of
8 course Don and his parents always wanted to spend more time,
9 but things were pretty amicable.

10 Now, with respect to child support, Don was behind.
11 He was way behind. There's no excuse for that. He needed to
12 be following through with his obligation. But there were not
13 angry phone calls with Susan. There wasn't animosity; there
14 weren't fights about that. He was working on a house and had
15 a plan to try to catch up.

16 Things were not in a situation where he felt
17 desperate or in a situation where he would want to harm the
18 mother of his children. That's simply not what the
19 circumstances were.

20 The State's case rests on people who cannot be
21 trusted. They lie to get out of trouble. They lie to get a
22 deal. They use drugs. They commit crimes. They're not
23 reliable sources of information.

24 Now, I really see this process with you as a
25 collaborative process. We're trying to work with you. I

1 mean, I always imagine kind of at the end of opening
2 statements, rolling up our sleeves together to try to evaluate
3 the evidence here and make a determination about what really
4 happened here.

5 As you've been told by the judge on a number of
6 occasions, there's a presumption of innocence here. Why do we
7 have a presumption of innocence? You know, there's certainly
8 an instinct, when you walk in the courtroom and there's a
9 defendant sitting at the defense table, there's a presumption
10 of guilt. Right? That's the normal, human response, to make
11 assumptions.

12 But jurors have a very special role. And the
13 Constitution requires, that in order to get a fair trial,
14 you've got to push that aside. We start today presuming Don
15 Millard is innocent. No matter what questions you have, no
16 matter what the State has said, no matter what you may have
17 thought, we start with this presumption of innocence. And it
18 needs to be something that you take seriously.

19 And, I mean, what does it mean, what does it mean to
20 presume someone is innocent? I try to think of it almost like
21 some sort of cloak, like a shield almost, that is surrounding
22 the defendant in this case. You must presume Don Millard
23 innocent, and you need to hold that presumption until the end
24 of the case.

25 And, at the end of the case, you'll all go back

1 there and you'll discuss it. And at that point you'll assess
2 whether or not the State has met its burden. And that burden
3 is a high one, as the judge told you.

4 Proof beyond a reasonable doubt, not, I don't know
5 what happened. You need to have proof beyond a reasonable
6 doubt, the highest burden of proof there is.

7 Why is that? Why do we even have that burden?
8 Again, because we're talking about liberty. We're talking
9 about the most serious of allegations you can face.

10 We believe that, once you hear all this evidence
11 that has been described, and a whole lot more, I imagine, you
12 will conclude that Don Millard is not guilty of this offense,
13 that he's innocent of the charges filed against him, and that
14 you'll return the only fair verdict which is not guilty.

15 Thank you.

16 *THE COURT:* Thank you, counsel.

17 All right. Call your first witness.

18 *MR. SEARLE:* Detective Dan Chamberlain.

19 Judge, we would invoke the Exclusionary Rule at this
20 time.

21 *THE COURT:* I'll grant that request.

22 That is, anybody here in the courtroom today that
23 has been called as a witness, subpoenaed to be here at some
24 point in time to provide testimony or otherwise anticipated
25 that you will provide testimony, I'm going to exclude you from

Addendum E

BUGDEN & ISAACSON, LLC
ATTORNEYS · AT · LAW

623 EAST 2100 SOUTH
SALT LAKE CITY, UT 84106
801-467-1700
FAX 801-467-1800

TARA L. ISAACSON

December 2, 2005

*PRIVILEGED
ATTORNEY / CLIENT COMMUNICATION*

Donald Millard
1060 East Country Lane Road
Salt Lake City, UT 84117

Re: State v. Millard / Case No. 041300401

COPY

Dear Don:

This letter will serve to confirm the multiple conversations we have had this week and a lengthy conversation I had with your father on Friday.

As you know, Wally and I have been aggressively preparing to defend you. We are both prepared to shred the Government witnesses. However, we do not want you to either ignore or cavalierly dismiss our evidence concerns. I always think it is important to confirm, in writing, what we are thinking about the case so that there is no misunderstanding.

As we have been meeting and preparing, I have tried to emphasize our most serious issues. Specifically, we are most concerned about the phone records. I have explained to you repeatedly how those records are going to be used by the prosecutor. The timing of many of the calls are going to be used against you.

At this point, we are recommending that you testify. It is ultimately your decision, but there are too many explanations that can only come from you. We will continue to prepare you for this experience.

Another concern is Idrese – thus far, you have been unable to get him in to meet with us to assess whether to call him for trial. If he doesn't back us up, our defense is weakened. We cannot simply subpoena him for trial without assessing what he will say. It needs to be your top priority to get him in here. We can arrange to meet with him any time on Tuesday the 6th, or we will find another time. We may decide not to call him. He may be too unreliable and dangerous, but we would like to meet with him to assess his usefulness.

BUGDEN & ISAACSON

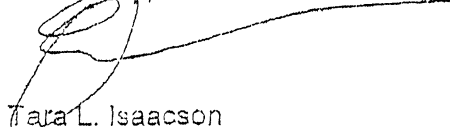
December 2, 2005

Page 2

I do not want to even think about a negative outcome, but it is important that you understand the potential penalties in this case. Each charge is a First Degree Felony. With multiple counts, they can be run consecutively – one after another. The potential penalty on each count is 5 years to life. It is impossible to predict how much time you would do if you were found guilty, it is ultimately up to the Board of Pardons. The time could literally be anywhere between 5 years to life in prison. We cannot make any guarantees or even reliable estimates about how much time you would serve if we were unlucky and things do not go our way.

Our focus right now is on winning your case. I will look forward to meeting with you again on Monday to continue preparations. Prepare, prepare, prepare!

Yours truly,

A handwritten signature in black ink, appearing to be "Tara L. Isaacson", with a long horizontal line extending to the right.

Tara L. Isaacson

TLI:sw

Enclosure

cc: Duane Millard

Addendum F

IN THE THIRD DISTRICT COURT
IN AND FOR TOOELE COUNTY, STATE OF UTAH

STATE OF UTAH,)	INTERVIEW TRANSCRIPT:
)	DONALD MILLARD
Plaintiff,)	(From Video Tape)
)	
v.)	Case No. 041300401
)	
DONALD MILLARD,)	Judge Randall Skanchy
)	
Defendant.)	

INTERVIEW OF DETECTIVE CHAMBERLAIN AND DONALD MILLARD
GRANTSVILLE POLICE STATION

does that, so I tried to call back and couldn't reach her.

Not on her cell phone. Not on her land line. Normally I won't bring the kids out unless I can reach her first. But her voice sounded real shaky. Wasn't expecting an assault. I still have no idea what happened. Like he said, she was stabbed. I don't even know what that means.

Det. Where do you think he is? Ok. Ok. Alright. Ok. He's right here. Hey, what color of clothes did, did he have on when you saw him? A white t-shirt. Did you ever see him with a black t-shirt with white lettering? Ok. Alright. Here's Don.

Millard: What's going on bud? Uh huh. Yeah. Yeah. Yeah, no problem. I have no idea. I'm still trying to figure out what's going on. I don't know. They won't tell me. All they said was, ah, did Brad call me? ~~I don't know~~ if he told you this or not, but, ah, from Susan's house. ~~But I told him I had no idea where he was.~~ He had to have been near the door because she doesn't let anybody in. She's extremely cautious about that, which is a good thing. But apparently as soon as he hung up the phone talking to me, he stabbed her. They won't say anything about it, where, or how, or won't say a word to me. I have no idea. They said she's okay. I guess in a good enough condition to take the kids, which is good. Still doesn't answer my

questions though. I still got a few questions that they're not going to answer yet. Well, they're still trying to figure out what I'm holding back and what I'm lying about but. Exactly. I have no idea. I'm just trying to think of little details I might have missed or might have forgotten. I got to check my notes and see if he left a phone number. Yeah, last I checked too. Yeah, I'm trying to get home. ~~I haven't~~ I haven't even made it to my place yet. Just my parents. I got all the luggage in the back of my truck. I have no idea. They wanted me to cut a deal. They wanted me to cut a deal. They want me to plead that I hired him. Wow, take it easy. I don't have a voice that strong, you know, I can't yell like that. I'm trying to be very careful about this. I don't know. I just want to go to sleep. I can answer questions a lot better tomorrow. But that's what's going on. That's the first thing I said when I walked in was, so, do you want to cut a deal? Yeah, on what? Do you want to sell me a house or something? That's all I'm doing. So it's, so I'm working on it. I'll have it done in about three weeks. Yeah, no doubt. So I don't know. I will. Not a problem. I'll talk to you later. Alright, bye. Same person I got. Cut a deal for what? What the hell are you talking about? I want to know what they found out. They caught this guy? Is that what they're saying, that they