

2006

## Utah v. Chavez-Espinoza : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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THE STATE OF UTAH,	)	<b>REPLY BRIEF</b>
	)	<b>OF THE APPELLANT</b>
Defendant/Appellee.	)	
vs.	)	
	)	
URIEL CHAVEZ-ESPINOZA,	)	Case No. 20061090
	)	
Plaintiff/Appellant,	)	

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An Appeal from the a final Judgment and Order of the  
Fourth District Court – Heber Department

The Honorable Derek Pullan,  
Presiding Judge

District Court Case No. 061500015 FS  
Court of Appeals Case No. 20061090

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**REPLY BRIEF OF THE APPELLANT**

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FILED  
UTAH APPELLATE COURTS  
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**SUMMARY OF ARGUMENT**

The Appellant submits that the Court should take into account all of the points fully briefed and raised by the Appellant in the opening Brief. In light of the Defendant's young age, the Adult Parole and Probation recommended only 365 days in jail. (See Transcript of Sentencing, pg. 3.) The trial court disregarded that recommendation and imposed the maximum sentence even in light of the inconsistent verdicts. The sentence is unduly harsh in light of the errors set forth in the Appellant's opening Brief.

Mr. Chavez-Espinoza disputes the position of the State that there was ever any basis for any factual finding that he failed to stay in contact with his attorney. Defense counsel made a motion to continue one week prior to the trial over the telephone, there was no evidentiary hearing, and the Defendant has not had any opportunity to dispute the findings made by the trial court to determine whether he failed to stay in contact with his attorney or whether his attorney failed to contact him.

A review of the totality of the instructions will indicate that the Court did not follow the traditional approach taken by trial judges in the State of Utah who formally tailor specific elements instructions on all criminal offenses. Further, the court should have granted instructions on the lesser included offenses of Burglary and Criminal Trespass. All of the errors in the instruction to the jury resulted in an enhanced sentence which is unduly harsh and that injustice alone should result in a reversal of a conviction and an award of a new trial.

## **ARGUMENT**

### **POINT I**

#### **THE ERRORS IN INSTRUCTING THE JURY SHOULD HAVE BEEN OBVIOUS TO THE TRIAL COURT AND THE ERROR IS HARMFUL .**

The Appellant respectfully submits that contrary to the State's position, Instruction No. 26 materially fails to define the separate offenses of Burglary and Aggravated Burglary. The State does not dispute that it is no specific intent instruction. The instructions fail to define specific intent as raised in the opening Brief of the Appellant. The Instruction inadequately defines the elements in the context of the actual facts of the proceeding.

In response on page 23 of the Brief of the Appellee, the Appellee makes an unsupported blanket assertion and indicates that, "While the Defendant may have been

found guilty based upon the acts of co-participants, he could not have been found guilty based upon their intent.” The Defendant submits that this position is not based upon an objective reading of the Instruction in the context the entire charge to the jury. The problem with the totality of instructions was that the basic elements mixed concepts of accomplice liability and enhancement. Further, the instructions failed to adequately explain the distinction between the general and specific intent requirements or relate those requirements to the facts. *State v. Winward* 909 P.2d 909 (Ct. App. 1995) and *State v. Potter*, 627 P.2d 75 (Utah 1981)

The Appellant submits that Instruction No. 26 is in error because subparagraph 3 of Instruction No. 26 is the only paragraph which refers to the state of mind of the Defendant. That element states, “The Defendant, as a party to the offense. . .”(R154). The instruction opened the scope of the jury’s consideration as to intent and conduct to the Defendant or any party as responsible for the conduct of any accomplice who entered the building with the intent to commit a felony, theft, or assault on any person (See R154). The instruction fails to adequately define the elements, including the specific intent element in order that the jury could have focused on whether or not the charged Defendant on trial had the intent to commit the underlying offense.

Further, the jury instruction never instructed as to the offence of Burglary, a Second Degree Felony. Only a combination of Burglary and Aggravated Burglary in one instruction. Instead of a detailed and focused elements instruction the jury was given a

bare bones instruction.

The evidence at trial supports a rational defense that the Defendant did not intend to provoke any kind of fight or encounter. (See Facts detailed by Appellant in Appendix) Instruction No. 26 is substantially prejudicial and manifests the injustice to Mr. Chavez-Espinoza because the jury was allowed to find his intent from the wrongful acts of other parties, especially in light of the failure to define separately accomplice liability and the gang enhancement.

It is the duty of the judge to instruct the jury on relevant law. The trial judge should give an instruction in proper form, that states the law correctly and does not prejudice the defendant. *State v. Hansen* 734 P.2d 421 (Utah 1986)

Under this Court's plain error standard, the Court should reverse the district court even if on an issue not properly preserved for appeal when a party has shown the following: (1) a error exists; (2) the error should have been obvious to the trial court; and (3) the error is harmful . *State v. Dunn*, 850 P.2d 1201 (Utah 1993) *State v. Powell*, 154 P.3d 788, 2007 UT 9 (Utah 01/23/2007) The second element of the plain error test requires that the error be plain, manifest, or obvious to the trial court. In explaining this prong, the Court has held that after examining the record, an appellate court must be able to say that it should have been obvious to a trial court that it was committing error. In this matter, given the circumstances, the trial court should have been aware that an error was being committed at the time.

The State fails to address the specific objections made by the Appellant in the Brief concerning the failure to define and instruct on fundamental error of specific intent. (See Brief of the Appellant, pg. 25-29.) In the opening Brief, counsel raised the manifest and material problem concerning the use of Instruction No. 34, the definitional instruction. (See Brief of the Appellant, pg. 30.) Plain error is manifest which prejudicially resulted in the enhanced First Degree felony conviction.

There exists a myriad of technical issues attempting to deflect the errors which were not objected to by ineffective counsel at trial or instructions not given by the trial court. However, the manifest injustice of sending a 19 year old to the Utah State Prison for the severe penalty based upon an incorrect statement of law should be sufficient grounds to award a new trial.

## **POINT II**

### **THE JURY INSTRUCTIONS AS TO ACCOMPLICE LIABILITY AND ENHANCEMENT FOR ACTING IN CONCERT CONSTITUTED AN ERROR WHICH SUBSTANTIALLY PREJUDICED THE DEFENDANT'S RIGHT TO A FAIR TRIAL.**

The State relies on Instruction No. 34 (R146) which is entitled "Definitions" to attempt to mitigate the failure to instruct the jury as to the gang enhancement offence. The State claims that this catch-all, general instruction was sufficient to instruct the jury of "the elements" of the separate criminal offense for enhancement for "in concert

activity”. *State v. Lopes*, 34 P.3d 762 (Utah 2001) The difficulty of this position is that the error in specifically charging the jury with any elements instruction on “gang enhancement” was aggravated by referring the jury to search in another instruction to a catch-all definitional instruction. This error did not correct the fundamental problem.

The State never addresses the fundamental error that Instruction No. 34 is merely a catch-all instruction of many definitions relevant to the entire proceeding which included myriad language “other persons” and “as parties”. The totality of these two instructions is unclear as to the intent to “engage in the same offense or degree of offense as the Defendant”. The use of this definition in conjunction with the poorly drafted element instruction for Burglary and Aggravated Burglary resulted in an ambiguous charge to the jury. The lack of direction as to the law is not saved by reference to the instruction requiring the jury to search out appropriate language.

The Defendant was substantially harmed by the error and the manner in which the Court submitted the criminal offense to the jury failing to structure a traditional element instruction on the enhanced charge. An appropriate and well crafted elements instruction for a criminal offense focuses on each element and the Defendant’s role, requiring the jury to analyze each potential material clause under the reasonable doubt standard. *State v. Casey*, 82 P.3d 1106 (Utah 2003)

The Appellee argues alternate hypothesis in favor of the State, but disregards the obvious situation where the jury in this case could have found the Defendant guilty of a serious, enhanced First Degree felony conviction based upon the fact that he never had

any specific intent. That intent could have been supplied by the acts and intent of other parties. It is inherently confusing that the Court's reference to the serious separate enhanced criminal offense was giving an instruction by indicating "see defined below". (Instruction No. 33, R147) Here, when the jury viewed the definitional instruction No. 34, the jury saw a laundry list of items that contained both accomplice liability definition and the in concert definition without direction to the jury.

Either the Court should have corrected this error or trial counsel for the Defendant should have objected or submitted correct jury instructions. Trial counsel also failed to submit an instruction on a key issue of specific intent for which Mr. Chavez-Espinoza was given the serious conviction and this is a fundamental error in any representation of any criminal defendant.

The court did not *sua sponte* bifurcate the hearing. Instead the Judge suggested to have the separate offenses submitted to the jury at one trial in one set of instructions unless defense counsel objected. This created upon the trial court an obligation to clearly and specifically define the separate offenses by discrete elemental instructions to avoid the prejudice sought to be corrected by a bifurcation of the trial. ***State v. Bishop*** 753 P.2d 439 (Utah 1988). In ***Victor v. Nebraska*** 511 U.S. 1(1994), the United States Supreme Court, citing ***In re Winship***, 397 U.S. 358, reaffirmed that the government must prove beyond a reasonable doubt every element of a charged offense in a criminal offense. A federal constitutional error occurs if a Court omits an element instruction which the

prosecution has the burden to prove each element of a charged offense beyond a reasonable doubt and that error is a structural error under *Sullivan v. Louisiana* 508 U.S. 275 (1993).

Particularly confusing is the fact that Instruction No. 34 (R146) defines in the same instruction and the same subparagraph of Paragraph 8. In the Appellant's Brief, the Appellant has indicated that there was a structural error in the manner and means of charging the accomplice liability charge without any definitional, specific offense especially in light of the in concert and gang enhancement instructions. The State, in responding to the appeal, has referred to Instruction No. 34. However the State cannot support the issue of missing elements instruction by reference to a confusing and conflicting instruction.

The fact remains that the definitions of both "in concert" and "accomplice liability" are contained under the same subparagraph (i.e. paragraph No. 8) of the instruction. This means and manner of instructing the jury could not be more confusing and the instructions must be categorized by this court by a "bare bones" instruction. The duty of the trial court to tailor jury instructions is increased in a complicated matter in which there were enhancements from Burglary to Aggravated Burglary, then to an enhancement based on the activity of other parties.

In *State v. Lopes* 1999 UT 24, 980 P.2d 191 (Utah 2001) the legislature indicated that the gang enhancement essentially created a specific new crime and that each element

must be proved beyond a reasonable doubt. The Appellee may be right that the jury was somehow able to sort out on their own the legal issues presented to them in this matter. However, this is speculation that cannot be answered by a logical analysis of the instructions. The Defendant took the stand to testify and this is a matter in which the jury was faced with a case in which the reasonable doubt standard was jeopardized by the confusing instructions on all elements of a crime.

### **POINT III**

#### **THE DEFENDANT TRIED TO CONTACT HIS ATTORNEY BUT HIS ATTORNEY FAILED IN MAKING REASONABLE CONTACT WITH MR. CHAVEZ-ESPINOZA.**

Mr. Chavez has not been able to address the issue of the allegation that he failed to stay in contact with his attorney. The Appellant disputes the position of the State that there was ever any basis for any factual finding that he failed to stay in contact with his attorney. Defense counsel made a motion to continue one week prior to the trial over the telephone, there was no evidentiary hearing, and the Defendant has not had any opportunity to dispute the findings made by the trial court to determine whether he failed to stay in contact with his attorney or whether his attorney failed to contact him

The trial court's findings in this case are not based upon any evidentiary hearing but merely upon pleadings and statements made by defense counsel in a telephone call. There is no evidence that the Defendant was even present during the telephone call which

occurred one week prior to trial and there is insufficient record of such a telephone call. The statement made by defense counsel that he “had not had an opportunity to adequately discuss and prepare for the case” and “hadn’t been in contact with [his] client.” R205:7 did not contribute the loss of contact to either to the Defendant or to the failure of the defense counsel to stay in contact with the Defendant.

The trial court was in error in attributing the failure to stay in contact to the Defendant. The Court should find that the inadequacy of defense counsel requires a new trial. This is corroborated by the above points which set forth the lack of the submission of jury instructions and a review of the record and the other errors which have been set forth in the Brief. The failure to submit instructions demonstrates that counsel was not prepared.

#### **POINT IV**

#### **THE EVIDENCE IS INSUFFICIENT TO WARRANT THE CONVICTION AND THE APPELLANT HAS MARSHALED THE EVIDENCE.**

The trial court sentenced the Defendant to a verdict on the gang enhancement in a First Degree felony. The error which occurred concerning the confusion in the instructions of accomplice liability and the in concert enhancement. This error could have been corrected by the dismissal of those charges by the Court at the close of the State’s evidence. Therefore, sufficiency of the evidence and the evidence is insufficient

to warrant the conviction of the enhanced First Degree felony and the appellant has marshaled the evidence.

The Defendant has marshaled evidence concerning this matter and has set forth in the Addendum an objective summary of the testimony at trial.

#### **POINT V**

#### **THE DEFENDANT'S CONDUCT DID NOT AMOUNT TO A FIRST DEGREE FELONY.**

The Appellant has set forth the evidence which constituted the testimony during the course of the trial. Instead of creating an argumentative statement of the offense, the Defendant has objectively set forth the relevant facts and circumstances of the trial including the evidence introduced in defense and in areas of cross examination.

#### **POINT VI**

#### **THE DEFENDANT WAS ENTITLED TO AN INSTRUCTION ON CRIMINAL TRESPASS.**

The State acknowledges that neither the attorney for the Defendant or the trial court included in the instructions to the jury the Criminal Trespass statute, the lesser included offense of criminal trespass. The Defendant submits the failure of trial counsel to request such an instruction clearly demonstrates ineffective assistance of counsel. Further, this error is manifest injustice and an error which requires a new trial.

The criminal trespass statute *Utah Code Annotated* § 76-6-206 (2)(c) states as follows:

**76-6-206. Criminal trespass.**

- (1) As used in this section, "enter" means intrusion of the entire body.
- (2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in Section **76-6-202**, **76-6-203**, or **76-6-204** or a violation of Section **76-10-2402** regarding commercial terrorism:
  - (a) he enters or remains unlawfully on property and:
    - (i) intends to cause annoyance or injury to any person or damage to any property, including the use of graffiti as defined in Section **76-6-107**;
    - (ii) intends to commit any crime, other than theft or a felony; or
    - (iii) is reckless as to whether his presence will cause fear for the safety of another;
  - (b) knowing his entry or presence is unlawful, he enters or remains on property as to which notice against entering is given by:
    - (i) personal communication to the actor by the owner or someone with apparent authority to act for the owner;
    - (ii) fencing or other enclosure obviously designed to exclude intruders; or
    - (iii) posting of signs reasonably likely to come to the attention of intruders; or
- (c) he enters a condominium unit in violation of Subsection **57-8-7(7)**.
- (3) (a) A violation of Subsection (2)(a) or (b) is a class B misdemeanor unless it was committed in a dwelling, in which event it is a class A misdemeanor.
- (b) A violation of Subsection (2)(c) is an infraction..

The statute specifically indicates that it applies to circumstances which do not amount to burglary as defined in the same Burglary and Aggravated Burglary sections of the property section of the criminal code. As in homicide cases, the legislature has defined the degree and type of offenses from aggravated burglary to criminal trespass, all involving assaultive conduct. Despite the evidence that supports a finding that there was intent in going to the apartment to confront his cousins; no lesser instructions at all were given by the trial court.

In reply to the State's indication that the Defendant has not alleged exceptional

circumstances or plain error on appeal, the Defendant refers to the points of this Reply Brief which show the inadequacy and bare bones instruction of the offenses. The Court, *sua sponte*, had the duty to give full and complete instructions on burglary and included criminal trespass, especially when the Court relied on mere definitional instructions without tailoring the instructions to the offense. Under such an approach to instructions, the Court was required, in order to give the Defendant a fair trial, to give a full instructions of all the applicable criminal offences.

### **CONCLUSION AND REQUEST FOR RELIEF**

The Appellant should be awarded a new trial. All of the errors in the context of the jury instruction resulted in an enhanced sentence which is unduly harsh and that fact alone should result in a reversal of a conviction and an award of a new trial.

DATED this \_\_\_\_ day of November, 2007.

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MAILING CERTIFICATE

I hereby certify that on the \_\_\_\_ day of November, 2007, two true and correct copies of the foregoing REPLY BRIEF OF THE APPELLANT was mailed First Class, postage prepaid to:

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