

2006

Utah v. Chavez-Espinoza : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

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

BRIEF OF THE APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant does request Oral Argument.

THE STATE OF UTAH,
Defendant/Appellee.
vs.
URIEL CHAVEZ-ESPINOZA,
Plaintiff/Appellant,

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BRIEF OF THE APPELLANT

Case No. 20061090

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

Respectfully submitted,
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URIEL CHAVEZ-ESPINOZA,
Plaintiff/Appellant,
vs.
THE STATE OF UTAH,
Defendant/Appellee.

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BRIEF OF THE APPELLANT

Case No. 20061090

The Utah Court of Appeals has jurisdiction from this appeal based upon the filing of a Notice of Appeal within thirty (30) days of the imposition of the sentence in a criminal felony case and based upon Rule 4 of the *Utah Rules of Appellate Procedure* from a final sentence imposed after a trial.

There are no prior or related appeals by this Appellant or any person.

1. THE VERDICT OF NOT GUILTY AS TO COUNT 7 IS INCONSISTENT WITH THE AGGRAVATED BURGLARY CONVICTION AND A NEW TRIAL SHOULD BE ORDERED.

1

evidence and all reasonable inferences in a light most favorable to the verdict. *State v. Gordon*, 913 P.2d 350, 351 (Utah 1996).

Citation to Record: See Verdict Form (Record 154 to 1580) set forth in Addendum.

2. THE DEFENDANT’S CONVICTION OF A FIRST DEGREE FELONY WAS BASED UPON JURY INSTRUCTIONS THAT DID NOT ADEQUATELY DEFINE THE FIRST DEGREE FELONY OFFENSE AND FAILED TO INSTRUCT OF SPECIFIC INTENT.

Standard of review: The court reviews jury instructions under a correctness standard, granting no particular deference to the trial court. *State v. Gibson*, 908 P.2d 352, 354 (Utah Ct.App. 1995), cert. denied, 917 P.2d 556 (Utah 1996). The court reviews jury instructions in their entirety to determine whether the instructions, taken as a whole, fairly instruct the jury on the applicable law." *Laws v. Blanding City*, 893 P.2d 1083, 1084 (Utah Ct.App.), cert. denied, 910 P.2d 425 (Utah 1995). "However, jury instructions to which a party failed to object at trial will not be reviewed absent a showing of manifest injustice." *Gibson*, 908 P.2d at 354.

Citation to Record: Instructions given are set forth in items 1 through 9 of Addendum to this Brief.

3. THE DEFENDANT’S TRIAL ATTORNEY WAS NOT PREPARED FOR TRIAL AND DID NOT MEET THE STANDARDS REQUIRED FOR EFFECTIVE COUNSEL.

Standard of review: The Court reviews ineffective assistance of counsel claims raised for the first time on appeal for correctness. *State v. Silva*, 2000 UT App 292, 13 P.3d 604 (Utah App 2002)

Citation to Record: The Defendant, on November 29, 2006, filed a hand written note from the Utah State prison indicating and questioning the effectiveness of his assistance of counsel. (See Record, pg 198)

4. THE COURT ERRED IN ALLOWING THE FIRST DEGREE FELONY TO BE SUBMITTED TO THE JURY AND SHOULD HAVE GRANTED THE MOTION TO DISMISS.

Standard of review: An appellate court reviews a trial court’s conclusions of law for correctness because “a single trial judge is in an inferior position to determine what the legal content of [a legal concept] should be [whereas] a panel of appellate judges, with their collective experience and their broader perspective, is better suited to that task. *State v. Pena*, 869 P.2d 932 (Utah 1994)

Citation to Record: Motion (Transcript of Trial, Vol. III, pg. 64)

5. THE EVIDENCE IS INSUFFICIENT TO JUSTIFY A VERDICT OF A FIRST DEGREE FELONY.

Standard of review: In reviewing a jury verdict, the Court views the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict. ***State v. Andrews***, 843 P.2d 1027, 1030 (Utah 19952).

Citation to Record: Facts set forth in detail in Addendum.

6. THE COURT ERRED IN STRIKING JURORS FOR CAUSE OVER OBJECTION OF DEFENSE COUNSEL AND IN GRANTING OBJECTION BY THE STATE.

Standard of review: The Utah Supreme Court has noted, however, that the exercise of the trial court's discretion in selecting a fair and impartial jury must be viewed "in light of the fact that it is a simple matter to obviate any problem of bias simply by excusing the prospective juror and selecting another." ***Jenkins v. Parrish***, 627 P.2d 533 (Utah 1981).

Citation to Record: Transcript of Trial: Vol. I, pg. 132-138.

7. THE APPELLANT WAS DENIED A FAIR JURY PANEL CONTAINING HISPANIC PERSONS.

Standard of review: The Utah Supreme Court has noted, however, that the exercise of the trial court's discretion in selecting a fair and impartial jury must be viewed "in light of the fact that it is a simple matter to obviate any problem of bias simply by excusing the prospective juror and selecting another." ***Jenkins v. Parrish***, 627 P.2d 533 (Utah 1981).

Citation to Record: Transcript of Trial: Vol. I, pg. 138 (See Jury List set forth in Addendum, pg. 19.)

8. THE COURT SHOULD HAVE GRANTED A MISTRIAL BASED UPON STATEMENTS MADE ABOUT INADMISSIBLE DEATH THREATS HEARD BY THE JURY.

Standard of review: Because a district judge is in an advantaged position to determine the impact of the courtroom events on the total proceedings, once a district court has exercised its discretion and denied a motion for a mistrial, we will not reverse the court's decision unless it "is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial." ***State v. Wach***, 24 P.3d 948 (Utah 2001)

Citation to Record: Transcript of Trial: Vol. II, pg. 127-128

9. THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE REMANDED FOR FURTHER HEARING.

Standard of review: When an ineffective assistance of counsel claim "is raised for the first time on appeal without a prior evidentiary hearing, it presents a question of law."

***State v. Holbert*, 61 P.3d 291 (2002)**

Citation to Record: See facts set forth in detail in Addendum which include points as to ineffective counsel.

CONSTITUTIONAL PROVISIONS, STATUTES, & ORDINANCES

Utah Code Annotated 76-3-203.1. Offenses committed in concert with two or more persons -- Notice -- Enhanced penalties.

(1) (a) A person who commits any offense listed in Subsection (4) is subject to an enhanced penalty for the offense as provided in Subsection (3) if the trier of fact finds beyond a reasonable doubt that the person acted in concert with two or more persons.

(b) "In concert with two or more persons" as used in this section means the defendant was aided or encouraged by at least two other persons in committing the offense and was aware that he was so aided or encouraged, and each of the other persons:

(i) was physically present; or

(ii) participated as a party to any offense listed in Subsection (4).

(c) For purposes of Subsection (1)(b)(ii):

(i) other persons participating as parties need not have the intent to engage in the same offense or degree of offense as the defendant; and

(ii) a minor is a party if the minor's actions would cause him to be a party if he were an adult.

(2) The prosecuting attorney, or grand jury if an indictment is returned, shall cause to be subscribed upon the information or indictment notice that the defendant is subject to the enhanced penalties provided under this section.

(3) The enhanced penalty for a:

(a) class B misdemeanor is a class A misdemeanor;

(b) class A misdemeanor is a third degree felony;

(c) third degree felony is a second degree felony;

(d) second degree felony is a first degree felony; and

(e) first degree felony is an indeterminate prison term of not less than nine years and which may be for life.

(5) It is not a bar to imposing the enhanced penalties under this section that the persons with whom the actor is alleged to have acted in concert are not identified, apprehended, charged, or convicted, or that any of those persons are charged with or convicted of a different or lesser offense.

STATEMENT OF THE CASE

Nature of the case

Based on a Felony Criminal Information the Appellant was convicted in the Fourth District Court, Wasatch County by the jury verdict of Aggravated Burglary with a jury finding that he acted in concert with two or more persons. Mr. Chavez-Espinoza was found Guilty of Aggravated Assault with the finding that he acted in concert with two or more persons as set forth in Count Three and was convicted of Assault of Florina Chavez under Count Four with the finding that he acted in concert with two or more persons. The Appellant was found Guilty of Assault as to Jose Luis Ramirez with the finding that he did not act in concert with two or more persons and was found Guilty of Assault as to Jorge Ramirez with the finding that he acted in concert with two or more persons. He was found Not Guilty of Assault as to Rosa Solis. The Appellant was sentenced to a term of Nine years to life on Count One with other counts to run concurrently and he is in prison based only on this conviction.

STATEMENT OF FACTS AND TESTIMONY AT TRIAL

Summary of Testimony from Trial Transcript Volume I, Record Pg. 204

1. The jury trial commenced on September 18, 2006 and prior to the trial, the Court made record of a pre-trial Motion to Continue filed by defense counsel that was addressed on September 13, 2006 during a telephone conference. (Trans. of Trial: Vol. I, pg 6)

2. During the Prosecutor's opening statement he indicated to the jury that "this is a culture we are not used to seeing everyday" and no objection was made by defense counsel. (Trans. of Trial: Vol. I, pg 159)

**Summary of Testimony from Trial Transcript
Volume II, Record Pg. 205**

3. Adrian Ramirez, 17 years of age, testified that he met Jorge Urias through Uriel Chavez-Espinoza and that he had purchased cocaine from Jorge Urias on or about December 24, 2005 which he gave to Jose Luis. (Trans. of Trial: Vol. II, pg 15)

4. Adrian Ramirez stated that on New Year's Eve, January 1, 2006, there was a party at his family's apartment in Todd Hollow, Heber City, State of Utah and on that morning Uriel Chavez-Espinoza told Adrian Ramirez during a telephone conversation to come to Park City so that he could fight him and his brother. He claimed Uriel stated that he would come to where he was at. (Trans. of Trial: Vol. II, pg 22)

5. Mr. Ramirez said that he went back to his bed to go to sleep but was later awoken by a knock at the front door and when he opened the door he was immediately hit by Uriel Chavez-Espinoza who was standing outside the door. (Trans. of Trial: Vol. II, pg 26)

6. Adrian Ramirez testified that the person known as La Borrega pulled him outside the residence where he was hit about seven times and Adrian also hit Uriel in the face. (Trans. of Trial: Vol. II, pg 27-28) According to his testimony, the other people present with Uriel as follows:

“It was Uriel, La Diabla, Angel, La Borrega.” (Trans. of Trial: Vol. II, pg 29)

7. Adrian Ramirez indicated that his brother and Jose Luis came out of the residence and began fighting with the others in the hallway when his mother told them to “keep running further down”. (Trans. of Trial: Vol. II, pg 31) He stated that after fighting in the hallway he left the area of the building and was hiding under a truck where Uriel found him, the other persons arrived, grabbed Adrian and started to hit him where he received cuts on his neck and face. (Trans. of Trial: Volume II, pg 37) Adrian Ramirez claimed that Uriel sat on his chest and was holding him down when Uriel said, “You’re going to die, dog.” (Trans. of Trial: Vol. II, pg 38) He did not see any knife, only hearing Uriel ask, “Hand me the knife.” (Trans. of Trial: Vol. II, pg 39)

8. The witness said he had been kicked in the ribs and that he was sore for about one month based on those injuries. (Trans. of Trial: Vol. II, pg 55) At the end of the examination, Adrian Ramirez testified as follows:

Q: Okay. Now, besides the fact that you had returned some cocaine to Jorge Urias for a refund – or Jose Luis did, do you know of any other reason why Uriel would have been mad at you?

A: I don’t know. It might have been his.

(Trans. of Trial: Vol. II, pg 60)

9. On cross-examination, Adrian Ramirez denied having any items in his hand such as a beer bottle when he answered the door. (Trans. of Trial: Vol. II, pg 73) He admitted that he did not tell anyone he was hiding under a truck at the last hearing before trial. (Trans. of Trial: Vol. II, pg 88) When asked about his testimony at the preliminary hearing, Mr. Poston indicated that Adrian Ramirez never mentioned anything about a

truck. (Trans. of Trial: Vol. II, pg 88) The witness claimed he was cut on the head when Uriel threw him on the snow, but he admitted that he did not see Uriel cut him with the knife. (Trans. of Trial: Vol. II, pg 91)

10. Jorge Ramirez, the brother of the witness Adrian Ramirez, testified that on January 1, 2006 he received a telephone call from the Appellant, Uriel Chavez-Espinoza. (Trans. of Trial: Vol. II, pg 98) He indicated that the Uriel Chavez-Espinoza wanted him to go to a bar where he was drinking in order to fight. (Trans. of Trial: Vol. II, pg 100) He stayed and observed Adrian Ramirez go to the front door and he heard screaming back and forth. He stated, "All of them were screaming." (Trans. of Trial: Vol. II, pg 103)

11. Jorge Ramirez claimed that he observed the Appellant and the other persons, Angel and La Diabla, inside the residence and they were fighting with Adrian. The witness testified that after the problem was over he went inside the residence and there was a hole in the wall. (Trans. of Trial: Vol.II, pg 105) The witness indicated that he was covering his face during the incident and he stated to Mr. Low concerning the hole in the wall as follows:

A: I think it was a kick because it's about this far up from – in the wall, and it could not be a fist because you could not reach all that way to hit the wall.

Q: Okay. But, again, you were the one standing by the wall when it got the hole in it?

A: Yes. (Trans. of Trial: Vol.II, pg 105)

12. Jorge Ramirez testified that he was cut on his arm by "Angel", with a bottle and he saw Jorge with a switchblade knife when Uriel was yelling and threatening that he

was going to kill him. (Trans. of Trial: Vol. II, pg 117)

13. He indicated that after the door to the apartment was closed, Adrian wasn't present in the residence and the Police were called. The witness, his sister, and Luis went outside and found Adrien who had fainted. (Trans. of Trial: Vol. II, pg 119)

14. On cross-examination, the witness indicated that Uriel Chavez-Espinoza had never touched him, it was only Angel. (Trans. of Trial: Vol. II, pg 129)

15. The Prosecutor asked him if he was involved in the purchase of cocaine from Jorge Urias and the witness answered, "Yes". (Trans. of Trial: Vol. II, pg 135) At that time the Court admonished the witness concerning his Fifth Amendment privilege not to incriminate himself and after a discussion with the Court about consulting with an attorney and about possible immunity, the witness left the stand to be re-called at a later time. (Trans. of Trial: Vol. II, pg 138)

16. Florina Chavez, Adrian and Jorge Ramirez's mother, said that Uriel Chavez-Espinoza was her nephew. She stated on January 1, 2006, her sons and nephew were fighting and Jose Luis was covered in blood. (Trans. of Trial: Vol. II, pg 143) She told Uriel to stop fighting and "just go home" but he never answered her. She said that when she turned around to look at her son, Jorge who was fighting with Angel, Angel hit her in the face. (Trans. of Trial: Vol. II, pg 144) She testified that Uriel was saying that he was going "to kill us all, that it didn't matter that we were his family". (Trans. of Trial: Vol. II, pg 147)

17. The witness stated that after the door to the apartment was closed after everyone left the hallway they discovered that Adrian was not present and that the family left the apartment to look for Adrian. (Trans. of Trial: Vol. II, pg 149)

18. On cross-examination, Florina Chavez testified that her husband had purchased a six-pack of beer and that her sons were drinking beer that evening. (Trans. of Trial: Vol. II, pg 152) She stated that Uriel stopped fighting with Jose Luis, “but this other guy, La Borrega, he continued” and that she never heard Uriel tell Angel to hit her or touch her. (Trans. of Trial: Vol. II, pg 155)

19. Ruben Ramirez, the husband of Florina Chavez, testified that when he awoke that night there was a fight outside the front door of his apartment, he went out to the hallway, and he was able to get his family back inside the house. La Borrega had a pocket knife which he had pointed toward Mr. Ramirez’s belly as the Ramirez family was backing away. (Trans. of Trial: Vol. II, pg 161)

20. Ruben Ramirez testified during cross-examination that his wife went outside the apartment before he did, and was asking Jose Luis and Uriel Chavez to stop fighting. When Ruben Ramirez got in the middle of the two, the fight stopped. (Trans. of Trial: Vol. II, pg 164) He said that he saw Jorge fighting and went to help him because there were three of them fighting with La Diabla, and Uriel hit him with a bottle and he received four stitches in his head. (Trans. of Trial: Vol. II, pg 192)

**Summary of Testimony from Trial Transcript
Volume III, Record Page 206**

21. Deputy Travus Jensen of the Wasatch County Sheriff's Department testified that on January 26, 2006 he interviewed the Appellant, Uriel Chavez-Espinoza, and his attorney Scott Poston. Uriel stated on the evening in question that he and Jorge Ramirez were challenging each other back and forth to come over to each other's house. (Trans. of Trial: Vol. III, pg 37)

22. The Prosecution then asked the following question without objection:

Q: And what did he say about Angel, as far as what he knew about Angel?

A: He said he knew a little about him. I believe he said he had been to his house before but didn't know his mas well, but did know of him.

Q: Did he say whether he thought Angel was involved in gangs?

A: He did say that he - - he thinks he is.

(Trans. of Trial: Vol. III, pg 40-41)

23. The Deputy indicated that the Appellant told him that his intent on going to the apartment in Todd Hollow that night was to "fix the problem" with his cousins. (Trans. of Trial: Vol. III, pg 41) The Deputy stated that the Appellant told him that during the fight he had received some bumps and was sore on his back although he didn't receive any cuts or bruises. (Trans. of Trial: Vol. III, pg 45) The Deputy indicated that Mr. Uriel Chavez-Espinoza came in to talk with him voluntarily and discussed matters for an hour and a half. (Trans. of Trial: Vol. III, pg 49)

24. At trial, the Wasatch County Deputy was shown Exhibit 36, a picture of Jorge Urias, and he indicated that Mr. Urias appeared to have an injury to his face caused by a

bottle or a knife. Deputy Jensen also indicated that he received information that the person known as “La Diabla” received a cut to the hand and it was a deep cut. (Trans. of Trial: Vol. III, pg 52) After the testimony of Deputy Jensen, the State rested. (Trans. of Trial: Vol. III, pg 57)

25. The defense re-called Adrian Ramirez to the stand and examined him regarding prior testimony from a preliminary hearing and was asked about earlier testimony in which he stated that he had never talked to Uriel Chavez-Espinoza on the night in question. Mr. Ramirez indicated that he meant to say that talking on the phone was not the same as speaking face to face with a person. (Trans. of Trial: Vol. III, pg 66)

26. The defense then re-called Jorge Ramirez to the stand concerning his testimony that Uriel Chavez-Espinoza called him early in the morning on January 1, 2006. He admitted that at the preliminary hearing he testified that he had never talked to the Appellant. Jorge testified that earlier in the day on the 31st of December, 2005, he stopped to talk to Uriel who was helping the person known as La Borrega move from the Aspens in Park City to Todd Hollow Apartments in Heber City. (Trans. of Trial: Vol. III, pg 74)

27. Veratania Nava testified that she lived with her sister and Uriel Chavez-Espinoza and that in March of 2006, Jorge Ramirez came to her house. She indicated that Jorge Ramirez was talking to her sister Carmen and holding Carmen and Uriel’s baby inside the residence. (Trans. of Trial: Vol. III, pg 81)

28. On cross-examination Ms. Nava was asked by the State if she was aware

whether or not Uriel sold cocaine. (Trans. of Trial: Vol. III, pg 84) At this time, an objection was made by defense counsel and after a ruling by the Court off the record, she testified that Uriel did not sell cocaine. (Trans. of Trial: Vol. III, pg 113)

29. Cecilio Chavez testified that he knew Adrian Ramirez and Jorge Ramirez, his cousins, and he testified that two or three months prior to the trial – after the incident and before trial, that he had been present with Jorge Ramirez and the Appellant in Park City, Utah. On a different occasion Mr. Chavez had also been present with Adrian Ramirez and the Appellant in Heber, Utah. He testified that on one occasion, Adrian Ramirez and Uriel Chavez-Espinoza came to a barbecue together. (Trans. of Trial: Vol. III, pg 117)

30. During Mr. Low's cross-examination of this witness concerning the reasons why there may have been such contact between the Appellant and alleged victims, the following exchange took place:

Q: Okay. All right. Now, are you aware of any of the demands that the State has made, someone from my office, or the police officers, on Adrian and on Jorge to continue their involvement in this case and to do whatever they may need to do to participate in this case?

A: I'm sorry.

Q: Are you aware of any of the stresses and demands that - -

A: No.

(Trans. of Trial: Vol. III, pg 120-121)

31. Adrian Janette Chavez testified that she also saw Adrian Ramirez, Jorge Ramirez, and Uriel Chavez-Espinoza together after the incident on January 1, 2006. (Trans. of Trial: Vol. III, pg 125)

32. Arturo Moreno stated that he was friends with Adrian Ramirez and Jorge

Ramirez and was at Rosa's apartment on December 31, 2005 because Rosa's niece was his girlfriend at the time. (Trans. of Trial: Vol. III, pg 127)

33. He indicated that he had a good view of the front door and that Jorge left about 3:00 a.m. and returned at about 4:30 a.m. or 5:00 a.m. (Trans. of Trial: Vol. III, pg 129) Mr. Moreno testified that Jorge and Rosa left the apartment after Jorge returned, but that Rosa had not left the apartment prior to that. (Trans. of Trial: Vol. III, pg 130)

34. Arturo Moreno testified that he was with La Diabla the next morning and saw that he had a deep wound or cut on his hand that was about 2 ½ to 3 inches long. (Trans. of Trial: Vol. III, pg 131)

35. Eden Guadalupe Chavez, the sister of the Appellant, said that she saw Adrian Ramirez with Uriel Chavez-Espinoza at the 7-11 in Heber during the month of January, 2006 and they were drinking together and getting along. (Trans. of Trial: Vol. III, pg 145)

36. The next witness, Carmen Nava, testified she was the girlfriend of the Appellant and that they had a child together. Between March and April of that year, Jorge Ramirez came over to her house and was holding her baby while he was visiting and talking with Uriel. (Trans. of Trial: Vol. III, pg 150)

37. Edgar Ivan Perez testified as a defense witness that he worked next to the Appellant, with Uriel Chavez-Espinoza working at Albertsons and at the witness working at Burger King in Park City, and that he sees Uriel almost every day. (Trans. of Trial:

Vol. III, pg 160) He testified that in the month of August he saw Adrian Ramirez and Jorge Ramirez with Uriel Chavez-Espinoza and that the three of them were drinking in the parking lot of the Todd Hollow apartments. At that time, he heard them talking about the incident of January 1, 2006 and Mr. Perez testified that the men told him that Uriel didn't cut Adrian but it was La Diabla that had cut Adrian. (Trans. of Trial: Vol. III, pg 164)

38. The Appellant took the stand and testified that on the night of December 31, 2005 or the morning of January 1, 2006 he was at a dinner of a friend who was having a birthday party where Miguel and La Diabla were present. He indicated that he met his friend, Jorge Urias, and there was some discussion about his cousin, Jorge Ramirez. The Appellant testified that Jorge Urias indicated that Jorge Ramirez wanted to "hit him [Jorge Urias]" because the drugs were no good, and Uriel wanted to fix the problem between his cousin and his friend. (Trans. of Trial: Vol. III, pg 175) He indicated that his friend, Jorge Urias, told him that his cousins were mad because of the bad drugs he had sold to them and then Uriel's friend, Jorge Urias, passed him the telephone after he had been talking with his cousin, Jorge Ramirez, for some time. (Trans. of Trial: Vol. III, pg 176)

39. The Appellant indicated that Jorge Ramirez was not happy that he was trying to be a mediator and his cousin, Mr. Ramirez, used curse words during the telephone call. (Trans. of Trial: Vol. III, pg 176) The Appellant testified that he told his cousin he was

going to come over to straighten out the situation and his cousin, Jorge Ramirez, hung up the telephone. (Trans. of Trial: Vol. III, pg 178)

40. Uriel Chavez-Espinoza said that he left the party and while leaving Miguel asked where he was going. Uriel told him they were going to Todd Hollow and Miguel said he would go with him because he had just moved into that apartment complex.

(Trans. of Trial: Vol. III, pg 180)

41. Mr. Chavez-Espinoza indicated that they all drove to Heber City from Park City and that he knocked on the door of the apartment. Adrian Ramirez came out of the door of the apartment and the Appellant stated that when he indicated to Adrian Ramirez, "What's up, man? Here I am." he was then pushed by Adrian Ramirez. (Trans. of Trial: Vol. III, pg 183) The Appellant indicated that he did not bring his friends along to beat anyone up but they just came along with him to the apartment. He indicated that the persons who came out of the apartment had glasses and bottles and they were throwing the bottles. (Trans. of Trial: Vol. III, pg 191)

42. Uriel Chavez-Espinoza testified that he did not see La Diabla until the next day when he got a call from his friend, Miguel, who lived at the Todd Hollow apartment complex. Miguel indicated that La Diabla was looking for Uriel because he wanted to leave and that he was wounded. (Trans. of Trial: Vol. III, pg 191)

43. At that time, La Diabla got back into the car and was bleeding from his wound. (Trans. of Trial: Vol. III, pg 192) Uriel said that he never told his friends to take

any physical action against his cousins and that he believed his friends were merely defending him at the time. (Trans. of Trial: Vol. III, pg 192)

44. On cross-examination the following exchange took place between the Prosecutor, Mr. Low and the Appellant, Uriel Chavez-Espinoza:

- Q: So somehow now this was a dispute between you and Jorge Ramirez?
- A: Well, kind of. We did have an argument. We did cross swear words. We were speaking harshly to each other.
- Q: Now, you told Deputy Jensen that you were the one that told Jorge Urias to go with you over to Todd Hollow?
- A: That is correct. I said let's go, let's go talk to – and fix things with your cousins.
- Q: And the word that you used with Deputy Jensen was that you were going to “fix” the problem?
- A: Yes.

(Trans. of Trial: Vol. III, pg 199-200)

**Summary of Testimony from Trial Transcript
Sentencing, Record Page 206**

45. The matter came for sentencing on November 17, 2006. (Trans. of Sentencing R. 97 pg. 2) At the sentencing, trial counsel for Mr. Chavez-Espinoza noted that Adult Parole and Probation recommended Probation and 365 days incarceration as a condition of probation in the county jail. (Trans. of Sentencing R. 97 pg. 3)

46. The Appellant's girlfriend, Carmen Nava, was allowed to testify and indicated that the Appellant had a child and it was important that the child be able to visit his father. (Trans. of Sentencing R. 97 pg. 6)

47. Ruben Ramirez, a victim, testified on an objection from the defense counsel

that the Uriel Chavez-Espinoza had allegedly made some type of threat against his family.

(Trans. of Sentencing R. 97 pg. 7)

48. After the prosecutor, Mr. Low, raised issues concerning the sentencing matrix, the Court asked defense counsel whether Adult Parole and Probations should re-examine the recommendation in light of what was heard by the Court at the hearing. (Trans. of Sentencing R. 97 pg. 20)

49. Trial counsel for the Appellant indicated that they could proceed with the sentencing and did not move for a continuance. (Trans. of Sentencing R. 97 pg. 20)

50. The Prosecutor, during his arguments, indicated as follows:

MR LOW: Mr. Chavez denies being involved in any gang activity or being involved in a gang, and yet he himself admits that he was with known gang members. He admits that in the PSI, and there's no doubting that that member – or that individual is a member of the Sureno 13 gang. He's got it written all over him. We know who he is. We know who the Sureno 13 gang is.

Our drug task force, which has within the last six months been authorized by all jurisdictions who form that task force to go into gangs as well – gang enforcement – is very familiar with the Sureno 13 gang.

I should tell the Court that Mr. Chavez is not the only member of his family involved in that gang. Another family member, Egdar Chavez, has been recently convicted for drug activity – distribution of drugs – and has been committed to jail. I don't know if he's been deported yet or not or if he's still in our jail. (Transcript of Sentencing R. 97 pg. 22)

Another family member was involved. I don't know if the Court remembers the drive-by shooting that you sentenced someone to jail on, Raphaelio Alvarado. That is not a family member, but the victim in that case is a family member. He was a juvenile. He was a juvenile who himself was arrested and has been – has spent a substantial amount of time in detention for his own gang involvement. (Trans. of Sentencing R. 97 pg. 23)

51. At this point in the sentencing, Attorney Poston objected to the characterization which the Court overruled. (Trans. of Sentencing R. 97 pg. 23)

52. In the objection the Prosecutor stated as follows:

MR. LOW: This particular gang – the Sureno 14 gang that you have tattooed in front you there is a very dangerous gang. It is a gang that takes enforcement very, very seriously. In fact, when I became aware that this was a case involving that gang, I knew that here would be a great difficulty in maintaining victim cooperation throughout the trial. Every time it didn't happen or every continuance – and the Court heard me object to a continuance request because every week that passed was more fear that was being put into that family. (Trans. of Sentencing R. 97 pg. 24)

53. The Court then sentenced the Appellant stating as follows:

Therefore, the maximum sentences that may be imposed today on the First Degree felony is an indeterminate term of not less than nine years and which may be for life. As to the Second Degree felony, and indeterminate term of not less than one year, and which may not exceed 15 years. For each Class A misdemeanor 365 days in the Wasatch County Jail. (Trans. of Sentencing R. 97 pg. 36-37)

SUMMARY OF ARGUMENT

The conviction of the Appellant should be reversed and remanded for a new trial because the conduct of Mr. Chavez-Espinoza does not in any manner justify the harsh and excessive sentence. A review the recommendation of the Pre-sentence Report on file will indicate that the experts at Adult Parole and Probation recommended probation as the appropriate sentence, despite the possible Nine to life sentence. The Aggravated Burglary charge should never have been submitted to the jury and when submitted it was given

pursuant to improper jury instructions which never defined specific intent. Instruction No. 33 (see Addendum to Brief, pg.13) misstates Utah law in several aspects. First by indicating that the jury could find the Appellant guilty but failed to direct the verdict to the critical element of *mens rea*. Secondly, by failing to define the target offense and specific intent. The jury instructions error must be found to be prejudicial and harmful to fair trial rights based upon the Enhanced First Degree Felony Conviction. Even though there was no proof that Mr. Chavez-Espinoza went to the apartment with the intent of entering to commit an assault, the jury verdict is in error because the jury was not directed to focus on the specific intent of the Appellant and the facts concerning entry with the intent to commit an assault.

Further, trial counsel was unprepared and on the record admitted he had not talked to or discussed the matter with Mr. Chavez-Espinoza. The approach indicated that counsel did not develop a defense to the Aggravated Burglary charges. This was a situation where Mr. Uriel Chavez-Espinoza acknowledged that he had gone to the apartment and that he was involved in an assault. Trial counsel focused on minor matters of impeachment because there was no direction or strategy to the trial based upon the fact that counsel had not met with the Appellant prior to trial. The trial was also complicated by material, evidentiary errors which allowed the jury to consider death threats and gang references which were not properly before the jury. Therefore, the conviction should be reversed for a new trial or the gang enhancement vacated.

ARGUMENT

POINT I

THE VERDICT OF NOT GUILTY AS TO COUNT 7 IS INCONSISTENT WITH THE AGGRAVATED BURGLARY CONVICTION AND A NEW TRIAL SHOULD BE ORDERED.

A review of the record marshaled in the Addendum (pg. 37) will indicate that the evidence as to entry into the premises was provided substantially by Rosa Solis, the girlfriend of Jorge Ramirez. This crucial witness testified that she lived in Todd Hollow Apartment complex in building No. 15 and that Jorge was with her that night until the Appellant called at about 3:30 a.m. (Vol. II, pg 169) Rosa Solis testified that she went to the other apartment unit and she was standing near the edge of the couch in the apartment when Uriel came into the apartment and “took a swing” at her and that she fell over the back of the couch. (Trans. of Trial: Vol. II, pg 174)

The witness further indicated that while she was at the Park City clinic on the morning of January 1, 2006 she received a telephone call from Mr. Chavez-Espinoza and that Uriel told her to tell Jorge that if he liked the present he had left for him that she would be the next one; and she then handed the telephone to Deputy Travus Jensen. (Vol. II, pg 177) Rosa Solis claimed on cross-examination that at the time of the assault she observed Florina in the doorway of the apartment and she did not know how Uriel came around her, but he would have had to go by Florina to enter the apartment. (Trans. of Trial: Vol. II, pg 181) When asked if she thought Uriel was coming after her, Rosa

indicated, “No he was probably looking for Adrian”. (Vol. II, pg 182)

The Verdict as to Count Seven involving Rosa Solis was Not Guilty (See Verdict form set forth in Addendum, pg 01) This verdict is factually and legally inconsistent with the Aggravated Burglary count and creates a factual inconsistency. The jury found no assault took place inside the apartment on this victim. The inconsistency of the Verdict is material because if the witness who testified that she was assaulted inside the residence specifically by Mr. Chavez Espinoza was found by the jury not to have been assaulted inside the residence, the jury should have also concluded that there was insufficient evidence to find the Appellant guilty of the Aggravated Burglary.

Thus conviction on the Aggravated Burglary was based entirely on other circumstantial evidence, such evidence is sufficient if it is of such quality and quantity as to justify a jury in determining guilt beyond a reasonable doubt. *State v. Nickles*, 728 P.2d 123, (Utah 1986) Since, the jury found the Appellant Not Guilty of the Rosa Solis assault, there is no quality or quantity of sufficient, direct evidence that Mr. Chavez-Espinoza entered into the residence with intent to assault. The Appellant submits that the basis for the Aggravated Burglary conviction was the confusion caused by the jury instructions on vicarious responsibility combined with gang enhancement as set forth in Point II of this Brief. From the opening statement of the Prosecutor, the case was presented to the jury focused on accomplice conduct of the conduct of third parties to prove the Appellant’s culpability and this error requires a new trial.

The factual inconsistency is apparent in a review of the entire record as set forth in the Addendum's detailed statement of facts which have been marshaled by the Appellant in an attempt to show the weakness of all of the relevant facts on points used to enhance the verdict. The facts show a melee that took place in the hallway and fighting.

The Appellant respectfully submits that the evidence supports only a finding that he arrived at the apartment to talk and knocked on the door. Thereafter, there was loud arguing and a fight commenced in the hallway. One of the persons there that night, La Borrega, may have grabbed another person from the apartment, this does not show any specific intent by Mr. Chavez-Espinoza to enter to commit an assault. One of the witnesses claimed that after the fight there was a hole in the wall of the apartment, even though he did not see how the hole in the wall was created. Most witnesses indicated that the fight took place outside of the apartment in the hallway and possibly in the parking lot of the Todd Hollow apartment complex. The inherent inconsistency requires a new trial and the Court should consider this issue as to all points set forth in this Brief.

POINT II

THE DEFENDANT'S CONVICTION OF A FIRST DEGREE FELONY WAS BASED UPON JURY INSTRUCTIONS THAT DID NOT ADEQUATELY DEFINE THE FIRST DEGREE FELONY OFFENSE AND FAILED TO INSTRUCT OF SPECIFIC INTENT.

A jury instruction, such as the elements instruction at issue here, to which a party failed to object at trial will be reviewed upon a showing of manifest injustice based upon

improper and incomplete instructions. *State v. Gibson*, 908 P.2d 352 (Utah Ct.App. 1995), cert. denied, 917 P.2d 556 (Utah 1996); and, *State v. Perdue*, 813 P.2d 1201, (Utah Ct.App. 1991), aff'd, 900 P.2d 1093 (Utah 1995). In *Perdue*, the Court said that failure to give an elements instruction for a crime satisfies the manifest injustice standard under *Utah Rule of Criminal Procedure 19(c)* and constitutes reversible error as a matter of law. Further, because “the general rule is that an accurate instruction upon the basic elements of an offense is essential.” *State v. Souza*, 846 P.2d 1313, 1320 (Utah Ct.App. 1993) In *State v. Stringham*, 957 P.2d 602 (Utah App. 04/23/1998), where a Communications Fraud conviction was set aside for failure to prove the *mens rea* set forth in the statute. The Appellant submits that the error here is of that same magnitude.

As to prejudice and unfair trial errors, an objective analysis will show that the improper instructions increased the severity of the Appellant’s conduct three times. First, from a situation involving a simple assault, which the Appellant had acknowledged, to Felony Burglary (primarily based on the inconsistent evidence that the fight in the hallway took place after an intentional entry). This was based upon evidence from Rosa Solis (see Point I of this Brief) and uncertain evidence concerning a possible entry to cause a hole in the livingroom wall. Next, the charges were elevated from Burglary to an Aggravated Burglary based upon and alleged possession of a weapon by a party. Finally, the already harsh sentence was enhanced based upon the involvement of multiple persons to an increased sentence to the First Degree felony of an indeterminate term of not less than nine years to life

as a result of the “gang” enhancement. Essentially, there was a double bump up for accomplice liability and a lack of focus on the Defendant’s actual conduct and intent.

During the opening statement, the Prosecutor improperly stated as follows:

MR LOW: “Why is this? Well, it’s called party liability. What you need to listen to throughout this trial is the evidence will show what did Uriel, what did he know, what did he want to have happen, because you know what sometimes? The getaway driver can be as guilty as the bank robber. Sometimes a person who hires a hit-man is as guilty as the hit-man. Right, we all know that. So what you need to do is listen to the evidence to decide, Is Uriel guilty not only for what he did, but also for what the others did? And I will ask you to find that he is. That he did this in group. They knew what was going on. They went there with a plan and they made it happen.” (Trans. of Trial: Vol. I; pg 165, lines 8-18)

The Appellant’s trial counsel failed to object at this time to this manifest error which became the central theme of the prosecution’s presentation. There was no evidence here of any alleged co-conspirators or any of the third parties that were with the Appellant at the front door to prove any conspiracy or “plan”. More importantly, Counsel failed to submit proper jury instructions and the Court failed to provide an adequate charge to the jury. The remarks in the opening statement were never clarified to the jury by trial counsel through instructions or during his closing arguments. The central theme of the prosecutor from this point forward was that the group of individuals had a plan and therefore the intent of one of the individuals became the intent of the Appellant. Therefore, this error is manifest error or in the alternative is reversible under ineffective assistance of counsel.

The elements of the base crime of Burglary are: (1) the act of entering the building,

with (2) the specific intent to commit a target offense of felony, theft, or other enumerated crime therein. *State v. Brooks*, 631 P.2d 878 (Utah 1981). "The act of entering alone does not give rise to an inference that the actor entered with the requisite intent to constitute burglary." *Brooks* at 881. The specific intent to commit a felony, theft, or assault must be proved, or circumstances shown from which the intent may reasonably be inferred. It is the intent to commit the specific crime, and not the actual crime, which is material. *Brooks*, 631 P.2d at 881. In *State v. Standiford*, 769 P.2d 254 (Utah 1988), the Court indicated that "In the future, trial courts should define the term 'specific intent' for the jury, if that term is used; and if it is, it should be expressly defined in terms of the specific mental state required."¹ The trial court failed to follow this precedent and the error resulted in an excessive sentence.

However, the jury instructions here never define any specific intent requirements. Instead, the Court used only generic, non-pinpointed, statutory language in the elements instruction on the critical element of intent. See **Instruction 26** as to Aggravated Burglary (see Addendum pg 10) which fails to refer to specific intent and sets forth, as far as mental

¹CALJIC No. 2.02 "The specific intent with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged in Counts 1, 2 or 3, namely, conspiracy to commit murder, attempted murder or burglary, or find the . . . gang allegation to be true, unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent but (2) cannot be reconciled with any other rational conclusion. Also, if the evidence as to any specific intent permits two reasonable interpretations, one of which points to the existence of the specific intent and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. *People v. Hughes*, 27 Cal.4th 287, 39 P.3d 432 (Cal. 2002)

state, the generic language “with the intent to commit a felony, theft, or an assault on any person”. This Instruction is in error because the Court failed to delete the theft language and failed to delete the overbroad phrase concerning committing a felony. This is clearly the responsibility of the trial judge to pinpoint and remove unnecessary language and apply the general law to the specific case in the charge to the jury. This is a prejudicial and material error because the term “felony” opens up the entire array of offenses in the criminal code. It is a very simple matter for the trial judge to remove extraneous language and to design instructions on elements in light of the facts at trial.

Further, the Court must require the jury to find beyond a reasonable doubt that there was specific intent to commit the target offense. As is traditionally required in Utah felony trials since the *State v. Standiford*, 769 P.2d 254 (Utah 1988) decision, there should be a separate instruction or language in the elements requiring that the jury must find that the Defendant had, at the time of acting, the specific intent to enter a dwelling for the purpose of committing an assault on a specific person in the residence. There should have also been an instruction that any reasonable hypothesis or an intent merely to discuss a problem and not an assault would be sufficient to convict on Burglary. (See CALJIC No. 2.02)

Instruction 26 then goes on in paragraph Three, the third element, to cause confusion by indicating that the jury is to consider “the Defendant as a party to the offence”. This is improper because the jury is not limited from using reverse logic to use the gang enactment or conduct of other parties to transfer the intent of third parties to prove elements as to the

Appellant and his mental state. **Instruction 26** in paragraph Eight again uses the phrase “or another participant in the crime” and “caused bodily injury” to any person without adequate definition.

In *State v. Casonguay*, 663 P.2d 1323 (Utah 1983) this Court stated that the act of entry in itself does not raise the presumption that it was done with the specific intent required to prove the offense. The Court stated, “All the circumstances, when taken together, must admit of no other reasonable hypothesis than that of guilt to warrant conviction.” In *Castonguay*, the defendant was convicted of attempted First Degree murder and that conviction was set aside. There, the State proved that the defendant fired his rifle, but there was neither direct nor circumstantial evidence of the necessary intent to kill anyone. Also, see *Cooper v. People*, 973 P.2d 1234, 1240 (Colo. 1999) (holding that the crime of burglary requires that the person have “intended to commit a crime inside at the moment he first became a trespasser”).)

Instruction No. 33 (see Addendum pg. 13) misstates Utah law by indicating that the jury could find the Appellant guilty of “acting in concert with two or more persons” but failed to direct the verdict tho the critical element of *mens rea*. In *State v. Lopes*, 980 P.2d 191 (Utah 2001), the Utah Supreme Court clarified that in order for the group crime enhancement to apply, section 76-3-203.1(1)(a) requires a finding, based on proof beyond a reasonable doubt, “that all three actors . . . possessed a mental state sufficient to commit the same underlying offense and . . . directly committed the underlying offense or solicited,

requested, commanded, encouraged, or intentionally aided on of the other two actors to engage in conduct constitution the underlying offense.” *Lopes*, held that due process requires that the prosecution prove every element of the charged crimes beyond a reasonable doubt. This instruction does not cover all of the elements and therefore any gang enhancement of the conviction must be vacated.

In this matter, Mr. Chavez-Espinoza contests this issue under either the plain error doctrine or ineffective counsel. First, the trial court erred by failing to *sua sponte* instruct the jury accurately on the elements of the offence and in lesser included offenses. The Appellant submits that such error was obvious and prejudicially resulted in a First Degree Felony conviction. As in *State v. Larsen*, 2005 UT App 201 (2005), there was no conceivable tactical basis for counsel’s actions in failing to request appropriate instructions and bifurcating the gang enhancement phase. *State v. Clark*, 89 P.3d 162 (Utah 2002).

The next instruction, **Instruction No. 34** (see Addendum, pg. 14) also defines “in concert with two or more persons.” Instruction No. 34 gives reference to the jury of section numbers which are meaningless and states that, “other persons’s participating as parties may not have the intent to engage in the same offence or degree of offence as the Defendant”. While this reference is set forth in the statute, this section negates a finding of intent read in light of the skeleton instructions as set forth in Instruction No. 33 and 26. As a whole, the charge presents to the jury the option of convicting the Appellant as if he was present with other parties who may have intended to enter the residence to commit an assault or carry a

knife, merely because of association. Therefore, the enhancement languages are inconsistent with the substantive offence statute of Burglary, especially in light of the fact that there is no enhancement instruction, just a reference in the Verdict form.

The inadequate instructions are also evident in **Instruction No. 35** (see Addendum, pg. 18). That incomplete instruction is confusing in light of the evidence that other parties and weapons and it is also is an error when the instructions are read in the entire context and again lacks instructions as to proper intent.

Missing in the key instructions, which are all set forth in the Addendum, is a specific instruction concerning the necessary elements of enhancement. The Court only referred in a definitional instruction, Instruction No. 34, Paragraph Eight, to the language “in concert with two or more persons”. There is no other instructions to the jury setting forth the elements as to enhancement until the Verdict form. These Instructions are confusing and trial counsel for the Appellant should have objected to the instructions. The Instructions as a whole – when read in context do not comply with the Utah Supreme Court decisions which require, in order for a group enhancement to apply, that there is a finding based upon proof, beyond a reasonable doubt, that all three of the actor possessed the mental intent sufficient to commit the target offence.

Trial counsel had an obligation to focus on the defense that the Appellant never had any specific intent to fight when he went to the apartment and never committed a First Degree Felony conviction. There are no requested Instructions on this issue. This is very

material because the Appellant would have been subject to only a Class A or B misdemeanor or, at most, a Third Degree Assault conviction and not subject to life imprisonment for the enhanced, aggravated Burglary.

In *People v. Failla* 64 Cal.2d 560 (1966), the California Supreme Court discussed the general law concerning jury instructions involving target offenses in Burglary offenses. In that decision the California Appellate Court held:

"[W]here the evidence permits an inference that the defendant at the time of entry intended to commit one or more felonies and also an inference that his intent was merely to commit one or more misdemeanors or acts not punishable as crimes, the court must define 'felony' and must instruct the jury which acts, among those which the jury could infer the defendant intended to commit, amount to felonies. Failure to do so is error, for it allows the triers of fact to indulge in unguided speculation as to what kinds of criminal conduct are serious enough to warrant punishment as felonies and incorporation into the burglary statute."

In *People v. Hughes*, 27 Cal.4th 287, 39 P.3d 432, 27 Cal.4th 825, 116 Cal.Rptr.2d 401 (Cal. 2002), the Court stated:

The duty to define such so-called target offenses and instruct on their elements has become well established. See *People v. Williams* (1975) 13 Cal.3d 559, 563; *People v. May* (1989) 213 Cal.App.3d 118, 129 (May); *People v. Smith* (1978) 78 Cal.App.3d 698, 708-711.) Indeed, at the time of trial, the Use Note to CALJIC No. 14.50 - then the standard instruction for burglary - admonished: "If the defendant is charged with entering to commit a felony other than theft," as was the present defendant, "the felony must be named in the instruction and instructions defining such crime must be given." (Use Note to CALJIC No. 14.50 (5th ed. 1988) p. 170.) We recently reaffirmed this understanding of *Failla* in a related context: "In *Failla*, . . . we held that when a defendant is charged with burglary, the trial court, on its own initiative, must give instructions to the jury identifying and defining the target offense(s) that the defendant allegedly intended to commit upon entry into the building." (*People v. Prettyman* (1996) 14 Cal.4th 248, 268,

italics in original.)

Here, the question of defendant's intent when he entered the apartment is unclear. There were no pre- or post-offense declarations of intent, and there was no evidence at the scene to suggest that a completed rape ever occurred. And yet the condition of the victim's body and the partial removal of her clothing would have suggested to a reasonable juror that some kind of sexual intent was in defendant's mind when he entered the apartment. As defendant observes, however, "sexual intent" - even if it consisted of an intent to commit some kind of sexual assault or some other "undifferentiated sexual misbehavior" (Failla, *supra*, 64 Cal.2d at p. 565-566) - is not the same thing as intent to commit rape.

Further, this is a critical issue facing the Courts in the State of Utah in light of the increasing number of domestic situations in which persons may become involved in disagreements which lead to assaultive behavior at residences. In this situation before the Court, Mr. Chavez-Espinoza was a relative and a friend of many of the persons who testified against him and who lived at the Todd Hollow apartment complex. The evidence shows that after the incident of January 1, 2006, the Appellant and the witnesses attended social events and were seen socializing together. The Appellant was not a third party or stranger. The burglary statute has been expanded to include assaults and therefore domestic assault situations, the statute is frequently more charged in similar situations where a co-habitant goes to a residence in which they have lived with the intention of confronting another person, but without the intent to commit an assault. When an assault takes place instead of being charged with a Class B misdemeanor a person can be charged with a First or Second Degree felony. The enhancement of misdemeanor conduct to felony conduct is a problem which occurs if the offences are not

carefully defined in situations where a person goes to a residence and a fight later occurs.

The Appellant submits that the totality of the jury instructions were either improper or trial counsel should not have allowed the issue of gang enhancement to be submitted at the same time as the issue of accomplice liability to the underlying charges. Prior to opening arguments, the Court gave the option to counsel to have the jury retire to deliberate the question of guilt and innocence as to the charged counts and then after a verdict was reached to retire again and deliberate the question of whether or not the Appellant acted in concert with two or more people. (Trans. of Trial: Vol. I, pg 135)

Trial counsel for the Appellant stipulated that the jury would not need to be bifurcated which resulted one deliberation, rather than two deliberations. (Trans. of Trial: Vol. I, pg 153) Counsel should not have agreed to this procedure which caused an improper verdict. The Instructions are in error on defining the elements of several offenses and in error of failing to adequately instruct on the enhancement. Therefore, the Appellant requests a new trial with pinpointed instructions on all of the key issues and the full range of offenses.

POINT III

THE DEFENDANT'S TRIAL ATTORNEY WAS NOT PREPARED FOR TRIAL AND DID NOT MEET THE STANDARDS REQUIRED FOR EFFECTIVE COUNSEL

On the day of the trial, trial counsel for the Appellant, Mr. Scott Poston, reiterated the Motion to Continue which he had filed requesting a continuance of the trial one week earlier. The Motion was based upon the fact that Attorney Poston acknowledged that he did not have

an opportunity to adequately discuss and prepare for the case because he had not been in contact with his client. (Trans. of Trial: Vol. I, pg 7) (See Affidavits in the Addendum, pg. 26-34.)

Thus, the trial commenced with the acknowledgment from Mr. Poston that he needed additional time to prepare and had not been sufficiently in contact with the Appellant. The Court transferred this error by trial counsel to the shoulders of the Appellant by denying the Motion and indicating that the Appellant should have kept in contact with his counsel, however there was never any adequate discussion concerning the reasons why there had not been sufficient contact and the issue of unpaid attorney's fees was never explored.

The Court ruled that the Appellant had a period of time to keep in contact with his counsel and there was no evidence that Mr. Chavez-Espinoza was unable to make contact with his retained counsel. (Trans. of Trial: Vol. I, pg 7) The trial court indicated that the trial had been set since May 10, 2006 and the Motion to Continue was not filed until one week before the trial was to commence. Based upon that and the Court's indication that the victims had a right to a speedy trial, the Court denied the continuance. (Trans. of Trial: Vol. I, pg 8) Counsel filed no request for jury instructions which in this case is a *per se* error.

The next problem with representation occurs after the jury was given general *voir dire* questions when a juror, Mr. Lowell, raised the issue regarding the fairness of the jury panel and the Trial court indicated that trial counsel had an opportunity to challenge the panel and "they elected not to do that". (See Point VII of this Brief.)

In *State v. Malaga*, 132 P.3d 703, 2006 UT App 103 (Utah App. 2006), the Court stated:

We will, however, examine Defendant's claims of structural and trial errors in the jury instructions under the ineffective assistance of counsel doctrine. "Where, as here, a claim of ineffective assistance of counsel is raised for the first time on appeal without a prior evidentiary hearing, it presents a question of law." *State v. Bryant*, 965 P.2d 539, 542 (Utah Ct. App. 1998). "To prevail on a claim of ineffective assistance of counsel, [Defendant] must show that (1) trial counsel's performance was objectively deficient and (2) there exists a reasonable probability that absent the deficient conduct, the outcome would likely have been more favorable to [Defendant]." *State v. Mecham*, 2000 UT App 247, ¶21, 9 P.3d 777. (Utah 2000)

As set forth throughout this Brief and in the Addendum, trial counsel committed numerous errors on key issues. This resulted from not being prepared for trial and not interviewing the witnesses until they agreed to testify. Failing to request jury instructions standing alone, is material error which lead to the First Degree Felony conviction.

POINT IV

THE COURT ERRED IN ALLOWING THE FIRST DEGREE FELONY TO BE SUBMITTED TO THE JURY AND SHOULD HAVE GRANTED THE MOTION TO DISMISS.

After some discussions off the record, the jury was called back into the jury room. At that time, trial counsel made a motion for directed verdict as to Count One, Two, and Four based upon the fact that there was no intent to commit a felony or a theft. (Transcript of Trial: Volume III, pg 64) The Court took the motion for directed verdict under advisement and denied the Motion.

At that time in the trial, the Court should have carefully reviewed the issues of vicarious liability in light of the gang enhancement and the evidence. The trial court, prior to instructing the jury, had the ability to clarify the case by dismissing the gang enhancement and dismissing the Aggravated Burglary charge. The Court erred in not submitting the matter as a Second Degree Burglary. At that stage in the proceedings, as more fully set forth in the Addendum, the evidence shows there was no sufficient evidence of the Appellant's specific intent to enter into the residence. In addition, the trial court should have seen that after the fight started the other individuals, some of whom were at the Todd Hollow apartments because they lived there and became involved in a fight and melee. Thereafter, it is not uncommon for two persons fighting to resort to the use of a weapon. The evidence here was that the Defendant, La Borrega, did pull a knife and also had a deep wound on his hand caused by the person he was fighting, who also used a weapon/knife. The entire factual scenario here should have been determined by the Court in the context of all of the evidence not to have warranted a submission to the jury on the Aggravated Burglary count or the gang enhancement count. Therefore, the conviction should be reversed or a new trial should be granted. In the alternative, this Court should reduce the conviction to a Second Degree Felony or Class A misdemeanor.

POINT V

THE EVIDENCE IS INSUFFICIENT TO JUSTIFY A VERDICT OF A FIRST DEGREE FELONY.

Counsel on appeal has detailed all of the relevant facts and evidence concerning the

insufficiency of the objective evidence as to the charge of Aggravated Burglary enhanced for gang involvement. (See Addendum, pg 37-60) The Appellant respectfully submits that if trial counsel had effectively prepared for trial and had designed effective pretrial motions and jury instructions, that the result would not have been to one of the most serious criminal offences under Utah Law.

This point is directed to Count I and the lack of evidence sufficient to raise this Count to the most serious felony level based upon the technical “entry”. The conviction should be reversed because of the failure to prove a First Degree Felony.

POINT VI

THE COURT ERRED IN STRIKING JURORS FOR CAUSE OVER OBJECTION OF TRIAL COUNSEL AND IN GRANTING OBJECTION BY THE STATE.

The Utah Supreme Court has noted, however, that the exercise of the trial court’s discretion in selecting a fair and impartial jury must be viewed “in light of the fact that it is a simple matter to obviate any problem of bias simply by excusing the prospective juror and selecting another.” *Jenkins v. Parrish*, 627 P.2d 533 (Utah 1981)

The State objected for cause to Juror No. 3, Jayme Thurman, based upon the fact that she had young children and the fact that she had an uncle and a friend who she believed were wrongfully convicted. (Trans. of Trial: Vol. I, pg 130) Defense counsel objected to excusing the witness for cause based upon the fact that when Ms. Thurman was examined by the Judge she indicated that she would be able to make an impartial judgement. The trial Judge

overruled the objection finding that the child care issues would justify a challenge for cause where she was internally conflicted in light of her experience and ongoing doubts concerning the justice system and granted the State's Motion for Cause. (Trans. of Trial: Vol. I, pg 132)

After both of the parties had made the challenges for cause, the Court, on its own motion indicated that the trial judge would strike from the jury panel Juror No. 28, Ms. Ashby, because she had a nephew who was in prison for homicide. (Trans. of Trial: Vol. I, pg 136) The Court stated that when answering questions regarding whether or not she could be fair and impartial, Ms. Ashby answered that she thought she could. The Court indicated that it was clear to the Judge that she was emotional about the issue and was, in his view, "internally conflicted". The Court found that she should be removed from the panel over an objection of the trial counsel and struck Ms. Ashby for cause. (Trans. of Trial: Vol. I, pg 138) (See Jury List set forth in Addendum, pg 19.)

The trial court committed plain error by denying Appellant's equivocal challenge of Juror 10 for cause, and by failing to *sua sponte* remove Juror 10 for cause. To prevail, Appellant must show that the trial court committed an obvious error, and that such error was prejudicial. The trial court committed error if it abuses its discretion by acting beyond the limits of reasonability. See *State v. Hamilton*, 827 P.2d 232 (Utah 1992). An error is harmful if absent the error "there is a reasonable likelihood of a more favorable outcome for the defendant." *Larsen*, 2005 UT App 201.

The Appellant submits that there were prejudicial errors in striking persons from

the jury. This further denied the Appellant his right to a fair trial and restricted the entire process of jury selection. The cumulative effect of the exclusion further denied him a right to trial.

POINT VII

THE APPELLANT WAS DENIED A FAIR JURY PANEL CONTAINING HISPANIC PERSONS.

A review of the record will indicate that this was a matter in which extra interpreters were required because the witnesses, as well as Mr. Chavez-Espinoza, were of Hispanic origin and the extra interpreters were required to translate the Spanish language. A further review will also indicate that the cultural differences were noted by the Prosecutor when he stated as follows in his opening argument:

[MR. LOW]: “this is a culture we are not used to seeing everyday” and no objection was made by defense counsel. (Trans. of Trial: Vol. I, pg 159)

Ironically, it was a non-Hispanic citizen and member of the jury who made the following statement in chambers:

[MR. LOWELL]: “I am curious if the Defendant is Hispanic. How come we aren’t more Hispanic in the jury pool? I mean, it is a fairly large population in this town and they all have Driver’s Licences and I am concerned that he is not represented.” (Trans. of Trial: Vol. I; pg 105, lines 21-25)

The record also reflects that trial counsel made a last minute Motion to Continue

indicating that he was not prepared to go to trial and had not engaged in sufficient communication with Uriel Chavez-Espinoza. It is reasonable to infer from the Motion to Continue that trial counsel also was negligent and should have filed a Motion that would have resulted in a procedure in which there would have been at least one Hispanic person selected for the jury panel. The venire of the jury indicates that there was one Hispanic surname on the jury panel, but that person did not appear on the day of trial. (Addendum, pg. 19)

Under the Federal and State Constitution, an accused is entitled to a jury drawn from a representative cross-section of the community. *United States Constitution, 6th Amendment; Duren v. Missouri* 439 U.S. 357, 358-367 (1979) *People v. Howard* 1 Cal. 4th 1132, 824 P.2d 1315 (1992). That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community. In *People v. Mattson*, 50 Cal.3d 826, (1990), the California Courts stated:

“In order to establish a *prima facie* violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process. If a defendant establishes a *prima facie* case of systematic under-representation, the burden shifts to the prosecution to provide either a more precise statistical showing that no constitutionally significant disparity exists or a compelling justification for the procedure that has resulted in the disparity of the jury venire.” *People v. Sanders*, 51 Cal.3d 471, 491 (1990).

The fact that the jury venire as set forth on the Jury List lists no Hispanics and the fact

that a citizen remarked on the obvious disparity of the panel are grounds to find manifest error or an additional ground supporting the claim of ineffective assistance of counsel.

POINT VIII

THE COURT SHOULD HAVE GRANTED A MISTRIAL BASED UPON STATEMENTS MADE ABOUT INADMISSIBLE DEATH THREATS HEARD BY THE JURY

The principle that evidence is not admissible to show a defendant's bad character or propensity to commit criminal acts is a "fundamental tenet of American jurisprudence and has been recognized in this Court's opinions for over ninety years" *State v. Doperto*, 935 P.2d 484 (Utah 1997) and, *State v. Featherson*, 781 P.2d 424, 426 (Utah 1989).

During the cross-examination of the Jorge Ramirez by defense counsel, Mr. Poston, the following exchange took place:

Q: And then now are you back together?

A: Yes, and we have a little girl. And I am afraid because –

Q: Sorry. I'm not asking any questions. He's just talking.

We need to have it translated and then we'll have it stricken.

THE REPORTER: I have from I am afraid because –

THE WITNESS: Because he has threatened my wife and we have a little girl and he has threatened her with her life.

MR. POSTON: Move to strike that, your Honor. It wasn't in response to any question.

THE COURT: The answer is stricken from the record. It was not responsive to the question that was posed.

MR. POSTON: Are you married now?

[THE WITNESS] A: Yes. (Trans. of Trial: Vol. II, pg 127-128)

Besides being stricken from the record there should have been a mistrial granted because even if the Court would have taken the next required step and admonished the jury concerning that statement, the inherent prejudice was unfair and created a presumption that the Appellant was a person of bad character. This was extraneous information which expanded liability based upon vicarious responsibility for other persons.

POINT IX

THE COURT ERRED IN FAILING TO INSTRUCT AS TO THE LESSER INCLUDED OFFENSE OF TRESPASSING

This is clearly an offense warranting an instruction on the lesser included offense of burglary and trespassing which is factually relevant to the conduct and states:

Utah Code Annotated 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)**.

In *State v. Baker*, 671 P.2d at 159 (Utah 1983), the Court held that if there is a

sufficient quantum of evidence to raise a jury question regarding a lesser offense, then the court should instruct the jury regarding the lesser offense. Under this test, a defendant must show (1) that the charged offense and the lesser included offense have overlapping statutory elements and (2) that the evidence provides a ‘rational basis’ for a verdict acquitting the defendant of the offense charged and conceiving him of the included offense. Here the elements of trespass are right on point under the Defendants’ theory of the defense. That is, Mr. Chavez Espinoza went to his cousins house to discuss a problem when he was intoxicated. This probably was “reckless as to whether his presence will cause fear for the safety of another” and may have been committed without entry if he went to the public area which is still part of the property.

The jury acquitted the Appellant and found him Not Guilty of the only assault that allegedly took place inside the residence. In *People v. Dewberry*, 51 Cal.2d 548, (1959) the California Supreme Court held that when the evidence is sufficient to support a finding of guilty of both the offense and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense. When a case involves a lesser-included offense, such an instruction must be given *sua sponte*. *People v. Crone*, 54 Cal. App.4th 71 (1997).

The Appellant respectfully submits that the Court erred in not giving the jury a range of related and included offenses including Burglary of a dwelling and trespass.

The failure to instruct denied the jury of the option of deciding on a rational basis whether or not the Appellant's conduct warranted a Trespass conviction. The trial Judge has an obligation to give a person the option of the range of offenses when the legislature has provided that assaultive conduct at a residence ranges from a Class B Misdemeanor to an enhanced First Degree Felony.

POINT X

THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE REMANDED FOR FURTHER HEARING

The Appellant submits that the Court of Appeals should reconsider the denial of the Motion to Remand the case for hearing in the context of the Brief of the Appellant and the Affidavits on file with the Court. The Court has jurisdiction to reconsider this matter based upon the filing of this Brief which shows in the entire context of the matter and the necessity of additional testimony concerning the issue of ineffective assistance of counsel.

CONCLUSION AND REQUEST FOR RELIEF

The Appellant respectfully requests that the Court correct the injustice which occurred in this matter in which an Appellant has been subjected to the severe punishment in excess of a First Degree felony for the conduct of third parties. There was no plan as alleged by the prosecutor. The Presentence Report recommended probation which

demonstrates the prejudice of the errors.

As detailed in this Brief, the improper Jury Instructions coupled with the overlapping evidence of accomplice liability and gang enhancement denied the Appellant a fair trial. Mr. Chavez-Espinoza respectfully requests that the matter be submitted for new trial or reversal of the gang enhancement. In the alternative, the Appellant requests that the Court stay the proceedings and remand this matter back to the District Court for findings on the issue of ineffective assistance of counsel raised in this Brief.

DATED this ____ day of July, 2007.

RANDALL GAITHER
Attorney for the Appellant

SERVICE CERTIFICATE

I hereby certify that on the ____ day of July 2007, two true and correct copies of the foregoing APPELLANT'S BRIEF was mailed First Class, postage prepaid to:

OFFICE OF THE UTAH ATTORNEY GENERAL – APPEALS DIVISION
ATTN: RYAN D TENNEY
P.O .BOX 140854
SALT LAKE CITY, UTAH 84114-0854

DATED this ____ day of July, 2007 .
