IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, v. CULLEN CHRISTOPHER CARRICK, Defendant / Appellant.	)))))))))	Case No. 20160249-CA

BRIEF OF APPELLANT

Appeal from Sentence, Judgment, Commitment entered on March 1, 2016, in the First District Court, Box Elder County, the Honorable Brandon J. Maynard, presiding

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ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Utah Court of Appeals is conferred with jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78A-4-103(2)(e) inasmuch as this is an appeal from a court of record in a criminal case not involving a conviction or charge of a first-degree felony or capital felony.

STATEMENT OF ISSUES / STANDARDS OF REVIEW / PRESERVATION

1. Whether the trial court erred by denying Defendant's motion for a directed verdict.

Standard of Review: The trial court's ruling on a motion for a directed verdict is reviewed for correctness. *See Gonzalez v. State*, 2015 UT 10, ¶ 21, 345 P.3d 1168 (citing *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 19, 221 P.3d 205).

Preservation of Issue Citation or Statement of Grounds for Review: Defendant preserved this issue by way of his motion and argument for a directed verdict set forth at R. 489-96.

2. Whether the trial court erred by admitting the hearsay statement asserted to establish Defendant's intent to commit theft.

Standard of Review: In reviewing hearsay rulings, the appellate court reviews legal questions regarding admissibility for correctness, questions of fact for clear error, and the final ruling on admissibility for abuse of discretion. *State v. Workman*, 2005 UT 66, ¶ 10, 122 P.3d 639 (citations and internal quotations omitted); *State v. Jackson*, 2010 UT App 328, ¶ 9, 243 P.3d 902.

Preservation of Issue Citation or Statement of Grounds for Review: Defendant preserved this issue by way of his objection and argument set forth at R. 621-22.

3. Whether the trial court erred by failing to instruct the jury as to the definition of the culpable mental state element of both Burglary and Criminal Trespass.

Standard of Review: Jury instructions are reviewed under a correctness standard, with no particular deference granted to the trial court. *See Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 452 (Utah 1993); *State v. Gibson*, 908 P.2d 352, 354 (Utah Ct.App.1995), *cert. denied*, 917 P.2d 556 (Utah 1996).

Preservation of Issue Citation or Statement of Grounds for Review: Defendant raises this issue pursuant to plain error. In *State v. Dunn*, 850 P.2d 1201 (Utah 1993), the Utah Supreme Court outlined the following principles or elements for establishing "plain error":

> In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

Id. at 1208-09; *State v. Dean*, 2004 UT 63, ¶ 13, 95 P.3d 276; *accord State v. Larsen*, 2005 UT App 201, ¶¶ 5-6, 113 P.3d 998; *see also* Utah Rule of Evidence 103(e). This issue may be reviewed – in the absence of an objection – "to avoid a manifest injustice." *See* Utah R. Crim. P. 19(e); *see also State v. Cobo*, 90 Utah 89, 60 P.2d 952, 958-59 (1936).

4. Whether trial counsel rendered ineffective assistance of counsel by failing to object to the lack of instruction as to the culpable mental state for both Burglary and Criminal Trespass.

Standard of Review: To make such a showing, a defendant must show, first, that counsel rendered a deficient performance, falling below an objective standard of reasonable professional judgment, and, second, that counsel's performance was prejudicial. *Bundy v. DeLand*, 763 P.2d 803 (Utah 1988). The appellate court reviews such a claim as a matter of law. *State v. Robertson*, 2005 UT App 419, ¶ 5, 122 P.3d 895; *State v. Maestas*, 1999 UT 32, ¶ 20, 984 P.2d 376; *State v. Strain*, 885 P.2d 810, 814 (Utah Ct. App. 1994).

Preservation of Issue Citation or Statement of Grounds for Review: Issues involving claims of ineffective assistance of counsel constitute an exception to the preservation rule and as such may be raised for the first time on appeal.

5. Whether the cumulative effect of the errors before and during trial merits reversal of Defendant's conviction of Burglary. "[T]he cumulative error doctrine . . . requires [the appellate court] to apply the standard of review applicable to each underlying claim of error," which is set forth respectively. *Radman v. Flanders Corp.*, 2007 UT App 351, ¶ 4, 172 P.3d 668, *cert. denied*, 186 P.3d 957 (2008). After assessing the claims, the appellate court will reverse "under the cumulative error doctrine only if the cumulative effect of the several errors undermines . . . confidence that a fair trial was had." *State v. Killpack*, 2008 UT 49, ¶ 56, 191 P.3d 17 (internal quotation marks omitted).

Preservation of Issue Citation or Statement of Grounds for Review: The preservation of issue citation or Statement of Grounds for Review for each underlying claim of error is set forth above, respectively.

DETERMINATIVE AUTHORITY

The constitutional provisions, statutes, ordinances, rules, regulations, or case law whose interpretation is determinative, are set out verbatim, with the appropriate citation, in the body and arguments of the instant Brief of Appellant.

STATEMENT OF RULE 23B MOTION FILING

Defendant previously filed a Rule 23B Motion, which the Court – on April 20, 2017 – deferred for consideration in conjunction with the briefing.[1] In the Rule 23B Motion, Defendant raises numerous claims of ineffective assistance of counsel that precluded Defendant from receiving a fair trial. Defendant incorporates the statements of fact and arguments set forth in his Motion into his Brief of Appellant. The adjudication by the trial court of the Rule 23B Motion is critical to the issues presented by Defendant in his Brief of Appellant.

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[1]A true and correct copy of the Order – dated April 20, 2017 – deferring consideration of the Rule 23B Motion with the briefing is attached to this Brief as Addendum A.

STATEMENT OF THE CASE

This is an appeal from a conviction of Burglary, a second-degree felony, by way of jury trial, the Sentence, Judgment, Commitment of which was entered on March 1, 2016, in the First District Court, Box Elder County, the Honorable Brandon J. Maynard, presiding.

STATEMENT OF FACTS

A. *Burglary Charge*

By Information[2] filed December 31, 2014, the State charged Defendant with Burglary, a second-degree felony, in violation of Utah Code Ann. § 76-6-202 (R. 1-2). The Factual basis / Probable cause statement stated, "Defendant was witnessed by neighbors entering the house of the victim through a screen window and then leaving a few moments later (R. 2).

Defendant requested a preliminary hearing on April 6, 2015, which the court set for May 6, 2015 (R. 38). He appeared with counsel on the appointed day and waived his right to a preliminary hearing (R. 202:10-11; R. 43-45). Defendant pleaded not guilty to the charge (R. 202:17-18).

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[2]The State subsequently filed an Amended Information on February 4, 2015, to remedy the incorrect name of "Christopher Carrick Cullen" listed on the original Information (*See* R. 1 and R. 13-14).

The court scheduled a two-day jury trial for November 5 & 6, 2015 (R. 48-49). At a subsequent pretrial conference, the court – pursuant to the stipulation of counsel – continued the jury trial and reset the trial for January 21 & 22, 2016 (R. 60).

On January 10, 2016, Defendant's trial counsel filed an Alibi Witness List pursuant to Utah Code Ann. § 77-14-2(1), which stated the following;

> 1. On the date alleged in the information, the defendant attended the funeral of his paramour with Celeste McCulley, Elias Carrass, Matt Bishop and Tawni Malmberg.
> 2. The defendant, and those individuals listed above, met, traveled and attended the funeral together.
> 3. After the funeral, at around 4:00 pm, those individuals and the defendant participated in a balloon release in remembrance of the deceased in the parking lot of the funeral home.
> 4. After the balloon release, the defendant was driven back to his vehicle in Harrisville and returned to his home in Huntsville. At no time did he, or any individual in his party, go to the home of the alleged victim.

(R. 72-73).[3]

B. ***Jury Trial***

The parties appeared for the jury trial on January 21, 2016 (R. 84). Following jury selection, the court and counsel discussed changes to the jury instructions (R. 286-91).

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[3]A true and correct copy of the Alibi Witness List, R. 72-73, is attached to this Brief as Addendum B.

During opening, the prosecutor stated, "Was something taken? As we take a look at burglary – and we'll look at that here in a minute – it doesn't matter. What matters is he went in there looking for something, to take something." (R. 308:13-15).

Defense counsel opened by asserting that Officer Fielding "didn't do very much investigation." (R. 311:23-24). He argued that "[n]o fingerprint dusting was ever done . . . CSI was not called . . ." and "[t]here was no – any DNA evidence searched for or found." (R. 314:22-25). Counsel emphasized that no photo lineup was utilized by Officer Fielding (315:12-18). He asked the jury to protect Defendant from the "shoddy police work." (R. 317:3-10). Finally, counsel argued that "the State cannot prove beyond a reasonable doubt the elements of this crime." (R. 317:17-19).

At trial, Kristine Starkey, a next-door neighbor to Zakary Taylor, testified that she did not know Defendant at the time and had not previously met him (R. 319-20). She testified that she saw Defendant at April Taylor's funeral in Brigham City on May 21, 2014, and at the balloon release in the funeral home parking lot following the funeral (R. 321-22).

Following the funeral and balloon release, Ms. Starkey returned to her home in Willard with her daughter, Jessica Roberts (R. 323:4-23). After pulling into the driveway, while getting out of the car, she claimed to have seen an individual in the backyard of the Taylor home, removing the screen and crawling in through the garage window (R. 324:1-10). When she and her daughter went into her house and came back out, the individual was crawling out of the window and then replaced the screen (R. 327:12-20). She did not see

the individual carry anything out of the house (R. 334:19-20). Becoming suspicious, she waved at him and he waved back (R. 327-28). According to Ms. Starkey, the individual then went through a gate and walked down the driveway (R. 111:8-10).

On cross-examination, Ms. Starkey admitted that her witness statement provided to Officer Fielding did not include a hat in her description of the suspect (R. 339:19-21). When asked if she had been shown any photographs by Officer Fielding, Ms. Starkey stated, "Not until after – in fact, I don't think I even saw a picture. No." (R. 343:23-25).

Jessica Roberts, the daughter of Kristine Starkey, testified that she attended the funeral with her mother and her daughter (R. 362:5-6). She did not know Defendant at the time (R. 363:15-21). At trial, she testified that she saw Defendant at the funeral, wearing "a western cowboy hat" (R. 364:4-5). Upon arriving at her mother's house after the funeral, she noticed an individual walking down the Taylor's driveway (R. 365:14-15). She observed him open the gate and go into the backyard, go to the window, remove the screen, and go in through the window (R. 366:16-18). After calling 911, Officer Fielding arrived and someone pulled Defendant up on Facebook (R. 371:17-20). Officer Fielding pulled up Defendant's driver license photo on his computer and Ms. Roberts identified him (R. 374:1-4).

On cross-examination, Ms. Roberts testified that Officer Fielding did not show her any other photos other than Defendant's driver license picture (R. 379-80). She also

admitted that her description of the suspect contained in her witness statement did not include a hat – just the description of a slender individual with long hair (R. 378:13-19).

Stephen Atkinson, a friend of Zakary Taylor, testified that he went to Mr. Taylor's house after the funeral to wait for his wife, Celeste (R. 403-05). He testified that he knew Defendant from what his wife and April Taylor had told him and from pictures that his wife had shown him (R. 406-07). Mr. Atkinson claimed that he saw Defendant walking down the driveway when he arrived at the Taylor home, and that Defendant walked "briskly" towards a silver Toyota 4Runner (R. 407-08).

On cross-examination, Mr. Atkinson admitted that Officer Fielding had pulled up Defendant's driver license picture and showed it to him (R. 419:6-11). Officer Fielding never asked him again about the silver Toyota 4Runner (R. 419:18-20).

Celeste Atkinson, the spouse of Stephen Atkinson, testified that April Taylor was her best friend, that she knew Defendant and April were having "an affair", and that she was very upset about their relationship (R. 425:12-13). Ms. Atkinson testified that she saw Defendant coming out of the backyard as she was driving by the Taylor home (R. 427:22-24). She said she was "[p]ositive, a hundred percent" is was Defendant (R. 428:4-6). On cross-examination, Ms. Atkinson testified that April had told her that she had filed for divorce from her husband, Zakary Taylor, in 2013 (R. 432:4-6).

Zakary Taylor,[4] the husband of April Taylor, testified that he had learned of Defendant the day April went into the hospital, which was maybe three days before she died (R. 435:13-20).[5] Mr. Taylor testified that he – after looking in the house – did not notice anything missing (R. 444:19-24). He also testified that he had not given Defendant permission to enter the house (R. 445-46; R. 451:23-25).

On cross-examination, Mr. Taylor testified that in October that same year he had again told Officer Fielding that he "couldn't find anything missing from [the] home" (R. 453:2-6). He also testified that he "may have seen a picture when Officer Fielding pulled it up on his computer in the car." (R. 454:2-5).

Theron Fielding, a police officer with the Willard City Police Department, testified that after he responded to the 911 call, the people at the scene "had found a name off of Facebook." (R. 457:9-10). He pulled Defendant up on his database for identification purposes (R. 457:13-20). The six to ten people who were at the scene all gathered around his police truck and began telling him "they had seen this individual go into the house" (R. 458-59). Officer Fielding testified that he very seldom sees a screen put back like in this case (R. 459-60). He also testified that – unlike this case – he usually is called to a burglary

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[4]Mr. Taylor – according to his testimony – apparently had not been excluded as a witness pursuant to the exclusionary rule and as a result had been "sitting through the trial" and had "heard the testimony" presented during trial (*See* R. 433:9-11).

[5]According to Mr. Taylor, he and Jessica Roberts began "hanging out a whole lot" after his wife's death (R. 435:15-25).

scene "because stuff has been taken." (R. 460:4-7). Finally, he testified that he did not dust for fingerprints because there were no obvious fingerprints on the window (R. 460:15-19).

On cross-examination, Officer Fielding testified that he did not get a picture from the Facebook page that night (R. 479:11-13). He also testified that when he pulled up Defendant's driver license picture in his vehicle, whoever was there "may have looked in and seen it." (R. 479:15-23). According to Officer Fielding, nine days later he was directed by the Chief of Police to take that same driver license picture to Ms. Roberts and have her re-identify Defendant and initial the picture, which he did (R. 480-82). No other pictures were shown to Ms. Roberts (R. 480:4-10).[6] Finally, Officer Fielding admitted that he had a fingerprint dusting kit in his truck at the time, which is not too terribly expensive (R. 488:13-16).

Following Officer Fielding's testimony, the State rested (R. 489:3). Defendant's counsel moved for a directed verdict, arguing that the State had not met its burden of showing that Defendant had entered or remained unlawfully in the house with the intent to commit a felony or a theft (R. 489 *et seq.*). According to counsel, "[t]here's been no showing of any type of intent that Cullen Carrick had on that day. And, again, assuming arguendo that he was there, there has not been any showing of that intent." (R. 490 *et seq.*).

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[6]Officer Fielding stated that it "was weird to [him] that [he] was even going and having her re-identify a picture she'd already identified." (R. 481:5-6).

As to the lesser included offense of Criminal Trespass, counsel argued that the State – assuming the court finds that Defendant had entered and remained unlawfully in the house – had likewise failed to show that Defendant "was reckless as to whether his presence would cause fear for the safety of another." (R. 490 *et seq.*). Counsel contended that the State had "not provided anyone to testify that [Defendant's] presence there caused fear." (R. 490 *et seq.*).

In response, the prosecutor argued that he intended to argue in closing arguments that Defendant is "where he's not supposed to be. He's having an affair with the victim's wife and he's entering into their home . . . . A reasonable, plausible explanation is he's in there because he's looking for something." (R. 491 *et seq.*).

Regarding the lesser included offense of Criminal Trespass, the prosecutor claimed that "[i]t's reckless disregard that it could have caused fear for the safety of another, and that's clearly what the statute contemplates." (R. 493:14-16). The prosecutor further argued that the statute "only requires a reckless disregard that it may cause fear. And it certainly could have if somebody had actually walked into the house on him while he was in there." (R. 493:16-19).

The trial court ruled on Defendant's motion for a directed verdict as follows:

> Mr. Bushell, I – I believe that there is sufficient evidence that a reasonable jury could find each of the elements as it relates to the burglary. There is circumstantial evidence your client – it's been testified to that your client has been in the house previously, that there was an affair that was going on. He was the one seen coming and going from the building.

> And, therefore, I believe that there is sufficient evidence that a jury could reasonably find that an individual had the intent to commit a theft.
>
> Likewise, and for the State's reason in the argument, the lesser included as to reckless, I agree with the State.
>
> And for those reasons, I'm going to deny your motion for a directed verdict.

(R. 495-96).[7]

Tanya Malmberg, April Taylor's friend, testified for the defense that she had met Defendant at the hospital the night April passed away (R. 498-99). She testified that she sat with Defendant at the funeral and was with him at the balloon release (R. 499-501). However, on cross-examination, Ms. Malmberg testified that she had not driven to or from the funeral with Defendant (R. 499:18-19; R. 505:23-25).

Matthew Bishop, April Taylor's co-worker and Defendant's friend, testified that he drove to and from the funeral with Defendant and another co-worker (R. 509-10; R. 511:3-5). He simply testified that Defendant was with him the entire time (R. 511:21-22). On cross-examination, the prosecution questioned why he did not contacted the police concerning his key knowledge of the case (R. 515-18).

Elias Caress, Defendant's good friend, testified for the defense that he was with Defendant during the balloon release (R. 596:14-21). On cross-examination, Mr. Caress testified that he knew Defendant from the Renaissance Faires (R. 598:14-17).

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[7]A true and correct copy of the partial transcript containing the arguments of counsel and the trial court's ruling on the motion for a directed verdict, R. 489-96, is attached to this Brief as Addendum C.

Celeste McCulley, April Taylor's good friend, testified that she attended the funeral with Elias in his car, sitting with Defendant and other friends (R. 602:7-9). She became acquainted with Defendant through the Renaissance Faires (R. 601:14-19). According to Ms. McCulley, Defendant never left the funeral (R. 604:14-17).

During cross-examination, Ms. McCulley testified that she received a telephone call from Zakary Taylor a day or two after the funeral, informing her that someone had broken into his house the day of the funeral (R. 605-06). She responded by suggesting that it might have been "Misty's son because he is known for breaking and entering into their families' homes on the day of funerals." (R. 606-07).

Defendant testified that he had met April Taylor at the Renaissance Faire, and that they had engaged in a romantic relationship for less than a year (R. 611-12). He testified that he met Matthew Bishop and a co-worker of Mr. Bishop at the barber shop where they both worked and drove with them to the funeral (R. 613:9-20). Following the balloon release, they returned to the barber shop, and he drove home in his car (R. 614-15). Defendant testified that he did not at anytime go into April's house the day of the funeral (R. 615:16-18). When asked why people would claim that he had gone into April's house, Defendant responded because they didn't approve of his relationship with April (R. 615-16).

The defense rested (R. 616:25).

On rebuttal, Zakary Taylor testified for the State that he had called Celeste McCulley after the funeral to find out why Defendant was in his house (620-21). Mr. Taylor then testified that Ms. McCulley "said [Defendant] was just in there looking for a momento or some – something sentimental." (R. 621:9-11). Defense counsel objected on the basis of hearsay (R. 621:12-13), with the following exchange taking place:

MR. BUSHELL:	I'm going to object to this, Your Honor. It's hearsay.
THE COURT:	Overruled.
MR. BUSHELL:	On what grounds, Your Honor?
THE COURT:	Statement of the –
MR. DUNCAN:	Impeachment.
THE COURT:	Yeah.
MR. BUSHELL:	I don't think you get full carte blanche waiver of the hearsay rule on impeachment.
THE COURT:	But it's not offered for the truth. It's offered to impeach what she denied.
MR. BUSHELL:	It's totally offered for the truth of the matter asserted.
THE COURT:	I disagree.
MR. BUSHELL:	That's what she said. Okay. I – I understand.
THE COURT:	It's – it's what she said to him on the phone, but she denied that when she got up on the stand.
MR. BUSHELL:	But what is the matter asserted.
THE COURT:	It's not offered for that. It's offered to show that she did not tell the truth to – to Zak. So I'm overruling the objection.
MR. DUNCAN:	Thank you. No more questions.

(R. 621-22).

During closing argument, the prosecutor argued, "Either Cullen Carrick was at the house that day and went in the window looking for something, or he wasn't. And he was with his friends from the renaissance faire and had nothing to do with it." (R. 642:19-22). The prosecutor further argued that Defendant "went into that house to retrieve something that the victim didn't know was there .... And it was theft." (R. 645:9-11). Alternatively, the prosecutor claimed that Defendant went into the house without permission "[a]nd was reckless as to whether his presence would cause for the – fear for the safety of another. It doesn't have to cause fear. He just has to be reckless." (R. 645-46). Finally, the prosecutor emphasized that four people positively identified Defendant "as going into the house in broad daylight." (649:19-25).

Defense counsel, in response, argued that there was no forensic evidence due to Officer Fielding's failure to dust for fingerprints (R. 661:8-22). There was no police work – Officer Fielding just assumed that Defendant was guilty (R. 662:5-11). Counsel also emphasized that there was no photo lineup utilized for eyewitness identification purposes (R. 662:12-20). In addition, counsel argued that there had been no showing of intent to commit theft or that there was any "causing of fear for the safety of another." (R. 664-67). Finally, trial counsel argued that Defendant did not have the opportunity to go into the house (R. 668:24-25).

On rebuttal, the prosecutor argued that Criminal Trespass only requires that the actor is "reckless as to whether his presence would cause fear for safety in another." (R. 669:21-

25). In addition, the prosecutor argued that Defendant had the opportunity in this case based on testimony at trial (R. 677-80).

After deliberating for a little over an hour and a half, the jury found Defendant guilty of Burglary (R.682-83).[8] The court referred the case to Adult Probation and Parole (AP&P) for a presentence report and scheduled a sentencing hearing (R. 684-85).

C. *Sentencing and Appeal*

At sentencing, trial counsel alerted the court that he had filed a Motion pursuant to Utah Code Ann. § 76-3-402(1) for a one-step reduction in the offense (R. 716:19-20). Counsel argued that a one-step reduction was appropriate due to Defendant's lack of criminal history, his young age, and that no damage had been done (R. 721:3-19). Accordingly, counsel requested home confinement with an ankle monitor for work release (R. 725-30).

The prosecutor argued that Defendant should be held accountable due to his refusal to take responsibility, noting that he had been offered a class A misdemeanor prior to trial (R. 722-23). In the Presentence Report, AP&P recommended that Defendant "be committed to the Utah State Prison for a period of 1 - 15 years" and that the sentence be suspended "upon successful completion of 36 months formal probation" conditioned upon Defendant serving 105 days in jail with work release and counseling (R. 755).

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[8]A true and correct copy of the Verdict, R. 130, is attached to this Brief as Addendum D.

The court denied Defendant's 402 Motion and sentenced him to serve one to fifteen years at the Utah State Prison, which the court suspended, with formal probation for thirty-six months with AP&P (R. 737:20-24). In addition, the court imposed 60 days in jail (R. 737-38).

The court signed the Sentence, Judgment, Commitment on March 1, 2016, which was entered that same day (R. 185-88).[9] Defendant – through appellate counsel – filed a timely Notice of Appeal on March 29, 2016 (R. 193-94).

SUMMARY OF ARGUMENTS

1. The trial court erred by denying Defendant's Motion for a directed verdict. A thorough review of the record in this case demonstrates a lack of evidence that directly shows, or even supporting an inference reasonably to be drawn from the evidence, that Defendant intended to commit theft. None of the State's witnesses, who testified during the State's case-in-chief, provided any testimony that Defendant had been seen carrying anything from the house. Rather, the testimony of the State's witnesses indicates a lack of furtive behavior in the course of Defendant allegedly entering and exiting the house. Moreover, Zakary Taylor, testified that he – after reviewing the contents of the house on the day of the incident – did not notice anything missing. Then – approximately five months later – he again told Officer Fielding that he "couldn't find anything missing from

[9]A true and correct copy of the Sentence, Judgment, Commitment, R. 185-88, is attached to this Brief as Addendum E.

[the] home." The absence of direct testimony that Defendant had been seen carrying anything from the house, coupled with the total lack of evidence that anything was missing from the house demonstrates the State's failure to produce believable evidence of all the elements of Burglary beyond a reasonable doubt.

Even when viewing the evidence in the light most favorable to the State, the evidence was sufficiently inconclusive that reasonable minds would have entertained a reasonable doubt that Defendant intended to commit theft. There was insufficient evidence or a lack of evidence to submit this issue to the jury. The prosecutor's assertion that he intended to argue the issue of intent at closing constitutes an admission that the State's case-in-chief lacked evidence of the intent-to-commit-theft element. In light of the evidence related above, a reasonable jury could not have found that the elements of Burglary had been proven beyond a reasonable doubt. Thus, the trial court erred in denying Defendant's motion for a directed verdict at the close of the State's case.

As to the lesser included offense of Criminal Trespass, there likewise was no evidence from which a reasonable jury could determine that Defendant – assuming he had unlawfully entered the house – was reckless as to whether his presence would cause fear for the safety of another. The State introduced no evidence in its case-in-chief to prove that Defendant – assuming he had unlawfully entered the house – was reckless as to whether his presence would cause fear for the safety of another.

Viewing the evidence in a light most favorable to the State, the evidence introduced in the State's case-in-chief indicates that Defendant's alleged behavior in entering and exiting the house was not reckless as to whether his presence would cause fear for the safety of another. The cautious manner in which Defendant allegedly entered and exited the house is in stark contrast to even a colloquial definition of the word "reckless." In addition, none of the State's witnesses testified that they feared for their safety in the course of Defendant allegedly entering and exiting the house. At most, there may have been some suspicion but nothing in terms of fear for their safety.

Nothing introduced by the State during its case-in-chief established that Defendant's alleged conduct indicated that he – from his perspective – was aware of but consciously disregarded a substantial and unjustifiable risk that his presence would cause fear for the safety of another. Moreover, there was no evidence introduced that would allow a reasonable jury to reasonably infer that Defendant's alleged conduct constituted a risk of such a nature and degree that its disregard constituted a gross deviation from the standard of care that an ordinary person would exercise under such circumstances.

According to the court's rationale in denying the motion as to the offense of Criminal Trespass, a person's unlawful entry or remaining on the property is presumptively reckless as to causing fear for the safety of another. The court's rationale created a narrower reading of the elements to prove Criminal Trespass than that intended by the legislature. According to the plain language of the Criminal Trespass statute, "A person is

guilty of criminal trespass if . . . the person enters or remains unlawfully on property *and* . . . is reckless as to whether his presence will cause fear for the safety of another." By ruling as it did, the trial court erred by effectively eliminating the culpable mental state as an element of the offense. This is contary to the established principle of statutory construction requiring the reviewing court, when interpreting statutory language, to presume that the Legislature used each word advisedly, giving effect to each term according to its ordinary and accepted meaning. The trial court's interpretation also violates the principle that any interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided.

In light of the foregoing, a reasonable jury could not have found that the elements of Criminal Trespass had been proven beyond a reasonable doubt, and the trial court erred by reading the Criminal Trespass statute too narrowly. Thus, the trial court – for this reason also – erred in denying Defendant's motion for a directed verdict at the close of the State's case.

2. The trial court erred by admitting the hearsay statement asserted to establish Defendant's intent to commit theft. The record reveals that there were no subsequent actions that Mr. Taylor took in response to hearing Ms. McCulley's alleged statement. Most importantly, however, the prosecutor used the hearsay statement at trial for the truth of the matter asserted. The statement was critical to correcting a major defect in the State's case-in-chief as revealed by the motion for a directed verdict, namely, the lack of proof as

to the intent to commit theft. Because the relevance of Ms. McCulley's statement depended on its truth, and the prosecutor in fact substantively used the statement for its truth, the statement was hearsay and its admission was error.

By admitting the hearsay statement, the trial court committed harmful error. The question of whether an error is harmful depends upon a host of factors, which weigh in Defendant's favor. The hearsay statement here was central to the State's case and the proof of Defendant's intent to commit theft for purposes of Burglary. Thus, the testimony weighed heavily against Defendant at trial. The hearsay statement was not cumulative of other testimony, and there was no corroborating testimony of the statement. Perhaps, most importantly, the prosecutor emphasized the statement at closing, utilizing the statement to correct the defect in its case-in-chief. Finally, the remaining evidence against Defendant was weak, in part, due to the lack of investigation by Officer Fielding. Consequently, the trial court erred by admitting the hearsay statement and there is a reasonable likelihood that the error affected the outcome in the trial court.

3. The trial court erred by failing to instruct the jury as to the definition of the culpable mental state element of both Burglary and Criminal Trespass. Instruction No. 26 informed the jury that before Defendant may be found guilty of a crime the evidence must prove "that the defendant was prohibited from committing the conduct charged . . . and that the defendant committed such conduct with the culpable mental state required for each offense." According to the Instruction, "The culpable mental state required is intentionally,

or knowingly, or recklessly." Instruction No. 28 provides the definition for the culpable mental state of "knowingly" that mirrors the statutory definition found in Utah Code Ann. § 76-2-103(2) (R. 122). However, the jury instructions are devoid of any definition for the culpable mental state required for either Burglary or Criminal Trespass.

Instructions 26 and 28 are wholly insufficient as culpable mental state instructions even when read in light of all other instructions. The definition in Instruction No. 28 is not applicable to the culpable mental state required for either Burglary or Criminal Trespass, namely, "intentionally" and "recklessly." This manner of instruction confused rather than enlightened the jury, since it concerns terms nowhere else defined in the Jury Instructions. The conclusion is inescapable that the jury instructions, taken as a whole, did not fairly instruct the jury on the culpable mental state for Burglary or Criminal Trespass.

The failure to instruct the jury appropriately as to the culpable mental state of both Burglary and Criminal Trespass should have been obvious in light of the previously mentioned statutory and case law. There is a reasonable likelihood that had the trial court accurately instructed the jury as to the culpable mental state for both Burglary and the lesser-included-offense of Criminal Trespass, the jury would have fully considered and recognized that the State had failed to prove each of the elements beyond a reasonable doubt. This is particularly applicable in the instant case where the intent to commit theft was such a critical issue throughout the case. In other words, there is – at the very least –

a reasonable likelihood of a more favorable outcome for Defendant. As a result, confidence in the manner in which the State obtained the Burglary conviction is undermined.

The jury must be instructed with respect to all the legal elements that it must find to convict of the crime charged, and the absence of such an instruction is reversible error as a matter of law. An accurate instruction upon the basic elements of an offense is essential and the failure to so instruct constitutes reversible error. The failure to fairly instruct the jury concerning the culpable mental state of Burglary and Criminal Trespass is not harmless error.

4. Trial counsel rendered ineffective assistance of counsel by failing to object to the lack of instruction as to the culpable mental state for both Burglary and Criminal Trespass. Given the circumstances of this case as set forth in Argument III, it is difficult to conceive of a sound trial strategy that would justify trial counsel's decision to remain completely silent concerning the Court's failure to accurately instruct the jury as to the culpable mental state for both Burglary and the lesser-included-offense of Criminal Trespass. In light of the issues surrounding Defendant's lack of intent to commit theft, among others, trial counsel should have objected to the lack of instruction. By failing to do so, not only did trial counsel fail to conduct the defense in manner consistent with the theory of the case, but he also failed to preserve the issue for appeal. Consequently, these failures are sufficiently egregious to support the conclusions that trial counsel's decision cannot be considered to be a "sound trial strategy," as required by *Strickland*, and that

defense counsel's performance fell below the objective standard of reasonableness set forth in *Strickland.* This is demonstrated by existing Utah case law, as discussed, and the underlying factual circumstances of this case.

But for counsel's unprofessional failure to object, the result of Defendant's jury trial would have been different. Had the trial court been alerted of its obligation, there is a reasonable probability that the jury, having been properly instructed, would have acquitted Defendant of Burglary or at least convicted Defendant of the lesser-included-offense of Criminal Trespass. The prejudice to Defendant resulting from this critical failure is evinced by the fact that the jury was precluded from properly considering the appropriate culpable mental state of the applicable offenses.

5. The cumulative effect of the errors before and during trial merits reversal of Defendant's conviction of Burglary. Here, the cumulative effect of the numerous errors, including the ineffective assistance of counsel, prejudiced Defendant, which undermines confidence that a fair trial was provided Defendant. But for the numerous errors, including the deficiencies and ineffective assistance of trial counsel, the evidence presented at trial did not implicate Defendant – beyond a reasonable doubt – as the man who committed Burglary. Thus, the State's case was based on the erroneous and incomplete evidence. The aggregate of these errors undermine confidence that Mr. Carrick received a fair trial, providing the basis for this Court to reverse his Burglary conviction.

ARGUMENTS

I. THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

When reviewing the denial of a motion for a directed verdict based on a claim of insufficiency of the evidence, the appellate court "will uphold the trial court's decision if, upon reviewing the evidence and all inferences that can be reasonably drawn from it, [the reviewing court] conclude[s] that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *State v. Dibello*, 780 P.2d 1221, 1225 (Utah 1989). Consequently, a motion for a directed verdict made at the close of the State's case may be denied if the trial court finds that the state has established a "prima facie case against the defendant by producing 'believable evidence of all the elements of the crime charged.'" *State v. Emmett*, 839 P.2d 781, 784 (Utah 1992) (quoting *State v. Smith*, 675 P.2d 521, 524 (Utah 1983)); *accord State v. Skousen*, 2012 UT App 325, ¶ 6, 290 P.3d 919. In so doing, the evidence is viewed in the light most favorable to the State. *See Mahmood v. Ross*, 1999 UT 104, ¶ 16, 990 P.2d 933 ("When reviewing any challenge to a trial court's denial of a motion for directed verdict, we review the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against. . . ." (internal quotations omitted)).

A trial court's directed-verdict inquiry is guided by the elements of the crime as defined by the applicable law, namely, the statutory provisions establishing and defining

the offense. *See State v. Bossert*, 2015 UT App 275, ¶ 18, 362 P.3d 1258. Accordingly, in reviewing the challenge to a denial of a motion for a directed verdict, the reviewing court examines the evidence introduced at trial and compares it to the statutory elements of the applicable offense. *Id.* at ¶ 19.

The statutes setting out the crimes of Burglary and Criminal Trespass provide the following, in relevant part:

> "76-6-202. Burglary.
> (1) An actor is guilty of burglary who enters or remains unlawfully in a building or any portion of a building with intent to commit . . . a felony [or] . . . theft . . . ."

Utah Code Ann. § 76-6-202(1)(a) & (b).[10]

> 76-6-206. Criminal Trespass.
> (2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in sections 76-6-202, 76-6-203, or 76-6-204 or a violation of Section 76-10-2402 regarding commercial obstruction:
> (a) the person enters or remains unlawfully on property and:
> (iii) is reckless as to whether his presence will cause fear for the safety of another; . . . .

Utah Code Ann. § 76-6-206(2)(a)(iii).[11]

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[10]A true and correct copy of Utah Code Ann. § 76-6-202 is attached to this Brief as Addendum F.

[11]A true and correct copy of Utah Code Ann. § 76-6-206 is attached to this Brief as Addendum G.

After the State rested its case – Defendant's counsel moved for a directed verdict, arguing that the State had not met its burden of showing that Defendant had entered or remained unlawfully in the house with the intent to commit a felony or a theft (R. 489 *et seq.*). He further argued that "[t]here's been no showing of any type of intent that Cullen Carrick had on that day. And, again, assuming arguendo that he was there, there has not been any showing of that intent." (R. 490 *et seq.*).

As to the lesser included offense of Criminal Trespass, counsel argued that the State – assuming the court finds that Defendant had entered and remained unlawfully in the house – had likewise failed to show that Defendant "was reckless as to whether his presence would cause fear for the safety of another." (R. 490 *et seq.*). Counsel contended that the State had "not provided anyone to testify that [Defendant's] presence there caused fear." (R. 490 *et seq.*).

The prosecutor responded by arguing that it intended to argue in closing arguments that Defendant is "where he's not supposed to be. He's having an affair with the victim's wife and he's entering into their home . . . . A reasonable, plausible explanation is he's in there because he's looking for something." (R. 491 *et seq.*).

In regard to the lesser included offense of Criminal Trespass, the prosecutor claimed that "[i]t's reckless disregard that it could have caused fear for the safety of another, and that's clearly what the statute contemplates." (R. 493:14-16). The prosecutor further argued that the statute "only requires a reckless disregard that it may cause fear. And it certainly

could have if somebody had actually walked into the house on him while he was in there." (R. 493:16-19).

The trial court denied the motion for a directed verdict as follows:

> Mr. Bushell, I – I believe that there is sufficient evidence that a reasonable jury could find each of the elements as it relates to the burglary. There is circumstantial evidence your client – it's been testified to that your client has been in the house previously, that there was an affair that was going on. He was the one seen coming and going from the building.
>
> And, therefore, I believe that there is sufficient evidence that a jury could reasonably find that an individual had the intent to commit a theft.
>
> Likewise, and for the State's reason in the argument, the lesser included as to reckless, I agree with the State.
>
> And for those reasons, I'm going to deny your motion for a directed verdict.

(R. 495-96).[12]

In this case, a thorough review of the record demonstrates a lack of evidence that directly shows, or even supporting an inference reasonably to be drawn from the evidence, that Defendant – assuming he had unlawfully entered or remained in the house – intended to commit theft. None of the State's witnesses, who testified during the State's case-in-chief, provided any testimony that Defendant had been seen carrying anything from the house. Rather, the testimony of the State's witnesses indicates a lack of furtive behavior in the course of Defendant allegedly entering and exiting the house. Moreover, Zakary Taylor, testified that he – after reviewing the contents of the house on the day of the

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[12] *See* Addendum C.

incident – did not notice anything missing (R. 444:19-24). Then – approximately five months later – he again told Officer Fielding that he "couldn't find anything missing from [the] home" (R. 453:2-6). The absence of direct testimony that Defendant had been seen carrying anything from the house, coupled with the total lack of evidence that anything was missing from the house demonstrates the State's failure to produce believable evidence of all the elements of Burglary beyond a reasonable doubt.

Even when viewing the evidence in the light most favorable to the State, the evidence was sufficiently inconclusive that reasonable minds would have entertained a reasonable doubt that Defendant intended to commit theft. *See & cf.* Utah Code Ann. § 76-2-103(1).[13] There was insufficient evidence or a lack of evidence to submit this issue to the jury. The prosecutor's assertion that he intended to argue the issue of intent at closing constitutes an admission that the State's case-in-chief lacked evidence of the intent-to-commit-theft element. In light of the evidence related above, a reasonable jury could not have found that the elements of Burglary had been proven beyond a reasonable doubt. Thus, the trial court erred in denying Defendant's motion for a directed verdict at the close of the State's case.

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[13]According to the statutory definition, a person engages in conduct "[i]ntentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result." Utah Code Ann. § 76-2-103(1). A true and correct copy of Utah Code Ann. § 76-2-103 is attached to this Brief as Addendum H.

As to the lesser included offense of Criminal Trespass, there likewise was no evidence from which a reasonable jury could determine that Defendant – assuming he had unlawfully entered the house – was reckless as to whether his presence would cause fear for the safety of another. *See* Utah Code Ann. § 76-6-206(2)(a)(iii). The State introduced no evidence in its case-in-chief to prove that Defendant – assuming he had unlawfully entered the house – was reckless as to whether his presence would cause fear for the safety of another.

According to the codified definition of reckless set forth in Utah Code Ann. § 76-2-103, a person engages in conduct

> Recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Utah Code Ann. § 76-2-103(3).

Viewing the evidence in a light most favorable to the State, the evidence introduced in the State's case-in-chief indicates that Defendant's alleged behavior in entering and exiting the house was not reckless as to whether his presence would cause fear for the safety of another. The cautious manner in which Defendant allegedly entered and exited the house is in stark contrast to even a colloquial definition of the word "reckless." (*See* R. 450:18-20 (Zakary Taylor testifying that the screen was "completely intact"); *see also* R. 459-60

(Officer Fielding testifying that "very seldom" will a screen be replaced or "stuff" not taken during a burglary)). In addition, none of the State's witnesses testified that they feared for their safety in the course of Defendant allegedly entering and exiting the house. At most, there may have been some suspicion but nothing in terms of fear for their safety (*See* R. 327-28 (Kristine Starkey testifying that she "actually waved to him" and "he waved back")).

Nothing introduced by the State during its case-in-chief established that Defendant's alleged conduct indicated that he – from his perspective – was aware of but consciously disregarded a substantial and unjustifiable risk that his presence would cause fear for the safety of another. Moreover, there was no evidence introduced that would allow a reasonable jury to reasonably infer that Defendant's alleged conduct constituted a risk of such a nature and degree that its disregard constituted a gross deviation from the standard of care that an ordinary person would exercise under such circumstances.

According to the court's rationale in denying the motion as to the offense of Criminal Trespass, a person's unlawful entry or remaining on the property is presumptively reckless as to causing fear for the safety of another. The court's rationale created a narrower reading of the elements to prove Criminal Trespass than that intended by the Legislature. According to the plain language of the Criminal Trespass statute, "A person is guilty of criminal trespass if . . . the person enters or remains unlawfully on property *and* . . . is reckless as to whether his presence will cause fear for the safety of another." Utah Code Ann. § 76-6-206(2)(a)(iii) (emphasis added). By ruling as it did, the trial court erred

by effectively eliminating the culpable mental state as an element of the offense. *See* Utah Code Ann. § 76-1-501(2)(b) (dictating that "the culpable mental state required" for the offense constitutes an "element of the offense"). This is contrary to the established principle of statutory construction requiring the reviewing court, when interpreting statutory language, to "presume that the Legislature used each word advisedly," giving "effect to each term according to its ordinary and accepted meaning." *State v. Terwilliger*, 1999 UT App 337, ¶ 10, 992 P.2d 490 (citation and internal quotation marks omitted). The trial court's interpretation also violates the principle that "'any interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided.'" *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995) (quoting *United States v. Rawlings*, 821 F.2d 1543, 1545 (11th Cir. 1987)).

In light of the foregoing, a reasonable jury could not have found that the elements of Criminal Trespass had been proven beyond a reasonable doubt, and the trial court erred by reading the Criminal Trespass statute too narrowly. Thus, the trial court – for this reason also – erred in denying Defendant's motion for a directed verdict at the close of the State's case.

II. THE TRIAL COURT ERRED BY ADMITTING THE HEARSAY STATEMENT ASSERTED TO ESTABLISH DEFENDANT'S INTENT TO COMMIT THEFT.

In the course of rebuttal testimony for the State, the prosecutor asked Zakary Taylor what Celeste McCulley had said during a telephone call that he had made to ask "why

[Defendant] was allegedly in [his] house and what he was looking for." (R. 620-21). Mr. Taylor responded, "She said he was just in there looking for a momento or some – something sentimental." Defense counsel objected and the following exchange took place:

MR. BUSHELL:	I'm going to object to this, Your Honor. It's hearsay.
THE COURT:	Overruled.
MR. BUSHELL:	On what grounds, Your Honor?
THE COURT:	Statement of the –
MR. DUNCAN:	Impeachment.
THE COURT:	Yeah.
MR. BUSHELL:	I don't think you get full carte blanche waiver of the hearsay rule on impeachment.
THE COURT:	But it's not offered for the truth. It's offered to impeach what she denied.
MR. BUSHELL:	It's totally offered for the truth of the matter asserted.
THE COURT:	I disagree.
MR. BUSHELL:	That's what she said. Okay. I – I understand.
THE COURT:	It's – it's what she said to him on the phone, but she denied that when she got up on the stand.
MR. BUSHELL:	But what is the matter asserted.
THE COURT:	It's not offered for that. It's offered to show that she did not tell the truth to – to Zak. So I'm overruling the objection.
MR. DUNCAN:	Thank you. No more questions.

(R. 621-22).

Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted in the statement." Utah R. Evid. 801(c)(1) & (2). "The term hearsay is applied to testimony offered to prove facts of which the witness has no personal knowledge, but which have

been told to him by others." *State v. Sibert*, 6 Utah 2d 198, 310 P.2d 388, 390 (1957) (citations omitted). Typically, hearsay is inadmissible because the witness "is not testifying from his own personal knowledge or observation, but is acting as a conduit to relay that of others." *Id.* at 390.

"[I]f an out-of-court statement is 'offered simply to prove it was made, without regard to whether it is true, such testimony is not proscribed by the hearsay rule.'" *State v. Olsen*, 860 P.2d 332, 335 (Utah 1993) (quoting *State v. Sorensen*, 617 P.2d 333, 337 (Utah 1980) (internal citations omitted)). "Testimony of this nature does not violate the hearsay rule since the witness is asserting under oath a fact he personally knows, that is, that the statement was made, and he is subject to cross-examination concerning such fact." *Sibert*, 310 P.2d at 391 (citations omitted). Statements of this type often reveal reasons for one's actions. *See, e.g., Barton v. Barton*, 2001 UT App 199, ¶ 16, 29 P.3d 13 (out-of-court statement offered "as proof of a good faith reason for not attending the hearing"); *In re G.Y.*, 962 P.2d 78, 85 (Utah Ct. App. 1998) (out-of-court statement offered because it illuminated a caseworker's "treatment plan evaluations, recommendations, and subsequent actions"); *State v. Perez*, 924 P.2d 1, 3 (Utah Ct. App. 1996) (out-of-court statement offered as "an explanation for his actions").

In this case, there were no subsequent actions that Mr. Taylor took in response to hearing Ms. McCulley's alleged statement. Most importantly, however, the prosecutor used the statement at trial for the truth of the matter asserted. The statement was critical to

correcting a major defect in the State's case-in-chief as revealed by the motion for a directed verdict, namely, the lack of proof as to the intent to commit theft. In closing, the prosecutor argued the following:

> He went into that house to retrieve something that the victim didn't know was there. But make no mistake, it didn't belong to Mr. Carrick. And it was theft. But he went in that house to find something and to retrieve it because he wanted it and he didn't want Mr. Taylor to know he had it.
>
> * * *
>
> So ultimately, ladies and gentlemen, at the end of – end of the day, what I'm telling you – and I'll get up in a minute and I'll explain it. You have two theories as to what happened in this case. Either Zakary Taylor – or either Cullen Carrick was there looking for a momento and got it or didn't get it – don't know for sure – and committed a burglary, or he was with his friends up at the funeral home until dusk that night when all this was going on.

(R. 645:9-14; R. 656:5-12). Because the relevance of Ms. McCulley's statement depended on its truth, and the prosecutor in fact substantively used the statement for its truth, the statement was hearsay and its admission was error.

A verdict is only reversed when the lower court commits harmful error. *State v. Matsamas*, 808 P.2d 1048, 1053 (Utah 1991). "An error is harmful if there is 'a reasonable likelihood that the error affected the outcome in the trial court.'" *Id.* (quoting *State v. Verde*, 770 P.2d 116, 121 (Utah 1989)).

The question of whether an error is harmful "depends upon a host of factors, all readily accessible to reviewing courts." *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106

S.Ct. 1431 (1986). These factors include "'the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.'" *State v. Hackford*, 737 P.2d 200, 205 (Utah 1987) (quoting *Van Arsdall*, 475 U.S. at 684, 106 S.Ct. 1431). The degree of emphasis the prosecution placed on the evidence in presenting its case is also a factor. *See State v. Valdez*, 748 P.2d 1050, 1055 (Utah 1987) (concluding that "any arguable error was harmless" due in part to "the lack of emphasis" placed on the evidence by the State).

The hearsay statement here was central to the State's case and the proof of Defendant's intent to commit theft for purposes of Burglary. Thus, the testimony weighed heavily against Defendant at trial. The hearsay statement was not cumulative of other testimony, and there was no corroborating testimony of the statement. Perhaps, most importantly, the prosecutor emphasized the statement at closing, utilizing the statement to correct the defect in its case-in-chief. Finally, the remaining evidence against Defendant was weak due, in part, to the lack of investigation by Officer Fielding.

Based on the foregoing, the trial court erred by admitting the hearsay statement and there is a "reasonable likelihood that the error affected the outcome in the trial court." *See Matsamas*, 808 P.2d at 1053.

III. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY AS TO THE DEFINITION OF THE CULPABLE MENTAL STATE ELEMENT OF BOTH BURGLARY AND CRIMINAL TRESPASS.

Jury instructions are reviewed under a correctness standard, with no particular deference granted to the trial court. *See Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 452 (Utah 1993); *State v. Gibson*, 908 P.2d 352, 354 (Utah Ct.App.1995), *cert. denied*, 917 P.2d 556 (Utah 1996). In the course of such a review, the appellate court "review[s the] 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). "Further, because '"[t]he general rule is that an accurate instruction upon the basic elements of an offense is essential,"' failure to provide such an instruction is reversible error that can never be considered harmless." *State v. Souza*, 846 P.2d 1313, 1320 (Utah Ct. App. 1993) (alteration in original) (citations omitted).

"The purpose of the instructions is to set forth the issues and the law applicable thereto in a clear, concise and orderly manner, so that the jury will understand how to discharge its responsibilities." *State v. Torres*, 619 P.2d 694, 696 (Utah 1980). This purpose was not accomplished by the instructions in the instant case.

In order to convict defendant of Burglary or the lesser-included-offense of Criminal Trespass, the State was required to prove every element, including the culpable mental state for such. *See* Utah Code Ann. § 76-1-501(1) ("A defendant in a criminal proceeding is

presumed innocent until each element of offense charged against him is proven beyond a reasonable doubt . . . ."). The statutes pertaining to the crimes of Burglary and Criminal Trespass provide the following elements:

> "76-6-202. Burglary.
> (1) An actor is guilty of burglary who enters or remains unlawfully in a building or any portion of a building *with intent to commit* . . . a felony [or] . . . theft . . . ."

Utah Code Ann. § 76-6-202(1)(a) & (b) (emphasis added).[14]

> 76-6-206. Criminal Trespass.
> (2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in sections 76-6-202, 76-6-203, or 76-6-204 or a violation of Section 76-10-2402 regarding commercial obstruction:
> (a) the person enters or remains unlawfully on property and:
> (iii) *is reckless* as to whether his presence will cause fear for the safety of another; . . . .

Utah Code Ann. § 76-6-206(2)(a)(iii) (emphasis added).[15]

In the instant case, Instruction No. 26 informed the jury that before Defendant may be found guilty of a crime the evidence must prove "that the defendant was prohibited from committing the conduct charged . . . and that the defendant committed such conduct with

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[14]*See* Addendum F.

[15]*See* Addendum G.

the culpable mental state required for each offense." (R. 120).[16] According to the Instruction, "The culpable mental state required is intentionally, or knowingly, or recklessly." (*Id.*). Instruction No. 28 provides the definition for the culpable mental state of "knowingly" that mirrors the statutory definition found in Utah Code Ann. § 76-2-103(2) (R. 122). However, the jury instructions are devoid of any definition for the culpable mental state required for either Burglary or Criminal Trespass.

Instructions 26 and 28 are wholly insufficient as culpable mental state instructions even when read in light of all other instructions. The definition in Instruction No. 28 is not applicable to the culpable mental state required for either Burglary or Criminal Trespass, namely, "intentionally" and "recklessly." *See* Utah Code Ann. § 76-2-103(1) and (3). This manner of instruction confused rather than enlightened the jury, since it concerns terms nowhere else defined in the Jury Instructions. "The conclusion is inescapable that the jury instructions, taken as a whole, did not fairly instruct the jury" on the culpable mental state for Burglary or Criminal Trespass. *See State v. Stringham*, 957 P.2d 602, 609 (Utah Ct. App. 1998).

This issue is raised pursuant to plain error. In *State v. Dunn*, 850 P.2d 1201 (Utah 1993), the Utah Supreme Court outlined the following principles or elements for establishing "plain error":

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[16]A true and correct copy of the Jury Instructions, R. 93-129, is attached to this Brief as Addendum I.

> In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

Id. at 1208-09; *State v. Dean*, 2004 UT 63, ¶ 13, 95 P.3d 276; *accord State v. Larsen*, 2005 UT App 201, ¶¶ 5-6, 113 P.3d 998; *see also* Utah Rule of Evidence 103(e).

The failure to instruct the jury appropriately as to the culpable mental state of both Burglary and Criminal Trespass should have been obvious in light of the previously mentioned statutory and case law. An "'error is harmful [if] absent the error, there is a reasonable likelihood of a more favorable outcome for [Defendant].'" *State v. Parker*, 2000 UT 51, ¶ 7, 4 P.3d 778 (quoting *Dunn*, 850 P.2d at 1208). There is a reasonable likelihood that had the trial court accurately defined the culpable mental state for both Burglary and the lesser-included-offense of Criminal Trespass, the jury would have recognized that the State had failed to prove each of the elements beyond a reasonable doubt. This is particularly applicable in this case where questions concerning the culpable mental state for the offenses were at the very center of the case not to mention the motion for a directed verdict. In other words, there is – at the very least – a reasonable likelihood of a more favorable outcome for Defendant. As a result, confidence in the manner in which the State obtained the Burglary conviction is substantially undermined.

"The jury must be instructed with respect to all the legal elements that it must find to convict of the crime charged, and the absence of such an instruction is reversible error as a matter of law." *State v. Jones*, 823 P.2d 1059, 1061 (Utah 1991) (citing *State v. Laine*, 618 P.2d 33, 35 (Utah 1980)). Moreover, "[t]he general rule is that an accurate instruction upon the basic elements of an offense is essential" and the "[f]ailure to so instruct constitutes reversible error." *State v. Roberts*, 711 P.2d 235, 239 (Utah 1985) (citing *Laine*, 618 P.2d at 35). The failure in this case to fairly instruct the jury concerning the culpable mental state of Burglary and Criminal Trespass is not harmless error.

In view of the fact that the trial court failed to give appropriate instructions concerning the definition as to the culpable mental state element of both Burglary and Criminal Trespass, which related to an important aspect of the Defendant's theory of the case, the conviction of Burglary should be reversed and Defendant granted a new trial.

IV. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE LACK OF INSTRUCTION AS TO THE CULPABLE MENTAL STATE FOR BOTH BURGLARY AND CRIMINAL TRESPASS.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984), the United States Supreme Court established a two-prong test for determining when a defendant's Sixth Amendment[17] right to effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct.

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[17]The Sixth Amendment to the United States Constitution states in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel

at 2064. The test – adopted by Utah courts – requires a defendant to show "first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant." *State v. Martinez*, 2001 UT 12, ¶ 16, 26 P.3d 203; *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); *State v. Stidham*, 2014 UT App 32, ¶ 18, 320 P.3d 696; *State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App. 1995); *State v. Wright*, 893 P.2d 1113, 1119 (Utah Ct. App. 1995). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *See Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993).

To satisfy the first prong of the test, a defendant must "'identify the acts or omissions' which, under the circumstances, 'show that counsel's representation fell below an objective standard of reasonableness.'" *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted)). A defendant must "overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment." *State v. Bullock*, 791 P.2d 155, 159-60 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3270 (1990).

To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support "a reasonable probability that, but for counsel's

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for his defence." U.S. Const. amend. VI.

unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Templin*, 805 P.2d at 187. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069; *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah), *cert. denied*, 513 U.S. 966, 115 S.Ct. 431 (1994); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986).

Given the circumstances of this case as outlined in detail above in Argument III, it is difficult to conceive of a sound trial strategy that would justify trial counsel's decision to remain completely silent concerning the court's failure accurately instruct the jury as to the culpable mental state for both Burglary and the lesser-included-offense of Criminal Trespass. In light of the issues surrounding Defendant's lack of intent to commit theft, among others, trial counsel should have objected to the lack of instruction. By failing to do so, not only did trial counsel fail to conduct the defense in manner consistent with the theory of the case, but he also failed to preserve the issue for appeal. *See and cf. State v. Larrabee*, 2013 UT 70, ¶ 26, 321 P.3d 1136. Consequently, these failures are sufficiently egregious to support the conclusions that trial counsel's decision cannot be considered to be a "sound trial strategy," as required by *Strickland*, and that defense counsel's performance fell below the objective standard of reasonableness set forth in *Strickland*. This is demonstrated by existing Utah case law, as previously discussed, and the underlying factual circumstances of this case.

But for counsel's unprofessional failure to object, the result of Defendant's jury trial would have been different. Had the trial court been alerted of its obligation, there is a reasonable probability that the jury, having been properly instructed, would have acquitted Defendant of Burglary or at least convicted Defendant of the lesser-included-offense of Criminal Trespass. The prejudice to Defendant resulting from this critical failure is evinced by the fact that the jury was precluded for properly considering the appropriate culpable mental state of the applicable offenses.

V. THE CUMULATIVE EFFECT OF THE ERRORS BEFORE AND DURING TRIAL MERITS REVERSAL OF DEFENDANT'S CONVICTION OF BURGLARY.

The cumulative effect of the numerous errors in the instant case, including the ineffective assistance of counsel before and during trial,[18] prejudiced Defendant, which undermines confidence that a fair trial was provided Defendant. "Under the cumulative error doctrine," this Court may reverse "if the cumulative effect of . . . several errors undermines . . . confidence . . . that a fair trial was had." *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993); *accord State v. Perea*, 2013 UT 68, ¶ 99, 322 P.3d 624 (stating

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[18]*See* Defendant's previously filed Rule 23B Motion, which the Court – by Order dated April 20, 2017 – deferred for consideration with the briefing in this case. Defendant's Rule 23B Motion raised numerous claims of ineffective assistance of counsel, including trial counsel's failure to investigate and utilize an eyewitness identification expert at trial, trial counsel's failure to investigate and engage a forensic investigations expert concerning the critical failures of Officer Fielding to follow standard CSI practices in his investigation of the case, and trial counsel's failure to investigate critical alibi witnesses.

cumulative error doctrine is "used when a single error may not constitute grounds for reversal, but many errors, when taken collectively, nonetheless undermine confidence in the fairness of a trial"). "In assessing a claim of cumulative error," this Court "consider[s] all the identified errors." *Dunn*, 850 P.2d at 1229. This Court is "more willing to reverse when a conviction is based on comparatively thin evidence." *State v. King*, 2010 UT App 396, ¶ 35, 248 P.3d 984. But for the numerous errors, including the deficiencies and ineffective assistance of trial counsel, the evidence presented at trial did not implicate Defendant – beyond a reasonable doubt – as the man who committed Burglary. As a result, the State's case was based on the erroneous and incomplete evidence. The aggregate of these errors "undermine . . . confidence that [Mr. Carrick] received a fair trial," providing the basis for this Court to reverse his Burglary conviction. *See id.* at ¶ 38, 248 P.3d 984.

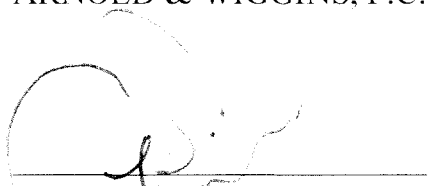
CONCLUSION

Based on the foregoing, Defendant respectfully requests that this Court reverse Defendant's conviction and remand the case for a new trial on the Burglary charge consistent with this Court's instructions as set forth in its opinion. Defendant also requests

that the Court provide him with any other remedy that the Court deems just and appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 5th day of May, 2017.

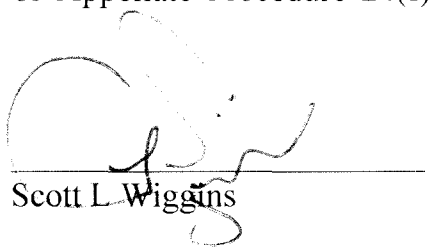
ARNOLD & WIGGINS, P.C.



Scott L. Wiggins
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned, Scott L Wiggins, hereby certifies, pursuant to Utah Rule of Appellate Procedure 24(f)(1)(C), that the Brief of Appellant complies with the applicable type-volume limitation set forth in Utah Rule of Appellate Procedure 24(f)(1)(A) by containing 11,836 words.



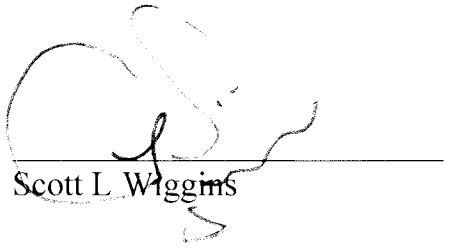
Scott L Wiggins

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following on this 8th day of May, 2017:

Thomas B. Brunker
Assistant Solicitor General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Counsel for the State of Utah

The undersigned also certifies that he included a digital copy of the Brief of Appellant.



Scott L Wiggins

ADDENDA

Addendum A:	Order – dated April 20, 2016
Addendum B:	Alibi Witness List R. 72-73
Addendum C:	Partial transcript containing arguments and ruling on motion for a directed verdict, R. 489-96
Addendum D:	Verdict, R. 130
Addendum E:	Sentence, Judgment, Commitment, R. 185-88
Addendum F:	Utah Code Ann. § 76-6-202
Addendum G:	Utah Code Ann. § 76-6-206
Addendum H:	Utah Code Ann. § 76-2-103
Addendum I:	Jury Instructions, R. 93-129

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, Appellee, *v.* CULLEN CHRISTOPHER CARRICK, Appellant.	))))))	ORDER Case No. 20160249-CA

Appellant Cullen Christopher Carrick moves this court for a remand pursuant to rule 23B of the Utah Rules of Appellate Procedure. Pursuant to the Utah Supreme Court's Revised Order Pertaining to Rule 23B, an appellate court may elect to adjudicate the motion either separately, or in conjunction with consideration of the merits of other issues presented on appeal. If the motion is adjudicated in conjunction with the briefing, the briefs may reference the arguments in the motion and response, and the motion and response may reference the fact statement and arguments in the briefs. Affidavits submitted in support of a rule 23B motion are not part of the record on appeal and will be considered only to determine whether to grant or deny the motion.

IT IS HEREBY ORDERED that a ruling on the motion for remand is deferred for consideration in conjunction with the briefing.

Appellant has exhausted his requests for extensions to file his brief, and this court's March 14, 2017 order specified that Appellant's brief must be filed on or before April 10, 2017. The order emphasized that NO FURTHER EXTENSIONS would be permitted. Appellant filed the rule 23B motion on April 10, 2017. Accordingly, IT IS HEREBY ORDERED that Appellant shall file his brief within fifteen (15) days of the date of this order. NO FURTHER EXTENSIONS shall be permitted.

Dated this 20th day of April, 2017.

FOR THE COURT:

Kate A. Toomey

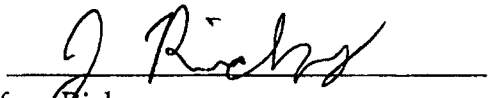
Kate A. Toomey, Judge

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2017, a true and correct copy of the foregoing ORDER was sent by electronic mail to be delivered to:

SCOTT L WIGGINS
swiggins@awpc.net

THOMAS B. BRUNKER
tbrunker@utah.gov

By 
Jeffrey Ricks
Judicial Assistant

Case No. 20160249
District Court No. 141100418

B

Ryan J. Bushell, #8843
204 Historic 25th Street, Suite 201
Ogden, Utah 84401
Telephone: (801) 612-9505
Attorney for Defendant

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. CULLEN CHRISTOPHER CARRICK, Defendant.	**ALIBI WITNESS LIST** Case No. 141100418 Judge Maynard

COMES NOW, defendant, Cullen Carrick, by and through his attorney of record, Ryan J. Bushell, pursuant to U.C.A. 77-14-2(1), and hereby gives notice of the intent to claim an alibi for the information filed against him, and in support states as follows:

1. On the date alleged in the information, the defendant attended the funeral of his paramour with Celeste McCulley, Elias Carrass, Matt Bishop and Tawni Malmberg.
2. The defendant, and those individuals listed above, met, traveled and attended the funeral together.
3. After the funeral, at around 4:00 pm, those individuals and the defendant participated in a balloon release in remembrance of the deceased in the parking lot of the funeral home.
4. After the balloon release, the defendant was driven back to his vehicle in Harrisville and returned to his home in Huntsville. At no time did he, or any individual in his party, go to the home of the alleged victim.

The following is the known names and address/phone numbers of the individuals the defendant intents to call as alibi witnesses.

Celeste McCulley
576 W. 300 N.
Salt Lake City, UT 84116
(801) 644-4088

Elias Carrass
576 W. 300 N.
Salt Lake City, UT 84116
(801) 783-6058

Tani Malmberg
1144 Harrop St.
Ogden, UT 84404
(801) 668-0666

Matt Bishop
Address Pending
(385) 288-9295

DATED this 10th day of January, 2016

/s/ Ryan Bushell
Ryan J. Bushell
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on this 10th day of January 2016, a true and correct and correct copy of the foregoing Alibi Witness List was delivered via electronic filing to:

Mr. Brian P. Duncan
81 N. Main Street, Suite 102
Brigham City, UT 84302

/s/ Ryan J. Bushell

C

THE COURT: All right. Go ahead and step down.

Mr. Duncan?

MR. DUNCAN: The State would rest, Your Honor.

THE COURT: No other witnesses. Now would be a good time. Let's take a brief recess.

Mr. Bushell, we can talk about maybe having one witness before we break.

MR. BUSHELL: After the jury has left may make --

THE COURT: Yeah.

MR. BUSHELL: -- a motion to the Court?

THE COURT: We'll -- we'll visit. So we'll go ahead and excuse the jury just for about five, maybe 10 minutes. Thank you.

(Pause in proceedings)

THE COURT: All right. Counsel -- Mr. Bushell.

MR. BUSHELL: Your Honor, at this time I'd make a motion for the Court to find a directed verdict. The State has not met their burden.

If I look at the initial charge on the Amended Information of burglary, the State would have to show -- and based on their evidence did not show -- the defendant entered or remained unlawfully in a dwelling with the intent to commit a felony or a theft.

For argument sake, let's say that the Court could find that based on the evidence presented in the State's case

in chief that the defendant entered or remained unlawfully in a portion -- a building or a portion of a building.

If that is the case, then the second prong indicates that they've got to prove that my client did so with the intent to commit a felony or a theft.

There's been no showing of any type of intent that Cullen Carrick had on that day. And, again, assuming arguendo that he was there, there has not been any showing of that intent.

Under the lesser included offense of Criminal Trespass, again, assuming the Court finds that my client entered and remained unlawfully on property that was a dwelling, based on what the State has shown, again, there has to be a second showing that he was reckless as to whether his presence would cause fear for the safety of another. There's been no showing of that. The State has not provided anyone to testify here today that his presence there caused fear.

What his presence caused -- again, I'm not saying he was there. Just arguing with the State that he was there. The -- the individuals who testified, they thought it was weird that he was there. There was nobody that testified that they were fearful for the safety either of themselves or for another person. In fact, Jessica Roberts and her mom went back out and waved to him. That doesn't scream to me that this individual caused any fear for the safety of another.

And as such, Your Honor, I would ask the Court to find in favor of my client. The State has not met their burden and as such this matter should be dismissed.

THE COURT: Okay. Thank you.

Mr. Duncan.

MR. DUNCAN: Your Honor, to the first part, as to whether or not the State has shown that there was a theft therein. Number one, all it requires is intent to commit a theft therein.

The reality is is I think a jury can make a very reasonable and plausible -- in fact, this is what the State intends to argue in closing arguments. Why else be there? Mr. Cullick (sic) has no basis for being there. It's reasonable -- it's what we call circumstantial evidence. He's where he's not supposed to be. He's having an affair with the victim's wife and he's entering into their home. What for? That's the whole point. A very reasonable, plausible explanation is he's in there because he's looking for something. This is a secret affair that he doesn't even know the victim is aware that it's going on.

So what does he do? He goes into the home. And what are you going to take? Something that the victim doesn't even know is there. And that's why you're going into the home. To suggest that -- that he just went in the home because, doesn't make any sense. To suggest that he went into the home to -- I

don't know -- commit a felony by forging a check, to suggest that he went into the home to assault somebody, now these are all aspects of burglary as well.

But the reality is is the only plausible and reasonable explanation -- and I think a jury by the evidence that's presented, circumstantial evidence, can absolutely reach the conclusion beyond a reasonable doubt that the only reason Mr. Carrick was in there was to find something and to take it -- to hide it, a momento, whatever the case may be -- but it's a plausible explanation.

Why even have the burglary statute say with the intent to commit a theft if we actually have to show a theft? That's what circumstantial evidence is, Your Honor, and I don't think there -- I think it's very reasonable for the jury to reach a conclusion that he was obviously there to get something out of the house. Did he find it or not? I don't care. It's the intent to commit a theft.

As to the criminal trespass, Your Honor, it doesn't say causes alarm, it says -- or causes fear for the safety of another. It says, and was reckless as to whether his presence would cause fear for the safety of another.

I'll just tell you now that if Mr. Taylor had showed up to his house and opened up the front door and walked in and found Mr. Carrick in his house -- I don't know of too many people that walk into their house and find somebody that

shouldn't be there and it doesn't scare them and wonder what in the world is going on.

So this whole idea that you have to go into someone's house -- the very presence of being there, the very presence of being there when you're not supposed to be there, the very presence of being furtive in there, absolutely is a reckless disregard that somebody might actually come along and find -- we read about it all the time. I mean, you can call it whatever you want to. But we read about all the time that people come in and find somebody in their house that's not supposed to be there and they go for their gun. That's what happens when you find a stranger in your house. Didn't find a stranger in his house. Could have.

It's reckless disregard that it could have caused fear for the safety of another, and that's clearly what the statute contemplates. It doesn't require fear. It only requires a reckless disregard that it may cause fear. And it certainly could have if somebody had actually walked into the house on him while he was in there.

THE COURT: Okay. Mr. Bushell, you have the final say. It's your motion.

MR. BUSHELL: I do. Thank you.

Judge, what Mr. -- I just want to call you by your first name. I'm so sorry.

MR. DUNCAN: Duncan. You're good, Ryan.

MR. BUSHELL: Mr. Duncan is arguing is a bunch of might have beens and could ofs. We're not -- we're past that. That's preliminary hearing type of language.

We're here at trial where they have to prove by their evidence that individuals could have been -- I'm just going to get it so I don't mess it up. That individuals -- because of my client's actions, would cause fear for the safety of another and he was reckless about that.

Again, I'm not even arguing he was there. Okay. But given what the testimony was, I think -- I think the juror (sic) could find that.

The State hasn't put on any evidence to show that his presence there was reckless. He didn't do that. That wasn't done. There was no showing about that. He can make all these grandiose arguments, well, if he'd come in and he had a gun then it could have been. That doesn't work here. We're beyond that probable cause stage. We're here for trial. The evidence put on today does not rise to the level to meet the statutory burden of the lesser included offense.

The same can be said about the charge itself of burglary. They -- they have to show intent, Your Honor. They can't argue, well, the jury would probably think that. Their burden is to show intent of my client. They haven't shown any intent. They have made it an argument that he may have gone back to get a -- a momento. He might have gone back to get a

momento is not intent to commit. There's a great big difference there. There's been no showing whatsoever of the intent of my client.

There's individuals who claim he was there. There's individuals who said they saw him go in and come out. Okay. But there's no showing of what his intent was. That has to be shown here. It has to be shown through testimony, not through argument by the State on what could have been or might have been. That's a great closing argument. I'll give him that. But it doesn't rise right now to the level of his burden.

And as such, I'd ask the Court for a directed verdict in this case.

THE COURT: Okay. Thank you.

Mr. Bushell, I -- I believe that there is sufficient evidence that a reasonable jury could find each of the elements as it relates to the burglary. There is circumstantial evidence your client -- it's been testified to that your client has been in the house previously, that there was an affair that was going on. He was the one seen coming and going from the building.

And, therefore, I believe that there is sufficient evidence that a jury could reasonably find that an individual had the intent to commit a theft.

Likewise, and for the State's reason in the argument, the lesser included as to reckless, I agree with the State.

And for those reasons, I'm going to deny your motion for a directed verdict.

Let's go ahead and take five minutes or two or three minutes. Are you prepared to begin today, Mr. Bushell? We still have about 40 minutes we can actually --

MR. BUSHELL: Yeah, I'd like to at least get started on them.

THE COURT: We -- we'd have at least one witness, maybe two, that we could get through before we close for today.

MR. BUSHELL: Okay. That would be fine.

THE COURT: All right. Let's take about three or four minutes, give you a chance to stretch. We'll be in recess.

(Recess taken)

THE COURT: All right. Is Mr. Duncan available?

(Unintelligible conversation)

UNIDENTIFIED SPEAKER: Are we ready to go get the jury?

THE COURT: Yeah. As soon as Mr. Duncan comes in.

All right. Let's go ahead and bring them back in.

UNIDENTIFIED SPEAKER: Did you say to get the jury, Your Honor?

THE COURT: Yeah. Go ahead and bring them in.

(Pause in proceedings)

D

IN THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH, **Plaintiff,** **vs.** **CULLEN CHRISTOPHER CARRICK,** **Defendant.**	**VERDICT** **Case No. 141100418**

We the Jury, duly impaneled and sworn, find as follows:

X Guilty of BURGLARY, a criminal offense.

____ Not Guilty of BURGLARY, a criminal offense.

If all eight of you cannot find that all of the elements have been satisfied beyond a reasonable doubt, you must find the Defendant "Not Guilty" under this prong of Burglary. If you find the Defendant "Not Guilty of Burglary," you must then consider and return a verdict of:

____ Guilty of CRIMINAL TRESPASS OF A DWELLING, a criminal offense.

____ Not Guilty of CRIMINAL TRESPASS OF A DWELLING, a criminal offense.

Dated this the 22nd day of January, 2016.

JURY FOREPERSON

DISTRICT COURT JUDGE

E

The Order of the Court is stated below:
Dated: March 01, 2016
10:15:42 AM

/s/ BRANDON MAYNARD
District Court Judge

FIRST DISTRICT - Box Elder
BOX ELDER COUNTY, STATE OF UTAH

Amended

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 141100418 FS
CULLEN CHRISTOPHER CARRICK,	:	Judge: BRANDON MAYNARD
Defendant.	:	Date: February 29, 2016

PRESENT
Clerk: kathij
Prosecutor: DUNCAN, BRIAN P
Defendant
Defendant's Attorney(s): BUSHELL, RYAN J
Agency: Adult Probation and Parole

DEFENDANT INFORMATION
Date of birth: April 19, 1986
Audio
Tape Number: 3 Tape Count: 9:21/9:57

CHARGES
1. BURGLARY - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/22/2016 Guilty

HEARING

Defendant's 402.1 motion is addressed by both Counsel.

Both Counsel address the Court regarding sentencing.

The Court denies the Defendant's 402 motion at this time, but will consider a 402 reduction upon successful completion of probation.

The Court proceeds with sentencing.

Case No: 141100418 Date: Feb 29, 2016

SENTENCE PRISON
Based on the defendant's conviction of BURGLARY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

SENTENCE JAIL
Based on the defendant's conviction of BURGLARY a 2nd Degree Felony, the defendant is sentenced to a term of 60 day(s)

SENTENCE JAIL RELEASE TIME NOTE
Defendant is to have work release.

SENTENCE JAIL SERVICE NOTE
Defendant to report to the Box Elder County jail OR Weber County Jail, if Weber County Jail is willing to receive Defendant, and upon Mr. Bushell making the arrangements. Defendant is to report March 4, 2016 at 9:00 am.

SENTENCE FINE

Charge # 1 Fine:	$603
Suspended:	$0.00
Surcharge:	
Due:	$603.00
Total Fine:	$603
Total Suspended:	$0
Total Surcharge:	
Total Principal Due:	$603.00
	Plus Interest

SENTENCE FINE PAYMENT NOTE
Fine includes a $43.00 security fee.

ORDER OF PROBATION
The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation and Parole.

Defendant to serve 60 day(s) jail.

Defendant is to pay a fine of 1178.70 where the surcharge has been added to the fine.
Interest may increase the final amount due.
COMPLY WITH DNA TESTING AND PAY THE FEE
COMPLY WITH THE REWARDS MATRIX PROBATION PROGRAM
COMPLY WITH A CURFEW AS SET FORTH BY PROBATION
SUBMIT TO RANDOM SEARCH AND SEIZURE AND CHEMICAL TESTING.
HAVE NO CONTACT WITH ZAKARY TAYLOR

End Of Order - Signature at the Top of the First Page

Case No: 141100418 Date: Feb 29, 2016

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 141100418 by the method and on the date specified.

EMAIL: RYAN J BUSHELL ryan@rjb-law.com
EMAIL: BRIAN P DUNCAN bduncan@boxeldercounty.org

Date: 03/01/2016 /s/ KATHI JOHNSTON

Deputy Court Clerk

F

76-6-202 Burglary.

(1) An actor is guilty of burglary who enters or remains unlawfully in a building or any portion of a building with intent to commit:
  (a) a felony;
  (b) theft;
  (c) an assault on any person;
  (d) lewdness, a violation of Section 76-9-702;
  (e) sexual battery, a violation of Section 76-9-702.1;
  (f) lewdness involving a child, in violation of Section 76-9-702.5; or
  (g) voyeurism under Section 76-9-702.7.

(2) Burglary is a third degree felony unless it was committed in a dwelling, in which event it is a second degree felony.

(3) A violation of this section is a separate offense from any of the offenses listed in Subsections (1)(a) through (g), and which may be committed by the actor while in the building.

Amended by Chapter 303, 2012 General Session

G

Effective 5/12/2015
Superseded 5/9/2017
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 obstruction:
  (a) the person 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 the person's entry or presence is unlawful, the person 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) the person enters a condominium unit in violation of Subsection 57-8-7(8).
(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.
(4) It is a defense to prosecution under this section that:
  (a) the property was at the time open to the public; and
  (b) the actor complied with all lawful conditions imposed on access to or remaining on the property.

Amended by Chapter 412, 2015 General Session

H

76-2-103 Definitions.

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

Amended by Chapter 229, 2007 General Session

IN THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH, **Plaintiff,** **vs.** **CULLEN CHRISTOPHER CARRICK** **Defendant.**	**INSTRUCTIONS TO THE JURY** **CASE NO. 141100418**

INSTRUCTION INDEX

1. INTRODUCTION

Now that we are about to begin the trial, there are some preliminary matters I would like to share with you so that you will better understand what will happen during the trial. In addition, I have some suggestions about your conduct during the trial.

It is your duty to follow these instructions. These instructions are preliminary and may be changed during or at the end of the trial. After you have heard all of the evidence I will read to you the final instructions of law. You will also receive a written copy of them. You must follow the instructions in deciding the case.

2. CHARGE

The Defendant is charged with the following crime:

BURGLARY, a criminal offense, in violation of Utah Code Ann. § 76-6-202, as follows: That on or about May 21, 2014, the defendant did enter or remain unlawfully in a dwelling or any portion of a dwelling with intent to commit:

(a) a felony;

(b) theft.

3. ELEMENTS

3A

Before you can convict the defendant of the crime of BURGLARY, a criminal offense, you must find from the evidence, beyond a reasonable doubt, all of the following elements of the crime;

(1) Said defendant, Cullen Christopher Carrick,
(2) in Box Elder County,
(3) did:
    (a) enter or remain unlawfully in a building or any portion of that building, which is a dwelling, with the intent to commit:
        (1) a felony; or
        (2) theft.

If you find from the evidence all of the elements defined above beyond a reasonable doubt, then you must find the defendant guilty of Burglary. If, however, you are unable to find one or more of the elements beyond a reasonable doubt, then you must find the defendant not guilty.

3B

If you find that the defendant is not guilty of Burglary, then you are to consider whether the defendant is guilty of the crime of CRIMINAL TRESPASS OF A DWELLING. Before you can convict the defendant of this crime, you must find from the evidence, beyond a reasonable doubt, all of the following elements of the crime;

(1) Said defendant, Cullen Christopher Carrick,

(2) in Box Elder County,

(3) did:

(a) enter or remain unlawfully on property that is a dwelling;

(b) and was reckless as to whether his presence would cause fear for the safety of another.

4. INFORMATION NOT EVIDENCE

The information in this case is the formal method of accusing the defendant of a crime. The information is not evidence and the law is that you should not allow yourselves to be influenced against the defendant by reason of the filing of the information. The mere fact that the defendant is charged with the offense outlined is not to be taken by you as any evidence of his guilt.

5. PLEA OF NOT GUILTY

The Defendant has pleaded not guilty. A plea of not guilty puts in issue each element of the crime(s) with which the defendant is charged. A plea of not guilty requires the prosecutor to prove each element of the crime beyond a reasonable doubt.

6. PRESUMPTION OF INNOCENCE

The Defendant is presumed innocent of the crime and the presumption continues until after considering all of the evidence, you are persuaded of his guilt beyond a reasonable doubt. The prosecutor has the burden of presenting the evidence that will persuade you of the guilt of the defendant beyond a reasonable doubt. The defendant must be found not guilty unless the prosecutor produces evidence which persuades you beyond a reasonable doubt of each element of the crime.

7. REASONABLE DOUBT

The State has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crimes charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

8. LEVEL OF PROOF

It is not necessary that the defendant's guilt should be established beyond any doubt or to an absolute certainty, but instead thereof that the defendant's guilt must be established beyond a reasonable doubt as herein defined.

9. EVIDENCE

Two classes of evidence are recognized and admitted in courts of justice upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness, who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question or tending to connect the defendant with the commission of such a crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law as stated in my instructions.

10. FUNCTIONS OF JURY

As jurors, you have two major duties:

First, you must listen to and look at the evidence and decide from the evidence what happened in this case, that is, what the facts are. It is your job and no one else's to decide what the facts are. I intend to preside impartially and not express any opinion concerning the facts. Any views of mine on the facts are totally irrelevant. This includes gestures or frowns or smiles or other body language. Comments to or questions to lawyers or witnesses by me are intended to move the case along or to clarify some evidence.

Second, you must carefully listen to the laws that I instruct you on. It is your duty to follow them in reaching your verdict.

In fulfilling your duties as jurors you must not be influenced by feelings of sympathy, prejudice or by concerns about the possible punishment in the case. In the event of a guilty verdict, the matter of punishment is the sole concern of the trial judge.

11. CREDIBILITY OF WITNESSES

In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony;

- How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- Does the witness have something to gain or lose from this case?
- Does the witness have any connection to the people involved in this case?
- Does the witness have any reason to lie or slant the testimony?
- Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
- How believable was the witness's testimony in light of other evidence presented at trial?
- How believable was the witness's testimony in light of human experience?
- Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether or not to believe a witness, you may also consider anything else you think is important.

You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

12. NOTE-TAKING

Note paper and pencils have been provided for note-taking. No juror is required to take notes. Some of you may feel that note-taking is not helpful because it may interfere with the hearing and evaluation of evidence. For example, you need to watch witnesses during their testimony in order to assess their appearance, behavior, memory and whatever else bears on their believability. Notes are only to help you remember. They should not take the place of your independent memory of the testimony. On the other hand, if you take no notes at all, you run the risk of forgetting important testimony needed for your verdict. Court reporter transcripts of testimony are usually not available during deliberations.

13. CONDUCT OF JURORS

There are a number of important rules governing your own conduct during the trial.

- You should keep an open mind throughout the trial and reach your conclusions only after you have heard all the evidence, the final instructions of law and the closing arguments of counsel and your deliberations have begun.

- Do not discuss the case during the trial, either among yourselves or with anyone else. If you discuss the evidence, you necessarily begin to form an opinion about the case. Keep your minds open and free of such opinions until you have heard all of the evidence. Should anyone happen to discuss the case in your presence, report that fact at once to any member of the staff.

- Though it is entirely natural to talk or visit with people with whom you are thrown incontact, please do not talk with any of the attorneys, defendant, witnesses or spectators either in or out of the courtroom. If you meet in the hallways or elevators, there is nothing wrong with saying a "good morning" or "good afternoon," but your conversation should end there. In no other way can the parties be assured of the absolute fairness they are entitled to expect from you as jurors. If the attorneys, parties and witnesses do not greet you outside the court, or avoid riding in the same elevator with you, they are not being rude. They are just carefully observing this rule forbidding contact.

- Since this case involves events that occurred at a particular location, you may be tempted to visit the scene. Please do not do so. Important changes may have occurred at the location since the original event. In making an unguided visit without the benefit of an explanation, you might get an erroneous or partial impression.

- Do not attempt any research, tests, experiments or other investigation on your own. It would be difficult or impossible to duplicate conditions shown by the evidence, therefore, your results would not be reliable. Nor would the parties or I know of your activities. Your verdict must be based solely upon the evidence produced in this courtroom.

If before any break or recess I do not repeat these admonitions word for word, I will simply say, "Please remember the admonitions." The rules apply at all times during the trial - - 24 hours a day, 7 days a week - - until you return a verdict in open court and are discharged by me.

Jurors have caused serious problems during trials by using computer and electronic communication technology. You may be tempted to use these devices to investigate the case, or to share your thoughts about the trial with others. However, you must not use any of these electronic devices while you are serving as a juror.

You violate your oath as a juror if you conduct your own investigations or communicate about this trial with others, and you may face serious consequences if you do. Let me be clear: do not "Google" the parties, witnesses, issues, or counsel; do not "Tweet" or text about the trial; do not use Blackberries or iPhones to gather or send information on the case; do not post updates about the trial on Facebook pages; do not use Wikipedia or other internet information sources, etc. Even using something as seemingly innocent as "Google Maps" can result in a mistrial.

Please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends on you reaching your decisions based on evidence presented to you in court, and not on other sources of information.

Post-trial investigations are common and can disclose these improper activities. If they are discovered, they will be brought to my attention and the entire case might have to be retried, at substantial cost.

14. FUNCTION OF THE ATTORNEYS

It is the responsibility of an attorney to present evidence, to examine and cross-examine witnesses, and to argue the evidence. No question, statement, or argument of an attorney is evidence, nor is an argument or statement made by a party evidence unless made under oath.

15. OBJECTIONS

From time to time during the trial, objections may be raised. When an objection is made, you should not speculate on the reason why it is made. When an objection is sustained, you should not speculate on what might have occurred or what might have been said had the objection not been sustained. Nor should you infer from any such ruling that I have any opinions on the merits of the case favoring one side or the other.

16. CONFERENCES WITH ATTORNEYS

During the trial it may be necessary for me to confer with the attorneys out of the hearing of the jury in respect to matters of law and other matters that require consideration by the Court alone. It is impossible to predict when such a conference may be required or how long it will last. When such conferences occur they will be conducted so as to consume as little of the jury's time as may be consistent with an orderly and fair disposition of the case.

17. RIGHT OF DEFENDANT NOT TO TESTIFY

The defendant may or may not testify during the trial. At no time is a defendant in a criminal case required to prove his/her innocence or furnish any evidence whatsoever. This right is guaranteed to all defendants by the Constitution and no other right is more thoroughly ingrained in our system of justice. The decision to testify or not testify is theirs alone to make, and a jury cannot draw any inference of guilt whatsoever from the fact that the Defendant did not take the witness stand in his own defense.

18. ORDER OF THE TRIAL

Trials generally proceed in the following order:

- The prosecutor will make an opening statement giving a preview of the case. The defendant's attorney may make an opening statement outlining the defense case immediately after the prosecutor's statement or it may be postponed until after the State's case has been presented. What is said in opening statements is not evidence. Nor is it an argument. The purpose of an opening statement is to help you prepare for anticipated evidence.
- The State will present its evidence. After the prosecutor finishes, the defendant may present evidence. The defendant is not required to produce evidence. If the defendant does produce evidence, the State may present additional, or rebuttal, evidence.

With each witness, there is a direct examination, a cross examination by the opposing side, and finally a redirect examination. This usually ends the testimony of that witness.

- After all the evidence is in, I will read and give you copies of the instructions, the rules of law you must follow in reaching your verdict.
- The attorneys will make closing arguments to tell you what they think the evidence shows and how they think you should decide the case. The prosecutor has the right to open and close the argument since the State has the burden of proof. Just as in the opening statements, what is said in closing arguments is not evidence.
- You will deliberate in the jury room about the evidence and rules of law and decide upon a verdict. Once you agree upon the verdict, it will be read in court with you and the parties present.

19. ADDITIONAL INSTRUCTIONS

At the close of the evidence, the Court will give you additional instructions on the law applicable to the case and the weighing of the evidence which has been introduced in the case to assist you in arriving at your verdict.

Also, in your juror books, you will find "A Guide to Jury Deliberations." The suggestions in this guide are not instructions of law but rather are simply suggestions for you to use if you find them helpful.

A GUIDE TO JURY DELIBERATIONS

You have just been instructed on the law in the trial and you are ready to begin deliberating. Before you begin, please take the time to read this note for some tips on how to organize yourselves, how to consider the evidence, and how to reach a verdict. You are free to deliberate in any way you wish. These are suggestions to help you proceed with the deliberations in a smooth and timely way.

Before you start, it would be useful to think about the following principles:

- Respect each other's opinions and value the different viewpoints each of you brings to this case.
- Be fair and give everyone a chance to speak.
- Do not be afraid to speak up and express your views.
- It is okay to change your mind.
- Listen carefully to one another. Do not let yourself be bullied into changing your opinion, and do not bully anyone else.
- Do not rush into a verdict to save time. The people in this case deserve your complete attention and thoughtful deliberation.
- Follow the judge's instructions about the law, and you will do a good job.

GETTING STARTED

Q. How do we start?

A. At first, you might want to:

- Talk about your feelings and what you think about the case.
- Talk about how to handle deliberations; lay out some rules to guide you.
- Talk about how to handle voting.

SELECTING THE FOREPERSON

Q. What qualities should we consider when choosing the Foreperson?

A. Suggestions include someone who:

- is a good discussion leader.
- is fair.
- is a good listener.
- is a good speaker.
- is organized.

Q. What are the responsibilities of the Foreperson?

A. The Foreperson should:

- Encourage all jurors to join in discussions.
- Keep the discussions focused on the evidence and the law.
- Tell the court when there are any questions or problems.
- Tell the court when you have reached a verdict.

Q. Does that mean the foreperson's opinions are more important than mine?

A. No. The opinions of each juror count equally.

GETTING ORGANIZED

Q. Are there any rules to tell us how to deliberate?

A. No. You could:

➢Go around the table, one by one, to talk about the case.
➢Have jurors speak up anytime, when they have something to say.
➢Encourage everyone to talk. Ask: "Does anyone have anything to add?"
➢Show respect to the other jurors by looking at the person speaking.
➢Take notes so you do not forget important points.
➢Have someone write down key points, perhaps on a chart, for everyone to see them.

DISCUSSING THE EVIDENCE AND THE LAW

Q. What do we do now?

A. First, review the judge's instructions on the law because the instructions tell you what to do.

Q. Is there a set way to examine and weigh the evidence and to apply the law?

A. The judge's instructions will tell you if there are special rules or procedures you should follow. Otherwise, you are free to conduct your deliberations in whatever way is helpful. Here are several suggestions:

➢Read the judge's instructions that define each charge or claim.
➢List each element that makes up that charge or claim.
➢For each element, review the evidence, both the exhibits and witness testimony, to see if each element has been established by the evidence.
➢If there is a lot of evidence, list each piece of evidence next to the element(s) it applies to.
➢Discuss each charge or claim, one at a time.
➢Vote on each charge or claim.
➢Fill out the verdict form(s) given to you by the judge.

Q. What if someone is not following the instructions, refuses to deliberate, or relies on information outside of the evidence?

A. This is a violation of a juror's oath. The presiding juror should tell the court.

VOTING

Q. When should we take the first vote?

A. There is no best time. But, if you spend a reasonable amount of time considering the evidence, the law, and listening to each other's opinions, you will probably feel more confident and satisfied with your verdict than if you rush things.

Q. Is there any correct way to take the vote?

A. No, any way is okay. You might vote by raising your hands, by written ballot, or by a voice ballot. Whatever method you use, you should express your vote openly to the other jurors.

Q. What if we cannot reach a verdict after trying many times to do so?

A. Ask the judge, in writing, for advice on how to proceed.

GETTING ASSISTANCE FROM THE COURT

Q. What if we don't understand or are confused by something in the judge's instructions, such as a legal principle or definition?

A. Send the question to the judge in written form. You must understand the instructions in order to do a good job.

THE VERDICT

A. After we have reached a verdict and signed the verdict form(s), how do we turn our verdict over to the court?

A. The following steps are usually followed:

➢The Foreperson tells the bailiff that you have reached a verdict.
➢The judge calls everyone, including you, back into the courtroom.
➢The judge or the clerk in the courtroom asks the Foreperson for the verdict.
➢The verdict is read into the record in open court by the judge.

Q. Will I be asked for my vote in open court?

A. Possibly. The judge may ask for an individual poll of each of you to see if you agree with the verdict. You need only answer "yes" or "no" OR "not guilty" or "guilty" to the questions asked by the judge.

ONCE JURY DUTY IS OVER

Q. After we deliver the verdict, may we speak with others about the case and the deliberations?

A. The judge will inform you about speaking with others. Generally, you do not have

to talk to anyone about the case. It is entirely up to you.

Q. How do we know we have done the right thing?

A. If you have tried your best, you have done the right thing. Making decisions as jurors about the lives, events, and facts in a trial is always difficult. Regardless of the outcome of this case, you have performed an invaluable service for the people in this case and for the system of justice in your community. Thank you for your time and thoughtful deliberations.

IN THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH **Plaintiff,** **vs.** **CULLEN CHRISTOPHER CARRICK, Defendant.**	INSTRUCTIONS TO THE JURY CASE NO. 141100418 INSTRUCTION NO. 20

MEMBERS OF THE JURY:

Now that you have heard the evidence, we come to that part of the trial where you are instructed on the applicable law.

I am required to read the instructions to you in open court. In addition, you will have these instructions in their written form in the jury room for use during your deliberations.

Whether a Defendant is to be found guilty or not guilty depends upon both the facts and the law.

As jurors, you have two duties to perform. One duty is to determine the facts of the case from the evidence received in the trial and not from any other source. The word "fact" means something that is proven directly or circumstantially by the evidence (or by agreement of counsel).

Your other duty is to apply the rules of law as I state them to you, to the facts as you determine them, and in this way arrive at your verdict.

It is my duty in these instructions to explain to you the rules of law that apply to this case. You must accept and follow the rules of law as I state them to you.

As jurors you must not be influenced by pity for the Defendant or by prejudice against him. You must not be biased against the Defendant because he has been arrested for this offense, or because he has been charged with a crime, or because he has been brought to trial. None of these circumstances is evidence of his guilt and you must not infer or assume from any or all of them that the Defendant is more likely to be guilty than innocent.

You must not be swayed by sympathy, passion, prejudice public opinion or public feeling. Both the State and the Defendant have a right to expect that you will

conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

INSTRUCTION NO. 21

"On or about" includes any day that closely approximates or is near the day alleged in the Information.

INSTRUCTION NO. 22

"Dwelling" means a building which is usually occupied by a person lodging in the building at night, whether or not a person is actually present.

"Enter or remain unlawfully" means a person enters or remains in or on any premises when:

(a) at the time of the entry or remaining, the premises or any portion of the premises are not open to the public; and

(b) the actor is not otherwise licensed or privileged to enter or remain on the premises or any portion of the premises.

"Enter" means:

(a) intrusion of any part of the body; or

(b) intrusion of any physical object under control of the actor.

INSTRUCTION NO. 23

You should not consider as evidence any statement of counsel made during the trial, unless such statement was made as a stipulation conceding the existence of a fact or facts.

INSTRUCTION NO. 24

It is not necessary that the Defendant's guilt should be established beyond any doubt or to an absolute certainty, but instead thereof that the Defendant's guilt must be established beyond a reasonable doubt as hereinafter defined.

INSTRUCTION NO. 25

The State has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

INSTRUCTION NO. 26

To constitute the crime charged in the Information there must be the joint operation of two essential elements: conduct prohibited by law and the appropriate culpable mental state or states with regard to the conduct prohibited by law.

Before a defendant may be found guilty of a crime, the evidence must prove beyond a reasonable doubt that the defendant was prohibited from committing the conduct charged in the information and that the defendant committed such conduct with the culpable mental state required for such offense. The culpable mental state required is intentionally, or knowingly, or recklessly.

"Conduct" means an act or omission.

"Act" means a voluntary bodily movement and includes speech.

"Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.

INSTRUCTION NO. 27

The intent with which an act is done denotes a state of mind and connotes a purpose in so acting. Intent, being a state of mind, is seldom susceptible of proof by direct and positive evidence and may ordinarily be inferred from acts, conduct, statements and circumstances.

INSTRUCTION NO. 28

A person engages in conduct knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

INSTRUCTION NO. 29

While you have a right to use your knowledge and experience as men and women in arriving at a decision as to the weight of the testimony and credibility of witnesses, your finding and decision must rest alone upon the evidence admitted in this trial. You cannot act upon the opinions and statements of counsel as to the truth of any evidence given or as to the guilt or innocence of the defendant.

You must consider all of the evidence in connection with the law as given by the Court, and therefrom reach a verdict; in doing so you must, without favor, bias, prejudice, or sympathy, weigh and consider all the facts and circumstances shown by the evidence with the sole purpose of doing equal and exact justice between the State of Utah and the defendant at the bar.

INSTRUCTION NO. 30

You are instructed that a defendant is a competent witness in his own behalf and his testimony should be received and given the same consideration as you give to that of any other witness. The fact that he stands accused of a crime is not evidence of his guilt and is no reason for rejecting his testimony. However, you should weigh his testimony the same as you weigh the testimony of any other witness.

INSTRUCTION NO. 31

The weight of the evidence is not determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence, regardless of who called that particular witness. You may believe one witness against many or many witnesses against one, as you determine.

INSTRUCTION NO. 32

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not to be concerned. Whether offered evidence is admissible is purely a question of law, and from a ruling on such a question you are not to draw any inference as to what weight should be given the evidence, or as to the credibility of a witness. In admitting evidence, to which an objection is made, the Court does not determine what weight should be given such evidence. As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

INSTRUCTION NO. 33

Upon retiring for deliberation, the Jury may take all papers and other items which have been received in evidence in the case. You also may take with you the written instructions given, and notes of testimony or other proceedings on the trial, taken by yourselves or any of you, but none taken by any other person.

INSTRUCTION NO. 34

The Court instructs the Jury that although the verdict to which each Juror agrees must, of course, be each Jurors own conclusion, and not a mere acquiescence in the conclusion of fellow Jurors, yet, in order to bring eight minds to a unanimous result the Jurors should examine with candor the questions submitted to them, with due regard and deference to the opinions of each other. A dissenting Juror should consider whether their state of mind is a reasonable one, when it makes no impression on the minds of so many Jurors equally honest, equally intelligent, who have heard the same evidence, with an equal desire to arrive at the truth, under the sanction of the same oath. You are not to give up a conscientious conclusion after you have reached such a conclusion finally, but it is your duty to confer with your fellow Jurors carefully and earnestly, and with a desire to do absolute justice both to the State and to the Defendant.

INSTRUCTION NO. 35

When you retire to deliberate, you should appoint one of your number as a foreperson, who will preside over your deliberations. Your verdict must be in writing, signed by your foreperson, and when found, must be returned by you into court.

In this case, it requires a unanimous agreement of all of the Jurors to find a verdict.

A verdict form is attached. Your verdict should be as your deliberations may result.

I have dated and signed these instructions and you may take them with you to the jury room for further considerations, but I request that you return them into Court with your verdict so they may be filed in this case as required by law.

Dated this the 22nd day of January, 2016.

District Court Judge