

Case No. 20160249-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

CULLEN CHRISTOPHER CARRICK,
Defendant/Appellant.

Second Supplemental Brief of Appellee

Appeal from a conviction for burglary, a second degree felony,
in the First Judicial District, Box Elder County, the Honorable
Brandon J. Maynard presiding

SCOTT L. WIGGINS
Arnold & Wiggins, P.C.
American Plaza II, Suite 105
Salt Lake City, UT 84101

Counsel for Appellant

KAREN A. KLUCZNIK (7912)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: kklucznik@agutah.gov

BRIAN P. DUNCAN
Deputy Box Elder County Attorney

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	II
RELEVANT PROCEEDINGS.....	2
1. Trial Evidence.....	2
2. Defendant’s rule 23B remand	6
ARGUMENT.....	10
Defendant has not proved that his trial counsel was constitutionally ineffective in his efforts to contact Matthew Bishop before trial.	10
1. Defendant cannot show deficient performance.	12
2. Defendant cannot show prejudice.	14
CONCLUSION	17
CERTIFICATE OF COMPLIANCE	18
ADDENDA	
Addendum A: June 18, 2019 supplemental briefing order	
Addendum B: Trial court’s April 19, 2019, Findings of Facts	
Trial court’s May 15, 2019, Supplemental Findings of Fact	

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	12
<i>Premo v. Moore</i> , 562 U.S. 115 (2011)	12
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000).....	11
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	<i>passim</i>

STATE CASES

<i>State v. J.A.L.</i> , 2011 UT 27, 262 P.3d 1.....	10
<i>State v. Munguia</i> , 2011 UT 5, 253 P.3d 1082.....	10

STATE RULES

Utah R. App. P. 23B.....	6
--------------------------	---

Case No. 20160249-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

CULLEN CHRISTOPHER CARRICK,
Defendant/Appellant.

Second Supplemental Brief of Appellee

Pursuant to this Court's June 18, 2019 order (Addendum A), this brief responds to Defendant's second supplemental brief asserting that defense counsel was constitutionally ineffective for not "adequately" investigating one of Defendant's alibi witnesses, Matthew Bishop. Defendant contends that had counsel interviewed Bishop earlier, Bishop might have identified two other alibi witnesses whose testimony could have then provided a "solid timeline" of Defendant's whereabouts at the time of the burglary to counter the State's evidence of his guilt. Aplt.Br. 1-10.

Defendant's claim fails. First, Defendant cannot prove his counsel performed deficiently, because competent counsel could reasonably rely on Defendant to identify his strongest alibi witnesses and counsel here contacted

all the alibi witnesses Defendant identified. Further, counsel testified that he was late in contacting Bishop because he had difficulty locating Bishop. Finally, even if counsel had been able to contact Bishop earlier and even if Bishop had informed counsel of two possible additional alibi witnesses, competent counsel could reasonably assume their testimony was unnecessary because it would be merely cumulative of the alibi witnesses already identified.

Second, Defendant cannot show prejudice. The two additional witnesses' testimony would have conflicted with both Defendant's trial testimony and the testimony of Defendant's other alibi witnesses. Thus, the additional witnesses' testimony would have undermined, rather than fortified, any alibi defense. Under such circumstances, Defendant cannot prove any reasonable likelihood of a different result had counsel called them.

RELEVANT PROCEEDINGS

1. Trial Evidence

Defendant and April Taylor were lovers when April unexpectedly died. R612. April was married at the time, but her husband, Zakary, did not find out about the affair until a few days before April's death. R436-38. Defendant and April had spent time at April and Zakary's home during their affair. R431,612. Defendant took April's death "really rough." R613.

April was Celeste Atkinson's best friend. R424. Celeste knew about April's affair with Defendant. R425. In addition, she had seen photos of Defendant, and she had met him once at April's home when she had visited April unexpectedly. R407,415,431. Celeste's husband, Steve, also knew about the affair and had seen photos of Defendant. R407,415.

Over 100 people attended April's funeral on May 21, 2014. R320,440. Defendant attended, wearing a "western cowboy" hat with feathers on it. R319,363,406-07,427,614. Kristine Starkey, who was one of the Taylors' neighbors, and her daughter Jessica Roberts, both saw Defendant at the funeral. R319,321,360. Neither of them knew Defendant at the time; but they both noticed his hat. R321,363.

It was still daylight when Kristine and Jessica went to Kristine's home after the funeral. R323-24,325,370,406,625. Once home, they saw Defendant – still wearing his hat – walking down the Taylors' driveway to the back of the Taylor house. R324,365-66,387. They then watched Defendant carefully remove the screen from a window and crawl into the Taylors' garage. *Id.*

About five minutes later, Kristine and Jessica saw Defendant crawl back out of the window and carefully replace the screen. R327,334,366,377. They then waved at Defendant, and Defendant waved back. R327-28,378.

Jessica tried to call Celeste Atkinson to see if anyone was supposed to be at the Taylor home at the time. R367,370,384. Jessica then called the police. R369. As she did, Defendant walked back down the Taylors' driveway. R329.

Just before Defendant left, Celeste's husband Steve and then Celeste herself arrived at the Taylors' home. R369,384. Both Steve and Celeste saw Defendant there. R407,427-28. Steve then saw Defendant get into an SUV that was waiting just south of the Taylors' home. R409.

By the time Officer Fielding arrived at the Taylors' home at 6:10 p.m., several people had identified Defendant on Facebook. R379,623. Officer Fielding looked up Defendant's name on his computer, got a picture of Defendant's license, and showed the picture to Jessica, who confirmed that he was the person who had just left the Taylors' home. R374,380,383,479.

One of the people who had gathered at the Taylors' home called Defendant and, after Defendant answered, handed the phone to Officer Fielding. R380,457,479. Officer Fielding told Defendant that the officer was investigating a break-in of the Taylors' home, that numerous people had identified him as the perpetrator, and that the officer wanted Defendant's side of the story. R465. Defendant did not deny breaking into the Taylors' home; rather, after asking how important it was, Defendant said he was busy and hung up. R466-67. When Officer Fielding left the sight at 7:03 p.m., it was

still light out. R623-24. Although Officer Fielding later left Defendant a message asking Defendant to call him, Defendant never did. R624.

April's husband, Zakary, had not given Defendant permission to enter the Taylors' home. R445-46. Zakary did not notice anything significant missing from his home. R444,453,481.

Defendant's defense. At his burglary trial, Defendant claimed he never went to the Taylors' home on the day of April's funeral. R615. In support, defense counsel called four alibi witnesses who, along with Defendant, testified to the timeline of Defendant's activities on the day of the funeral. R497-507 (Tanya Malmberg); R508-19 (Matthew Bishop); R594-599 (Elias Caress); R600-607 (Celeste McCulley); R609-616 (Defendant). R499,510, 595,602. All of Defendant's alibi witnesses testified that they never saw Defendant leave the funeral. R502,504,511-12,597. Further, although the burglary at the Taylors' home occurred when it was still daylight, Defendant and his witnesses all testified that it was getting dark by the time they and Defendant left the funeral. R501 (Malmberg testifying it "was almost dark"); R511 (Bishop testifying "it was getting dark"); R597 (Caress testifying "it was starting to get dusk"); R604 (McCulley testifying it "was getting to be dark"); R615 (Defendant testifying "the sun was setting"). Finally, two of

Defendant's witnesses testified that after the funeral, Defendant hung out with them for the rest of the night. R597,603-04.

Verdict. Rejecting Defendant's testimony and the testimony of his four alibi witnesses, the jury convicted Defendant of burglary. R130.

2. Defendant's rule 23B remand

On appeal, Defendant moved for and was granted a remand under Utah R. App. P. 23B to present non-record evidence supporting several ineffective assistance of counsel claims. As relevant here, Defendant claimed defense counsel was ineffective for allegedly dragging his feet in contacting Matthew Bishop, one of Defendant's alibi witnesses, because had counsel contacted Bishop earlier, Bishop may have given counsel the names of two other alibi witnesses, Edith Dawson and Cheryl Stoker. Def.Mot. at 14.

On remand, defense counsel testified that Defendant provided him with the names and contact information of four potential alibi witnesses: Tawnie Mulberg, Celeste McCulley, Elias Karras, and Matthew Bishop. Remand Trans. at 228. Defendant also identified a woman named Ally, but he did not provide counsel with any contact information for her "because he had just met her at the funeral and hadn't even caught her last name." R767-68; Remand Trans. at 126,253. Despite Defendant's testimony on remand that he vaguely referenced two other women, the trial court found that

“Defendant failed to disclose additional alibi witnesses” and that defense counsel “was not aware of them.” R780-81; Remand Trans. at 126,231-32.

Defense counsel also testified that before trial, he contacted all the witnesses Defendant identified and that during their discussions, “the witnesses gave him what was presented at trial.” R777; Remand Trans. at 231-32. Counsel testified that Matthew Bishop “was very hard to get a hold of,” that counsel “called a lot of different places” trying “to track him down,” and that “it was pretty close to trial” when counsel was able to contact him. Remand Trans. at 245,260. Defendant corroborated that Bishop was difficult to locate, testifying that he tried unsuccessfully to track Bishop down at his last known address (which led him to “an apartment complex facility that probably has 600 doors in it”) before finally sending him a message through Facebook and “begg[ing]” Bishop to call him back. Remand Trans. at 131-32.

When asked whether he would have called more alibi witnesses if they were available, counsel testified that the stories of the witnesses he called “were consistent” and that their alibi testimony would be sufficient. R777. There “was no need for two more additional witnesses,” counsel explained, because “if he called too many alibi witnesses, the jury would tune out” and “a defense loses some of its strength if the same thing is presented over and over.” R777; Remand Trans. at 233-35.

Edith Dawson testified on remand that she owned the barber shop where April had worked and that she knew Defendant (though not very well) because he sometimes came in for a haircut. Remand Trans. 55-57. Dawson testified that she, Bishop, Defendant, and two other employees of the shop, Cheryl Stoker and another woman, met at the barber shop before the funeral. *Id.* at 58. Dawson and Stoker then drove to the funeral in one car, while Defendant, Bishop, and the other employee took Bishop's car. *Id.* at 59. According to Dawson, the group left the funeral together about 30-35 minutes after the funeral ended, while it was still light outside, and drove in tandem the 20-25 minutes back to the barber shop. *Id.* at 61-63,70. After then talking about the funeral for about 30 minutes, everyone left. *Id.* at 64.

Dawson testified that the first time she was contacted as an alibi witness for Defendant was when Defendant's appellate counsel contacted her some four years after the funeral. *Id.* at 68. She further testified that she was not completely sure of the timeline. *Id.* at 67. And she testified that she never reached out to Defendant or his counsel before trial. *Id.* at 69.

Cheryl Stoke, a barber who at the time of her testimony was also serving as a councilwoman and the mayor pro temp for North Ogden City after the mayor died, also knew Defendant as one of April's customers. *Id.* at 73-74. Like Dawson, Stoker testified that she and Bishop drove in tandem to

and from the funeral. *Id.* at Unlike Dawson, though, Stoker testified that their group left 10-20 minutes – not 30-35 – after the funeral. *Id.* at 76-77,82. She also testified that they spent only “a few minutes” talking back at the barber shop before each of them went their separate ways. *Id.* at 79.

Finally, Defendant called two private investigators who testified that based on Dawson’s and Stoker’s testimony and driving times between the various relevant locations, they calculated that Defendant’s group left the funeral home at about 5:50 p.m., arrived back at the barber shop at 6:15 p.m., and then visited for about 30 minutes. *Id.* at 142-44. Thus, according to the investigators, Defendant was in the process of driving back to the barber shop when the burglary happened sometime around 5:53. *Id.* at 144,155-56,163,205.

On cross-examination, the investigators acknowledged they did not speak with, nor did their timeline take into account, the witnesses whose timeline contradicted that of Dawson and Stoker—in particular, the eyewitnesses who saw Defendant perpetrating the burglary at the Taylors’ home. *Id.* at 167-68,209-10,212-13. One of the investigators also acknowledged that the route Defendant’s group took from the funeral to the barber shop passed close to the Taylors’ home. *Id.* at 159.

ARGUMENT

Defendant has not proved that his trial counsel was constitutionally ineffective in his efforts to contact Matthew Bishop before trial.

Defendant claims defense counsel was ineffective for not contacting Matthew Bishop, one of the alibi witnesses, until just before trial. Second.Supp.Br. at 1-10. Defendant asserts counsel performed deficiently because had he contacted Bishop earlier, Bishop would have given him the names of two additional alibi witnesses, Edith Dawson and Cheryl Stoker. *Id.* at 3-5. Defendant asserts counsel's performance prejudiced him because Dawson and Stoker would have provided a "solid timeline" supporting Defendant's alibi defense. *Id.* at 10.

Ineffective assistance of counsel claims place a "heavy burden" on a defendant. *State v. J.A.L.*, 2011 UT 27, ¶25, 262 P.3d 1. To prevail, he must prove both (1) that his trial counsel's performance was deficient, i.e., "fell below an objective standard of reasonableness," and (2) that he was prejudiced by it. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). And the defendant's proof "cannot be a speculative matter but must be a demonstrable reality." *State v. Munguia*, 2011 UT 5, ¶30, 253 P.3d 1082 (cleaned up).

Concerning counsel's performance, courts "must indulge a strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90. To overcome that presumption, the defendant must identify counsel's alleged errors and show how, "in light of all the circumstances," they fell "outside the wide range of professionally competent assistance." *Id.* at 690.

Further, the reasonableness of counsel's actions may be "substantially influenced by the defendant's own statements or actions" and the "information supplied by the defendant." *Id.* at 691. Thus, "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions." *Id.*

Finally, the determinative question "is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). Because there are "countless ways to provide effective assistance in any given case" –and thus "[e]ven the best criminal defense attorneys would not defend a particular client in the same way," *Strickland*, 466 U.S. at 689—a defendant proves counsel's conduct was objectively unreasonable only if he proves that "no competent attorney" would have

proceeded as his attorney did, *Premo v. Moore*, 562 U.S. 115, 124 (2011). This is no easy task.

Proving prejudice is no easier. A defendant must prove “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. It is “not enough for the defendant to show that the errors had some conceivable effect on the outcome.” *Id.* at 693-94. Rather, the defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, [i.e.], a trial whose result is reliable.” *Id.* at 687. In other words, the “likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

Here, Defendant cannot show either deficient performance or prejudice.

1. Defendant cannot show deficient performance.

Defendant’s claim fails because he cannot show deficient performance.

First, defense counsel testified on remand that Defendant gave him the names and contact information of only four potential witnesses: Tawnie Mulberg, Celeste McCulley, Elias Karras, and Matthew Bishop. Remand Trans. at 228. The trial court found that “Defendant failed to disclose additional alibi witnesses.” R780-81. Under such circumstances, competent

defense counsel could reasonably conclude that Defendant provided counsel with the names of his strongest alibi witnesses and that Defendant did not believe any additional alibi witnesses would be necessary. *See Strickland*, 466 U.S. at 691 (“Counsel’s actions are usually based, quite properly,” on “information supplied by the defendant.”) *Id.* at 691.

Second, although defense counsel acknowledged he did not talk with Matthew Bishop until shortly before trial, counsel did not procrastinate in trying to contact Matthew Bishop. Rather, counsel testified that Bishop “was very hard to get a hold of” and that counsel “called a lot of different places” trying “to track him down.” Remand Trans. at 245,260. Defendant’s own testimony on remand confirmed that Bishop was hard to contact. Remand Trans. at 131-32 (testifying that upon learning that counsel had not yet contacted Bishop, he tried unsuccessfully to track Bishop down at his last known address before finally sending him a message through Facebook and “begg[ing]” Bishop to call him back). And Defendant fails to explain how, in light of these circumstances, counsel’s inability to contact Bishop earlier fell “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690.

Finally, when asked on remand whether he would have called more alibi witnesses if they were available, defense counsel testified that there

“was no need for two more additional witnesses” because stories of the witnesses he called “were consistent”; “if he called too many alibi witnesses, the jury would tune out”; and “a defense loses some of its strength if the same thing is presented over and over.” R777; Remand Trans. at 233-35. And Defendant cites no case law requiring defense counsel to investigate or call more than four alibi witnesses. Second.Def.Supp. at 3-9. *See Strickland*, 466 U.S. at 690-91 (counsel only has a duty “to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”).

Defendant, therefore, cannot prove that defense counsel performed deficiently related to his investigation of Matthew Bishop. His ineffectiveness claim fails for this reason alone. But even if Defendant could prove deficient performance, his claim would fail for lack of prejudice.

2. Defendant cannot show prejudice.

Defendant’s ineffectiveness claim also fails because he cannot prove prejudice. He has not, and cannot, demonstrate a reasonable likelihood of a different result had counsel been able to contact Bishop earlier, had Bishop provided him with the contact information for the two additional alibi witnesses, and had counsel decided to call those additional witnesses at trial.

Simply stated, Defendant offers no insight as to why those witnesses would have been any more credible than the alibi witnesses defense counsel called at trial or how the additional witnesses would have otherwise fortified his alibi defense. Second.Def.Supp. at 9-10. Nor can he, where the timeline Defendant claims the new witnesses would have provided conflicts with the timeline provided by Defendant's other alibi witnesses.

Although the evidence was that the burglary occurred at around 6:00 p.m, when it was still light out, all of Defendant's trial witnesses testified that it was getting dark by the time they and Defendant left April's funeral. R501 (Malmberg testifying that it "was almost dark"); R511 (Bishop testifying that "it was getting dark"); R597 (Caress testifying that "it was starting to get dusk"); R604 (McCulley testifying that it "was getting to be dark"); R615 (Defendant testifying that "the sun was setting"). In addition, McCulley repeated that claim on remand, confirming that Defendant was with her at the funeral "until it was almost dark." Remand Trans. at 103,105. And although Bishop initially testified on remand that it was light out when he and Defendant's group left the funeral, he later clarified that "just after the funeral, ... it was brighter than when we actually were driving back," that he "couldn't remember on the drive back if it was getting dark," and that it

“wouldn’t surprise” him that everyone at trial testified that it was getting dark when they left the funeral. R118-19.

According to their testimony on remand, however, Defendant’s new witnesses would have testified that Defendant and his friends left April’s funeral when it was still “bright” out. Remand Trans. at 70,75-77,82. Their testimony, then, would have conflicted with Defendant’s other alibi witnesses. Consequently, their testimony was more likely to have undermined Defendant’s alibi defense than helped it.

Defendant, therefore, cannot prove any reasonable likelihood that the result of his trial would have been different had counsel discovered these witnesses and called them to testify at trial. This is especially so where four impartial witnesses identified Defendant as the person at April’s home at the time of the burglary; two of those witnesses had seen Defendant before April’s funeral; the other two witnesses testified that when they saw Defendant at April’s home, he was wearing the same unique hat he admitted wearing to April’s funeral; Defendant did not deny breaking into April’s home but rather simply hung up when the investigating officer called him shortly after the burglary; Defendant never returned the officer’s call after the officer later left him a message asking him to call the officer back; and when asked by April’s husband shortly after the burglary why Defendant had

broken into his house, one of Defendant's alibi witnesses told April's husband that Defendant probably just wanted a memento. R324,365-66,369,384,387, 403,427,466-67,624.

* * * * *

In sum, this Court should reject Defendant's ineffectiveness claim because he has shown neither deficient performance nor prejudice related to counsel's investigation of Matthew Bishop before trial.

CONCLUSION

For these reasons as well as the reasons set forth in the State's prior briefs, this Court should affirm Defendant's conviction.

Respectfully submitted on October 28, 2019.

SEAN D. REYES
Utah Attorney General

/s/ Karen A. Klucznik
KAREN A. KLUCZNIK
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 17 pages, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☒ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Karen A. Klucznik

KAREN A. KLUCZNIK

Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on October 28, 2019, the Second Supplemental Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☒ email ☐ hand-delivery at:

Scott L. Wiggins
Arnold & Wiggins, P.C.
American Plaza II, Suite 105
Salt Lake City, UT 84101
swiggins@awpc.net

/s/ Lee Nakamura

Addenda

Addendum A

The Order of the Court is stated below:

Dated: June 18, 2019
02:11:59 PM

At the direction of:
/s/ JUDGE GREGORY K. ORME

by
/s/ Lisa A. Collins
Clerk of Court, Utah Court of Appeals



IN THE UTAH COURT OF APPEALS

State of Utah,
Appellee,
v.
Cullen Christopher Carrick,
Appellant.

ORDER

Case No. 20160249-CA

Trial Court Case No. 141100418

Before Judges Orme, Mortensen, and Harris.

This matter is before the court on Carricks motions for briefing on other rule 23B remand issues and to have the record supplemented with the rule 23B proceedings, both of which the State has stipulated to. Specifically Carrick asks this court to allow further supplemental briefing on his trial counsels alleged failure to investigate alibi witnesses and to present a timeline of his whereabouts during the time of the burglary. Carricks motions are granted, the record has been supplemented as requested, and the parties are given leave to provide the court with supplemental briefing addressing these issues.

Carrick shall submit his memorandum to the court within 45 days from the date of this order. The State shall submit its response memorandum, if it chooses to respond, within 45 days of Carricks submission. Carrick shall then submit his reply within 30 days of the States submission, if any. The memoranda shall not exceed 20 pages in length. All submissions shall comply with the Utah Rules of Appellate Procedure in form, but may be emailed in PDF rather than bound and delivered in hard copy.

End of Order - Signature at Top of the First Page

Addendum B

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

APR 29 2019

20160249-CA

STATE OF UTAH, Plaintiff, vs. CULLEN CRISTOPHER CARRICK, Defendant.	FINDINGS OF FACT Case No. 141100418 Judge Brandon Maynard
---	---

THIS MATTER IS BEFORE THE COURT pursuant to the Order of Remand Pursuant to Rule 23B of the Utah Court of Appeals filed May 23, 2018. Following a hearing held on November 13, 2018, the Court hereby enters the Findings of Fact:

TESTIMONY OF CURTIS FUNK

1. Witness provided the live stream webcasting of the funeral.
2. Upon his review of the webcast, the funeral began about 4:00 pm and ended about 5:04 pm.

TESTIMONY OF AMANDA REED

3. Witness is the cousin to the Victim's deceased wife. She and the deceased were pretty close and made telephone calls between each other. They did not see each other very much, but would at family functions.
4. Witness was present at the funeral and sat close to the front.

5. She took pictures of the balloon release that took place in the parking lot after the funeral. She provided them to someone else. After the balloon release she left. A pretty good sized crowd remained.

6. Witness also identified pictures of Nicholas Anthony Seymour (Tony). She indicated that she considers him a cousin because Tony and a first cousin of hers are half siblings. She testified that April and Tony are cousins.

TESTIMONY OF ANDREW DEAN HASLEM

7. Witnesses dated April Taylor's younger sister, Holly Lunday for about 7 years until the end of 2017. They are no longer dating, but they remained friends.

8. He knew who Nicholas Seymour was and identified him in photographs.

9. He testified that he would visit with Nicholas at family functions that he and Holly attended. He said that Nicholas was homeless most of the time because of substance abuse problems. They would bring him food down to Ogden.

TESTIMONY OF ERIN CARRICK MOORE

10. Witness is the Defendant's older sister.

11. She testified that she went with the Defendant to two meetings with Ryan Bushell, trial counsel for Defendant.

12. The first meeting was in April of 2015 and lasted 15-20 minutes. In that meeting, she stated that Mr. Bushell was given the name of Matt Bishop and a person named Ally as alibi witnesses. She did not know Ally's last name. She said that the Defendant provided a number for Matt

Bishop but didn't have one for Ally because he had just met her at the funeral and hadn't even caught her last name. No other people were mentioned at this meeting. She indicated that Mr. Bushell mentioned that the case was open and shut.

13. The second meeting occurred in the fall of 2015 and lasted 10-15 minutes. The meeting took place in Mr. Bushell's office. They talked about the events of the day. She testified that Mr. Bushell had not talked to Matt Bishop. She testified that Mr. Bushell would be providing a time chart for the trial. She testified that she never saw Mr. Bushell take notes. She testified that the Defendant told Mr. Bushell that he knew about the garage code at the April's home and therefore would not need to go through the window. The person that had given him the code was April. She testified that Mr. Bushell had not contacted Matt Bishop and asked for his contact information again. No other people were mentioned at this meeting.

14. A third meeting was on the Tuesday evening before the trial. She was asked to attend by the Defendant, but could not. She testified that after that meeting, Mr. Bushell had not contacted Matt Bishop and so she went out and found Matt Bishop's work and left a note for him and gave the information to the Defendant. They also found an address through Google and she and the Defendant went to try and find that address.

TESTIMONY OF COREE BUCK

15. Witness is an older sister to the Defendant with about 13 years between them.

16. She testified that she went a meeting on a Tuesday, just before the trial, at Mr. Bushell's office in Ogden. Mr. Bushell, the Defendant and she were the only ones at the meeting which lasted about 10-15 minutes. She testified that there had been no trial preparation and that Mr.

Bushell only had the police report. She testified that Mr. Bushell indicated that he had not been able to contact any witnesses. She testified that she was not aware of any disclosure of alibi witnesses from Mr. Bushell about 30 days before the trial. She was not aware of how Mr. Bushell was able to call multiple witnesses at trial.

TESTIMONY OF EDITH DAWSON

17. Witness did not testify at trial. She stated that April was an employee of hers who worked as a barber at Rack's Barber Shop. She knew the Defendant because he was a client of April.

18. She testified that she went to the funeral in Brigham City with another employee, Cheryl Stoker. She testified that they all met at the barbershop in Harrisville and carpooled with two cars, Cheryl and her in one – a red SUV - and Matt Bishop, the Defendant, and Ally in the other car – a little white car. They drove in tandem because they wanted to be together at the funeral.

19. She saw the Defendant during the funeral and after the funeral, at the balloon launch. After the funeral they had to ask the Defendant to come and leave as he was talking to friends. She determined that the parties, including the Defendant, left somewhere between 35-45 minutes after the funeral, that it was not even 6:00 pm and that it was light outside. She stated that the parties left together in the two cars and drove back to Rack's in Ogden. She testified that they spent about 20-30 minutes there and then all left.

20. She was first contacted about being a witness by Mr. Wiggins earlier in 2018. I knew about the first trial because of Matt being called – he works with me. We talked about Matt coming and why none of us were called. We didn't reach out to anyone because we really didn't know about what was going on.

TESTIMONY OF CHERYL STOKER

21. Witness was another witness that did not testify at trial. She has been cutting hair for 35 years and is a Councilwoman for North Ogden City for 7 years.

22. Edith, Matt, Ally, the Defendant and she met at Rack's. They drove in two different cars. She drove with Edith in her 2011 red Santa Fe, and the Defendant went in Matt's white car. They travelled in tandem together up to the funeral.

23. She uncertain of the time that the parties left after the funeral. At times she estimated 10-20 minutes. She also estimated a few more minutes than 10-20 minutes. After the parties left, the funeral, they drove back to Rack's in the same manner they drove to the funeral – never leaving sight of the other vehicle.

24. They drove on Highway 89 at the speed limit. The drive took about 22-25 minutes. They remained at Rack's for a few minutes talking about April and the funeral and then went home.

25. She was not contacted by Mr. Bushell.

TESTIMONY OF LYNETTE HATCH

26. Lynette was a friend of April Taylor. She met April through Celeste McCulley. She met the Defendant through Celeste.

27. She went to the funeral and saw the Defendant there and he was there the whole time she was there – until he left a few minutes before her. She stated that the Defendant was at the balloon release and left about 55-65 minutes after the funeral. It was bright outside when Defendant left.

TESTIMONY OF ANNIE CELESTE MCCULLEY

28. Witness was called and testified as a witness at trial. She was at April's funeral and that they had been best friends since they were age 13. She was contacted by Mr. Bushell because she was at the funeral and the time after when the events supposedly happened. She was contacted by a brief phone call right before trial. She never met with Mr. Bushell.

29. She talked for about 10 minutes with Mr. Bushell before trial. Later she said it was maybe 5 minutes. She told him what she was trying to convey, but she felt like he wasn't listening. She thought that maybe she hadn't conveyed it in the right way. She wanted him to tell her more about what was going on. She wanted Mr. Bushell to tell her about how many witnesses there would be and what they were going to talk about. She told Mr. Bushell that she thought it was an open and shut case because a group had been together at the funeral home with the Defendant at the time of the incident and that a person can't be in two places at once. She told Mr. Bushell that she was with the Defendant at the funeral home until it was getting dark.

30. She stated that she conveyed what she wanted to at the trial. However, she wanted to tell the jury that April's husband could have saved her life and didn't, and that there was a lot of underlying circumstances.

TESTIMONY OF MATT BISHOP

31. Witness was called and testified as a witness at trial. He testified that he knew April and that they went as a group to her funeral. They met at Rack's Barber Shop and split up into two groups. Cheryl and Edie went in Cheryl's car and the Defendant, Ally and he went in his white 2002 Mazda Protégé. They drove separately because he was vaping and Ally was a smoker. We

never lost sight of Cheryl's car because I had never been to the funeral chapel before. He said he had a phobia of getting lost.

32. The Defendant never left the funeral services. About 15-20 minutes after the funeral they had the balloon release. They then left about 50 minutes after that. He thought it was brighter outside after the funeral then when they were driving back. It wouldn't surprise him if other witnesses at trial said it was getting dark outside. They drove back to Rack's on Highway 89 in the same manner they came. They drove the speed limit and did not make any stops. They went into the barber shop and visited about the funeral and April's death for about 30 minutes. When the Defendant left, he watched him turn South on Highway 89. He was aware that the Defendant and April were having an intimate relationship.

33. He testified that never met Mr. Bushell before trial. He spoke to Mr. Bushell the day before trial and was told needed me to testify for the Defendant's case. He talked to Mr. Bushell for about three minutes on the phone before trial.

34. He said that he answered all of the questions that were asked of him at trial. He felt that Mr. Bushell should have asked him who was at the funeral with him.

TESTIMONY OF CULLEN CARRICK

35. Witness is the Defendant and was advised of his right not to testify.

36. Witness testified the first meeting with Mr. Bushell was about 8 months before trial. Erin, Mr. Bushell and he were present. The meeting lasted up to 30 minutes, where he told his story. At that meeting, the Defendant gave witness names to Mr. Bushell and Mr. Bushell kept asking for the names.

37. The Defendant testified there was a second meeting in the fall of 2015 that lasted about 15 minutes. Erin, Mr. Bushell and he were present. The Defendant said he told Mr. Bushell about the garage code and that he could enter the house without using a window. The Defendant testified that April had given him the garage code and he had used it 2 or 3 times to get into April's house. The Defendant testified that Mr. Bushell did not use the information at trial. Nor was he aware if Mr. Bushell investigated that information.

38. The Defendant said that he met with Mr. Bushell 2 days before trial. The meeting lasted maybe 20 minutes. He learned that Mr. Bushell never contacted any witnesses. The Defendant told his sister and sought advice as to what to do. They then tried to find the witnesses. The Defendant knocked on 2-3 dozen doors at an apartment complex he believed Matt Bishop to be living at. Having no success, he left a message on Facebook for Matt to call him. When Matt called, the Defendant asked him to call Mr. Bushell and have him Mr. Bushell's phone number. He was unaware if Mr. Bushell had hired an investigator.

TESTIMONY OF ROBERT WELLING

39. He is a licensed private investigator for Utah for 35 years. He is the owner of his company, Beehive Detective Agency, Inc. He indicated that he is a member of the Private Investigator's association of Utah and has served as a former chairman of the board. In his business he has handled all types of investigations. He testified that it takes 10,000 hours of experience to get a license and then 35 years of work from there. He has done surveillance, timeline reconstruction and witness interviews. He was hired by the Defendant for the appeal.

40. Mr. Welling testified to meeting with the Defendant, reviewing police reports, witness statements and other documents related to the trial. He created a timeline of the Defendants movements before, during and after the burglary.

41. Mr. Welling did 2 time-distance-speed calculations from the funeral home to the barber shop and determined the miles between them to be 15.7 miles and the time to drive at the speed limit was 23 minutes and 15 seconds. He made determinations of where the Defendant was at during the time of the burglary. He obtained photos from Amanda Reed of the balloon release. After reviewing a report from a forensic examiner, Clint Emmet's report of metadata from the balloon release photos, he interviewed the Defendant, Matt Bishop, Edie Dawson and Cheryl Stoker. He didn't have enough information to locate and speak with Ally. From the witnesses' timelines of events, he determined that the Defendant would have left the funeral home at approximately 5:50 pm with them and arrived at Rack's at approximately 6:15 pm. They then remained there visiting for about 30 minutes. He also obtained a call detail report showing that the burglary call came in at 6:03 pm and that the burglary was concluded 10 minutes earlier at 5:53 pm. He concluded, based on his investigation, that Edie Dawson and Cheryl Stoker were critical alibi witnesses. He also concluded that the Defendant did not have the opportunity to commit the burglary.

42. Mr. Welling looked into Nicholas Seymour as another suspect. He came up with Nicholas Seymour's name from interviewing Holly Lunday.

43. Mr. Welling determined that the April's address, the location of the burglary, was 7.3 miles away. The distance in time from the funeral home was 11 minutes and 36 seconds to April's address. He admitted that April's address was on Highway 89 between the funeral home and

Rack's. At trial, witnesses testified that they saw the Defendant commit the burglary. Mr. Welling did not interview the eyewitnesses from the police report that placed the Defendant at the burglary address while doing a timeline, but he did review their statements. He believed that any eyewitnesses, that identified the Defendant at the burglary address, misidentified him. He was directed by Mr. Wiggins not to interview the eyewitnesses. Mr. Welling said he did not weigh the credibility of the witnesses and later admitted credibility mattered.

TESTIMONY OF JEFFERY NELSON

44. Mr. Nelson has been a licensed private investigator since 1977. He helped create Private Investigators Association of Utah. It is a private group whose membership requires private investigators to have a license. He has investigated all types of criminal cases including approximately 70 murder cases some of which were capital cases. He has had training with law enforcement and attended Utah Peace Officers Association although not a sworn officer. He has been involved in a couple high profile type cases wherein at least one involved a timeline investigation. He also attended a law enforcement training relating to death and blood spatter investigations at Davis Area Training Association, it also dealt with timelines. He was hired to look at the timeline and alibi, as well as another suspect Nicholas Seymour.

45. Mr. Nelson's investigation established a similar timeline to Mr. Welling. He accompanied Mr. Welling on one trip determining distance and time of travel between the funeral home and the barbershop. He reviewed police reports, statements, a transcript of the trial, he interviewed Matt Bishop and looked at photos of the location.

46. Mr. Nelson learned that Nicholas Seymour had two burglary convictions from Texas, including a dwelling. He based his information on a document obtained from TLO. The report was generated based on information that Mr. Nelson plugged into the database. Mr. Nelson also used Mugshots.com to obtain some information on Nicholas Seymour's criminal history.

47. Mr. Nelson testified that the only connection between Seymour and the burglary was that he was related to the victim's family. Mr. Nelson acknowledged age differences, as well as that Nicholas Seymour is bald. Mr. Nelson agreed that at trial it was testified that the Defendant wore a very unique hat and that none of the pictures of Nicholas Seymour with a hat resembled such a hat. Mr. Nelson stated that it was not known when the pictures of Nicholas Seymour were taken. Mr. Nelson did not place Nicholas Seymour at the scene of the burglary. Mr. Nelson indicated that there was a difference in the eyewitnesses that testified at trial and Matt, Edie and Cheryl because they were with the Defendant longer. He agreed that there were no pictures or other corroborating evidence that showed the Defendant at the funeral.

TESTIMONY OF RYAN BUSHELL

48. Mr. Bushell was trial counsel for the Defendant. Mr. Bushell kept a file in this matter. They first met in March or April 2015. Mr. Bushell testified that he met between one dozen to two dozen times with the Defendant, including a time with Coree Buck and the Defendant just before trial. Mr. Bushell said that he was sure that he spent more than 12 hours in preparing that case with the Defendant. He also testified that he spent numerous hours working on the case without the Defendant present.

49. Mr. Bushell indicated that he had the names of individuals who would have been alibi witnesses. The names, phone numbers and some addresses written in Mr. Bushell's file were between the dates of June 1, 2015 and June 26, 2015 – they included Tawnie Mulberg, Celest McCulley, Elias Karras, and Matt Bishop. Mr. Bushell identified an email in April 2015 between him and the Defendant where it was mentioned that Matt Bishop was working at a barber shop. It took a while to find Mr. Bishop, as Mr. Bushell said he was hard to find. He was contacted a day or two before trial. He met a couple of times with the Defendant and talked about who should be called as alibi witnesses. He did not recall hearing the name of Edith Dawson or Cheryl Stoker before. Because it had been so long he did not remember anything other than the names he had written down. If he had been given other names, he would have written them down. He contacted all the witness, that the Defendant and he discussed, and the witnesses gave him what was presented at trial.

50. Mr. Bushell testified that there were four alibi witnesses at trial and their stories were consistent. Mr. Bushell stated that there was no need for two more witnesses.

51. Mr. Bushell testified that he went over the timeline with the Defendant. He said they thoroughly discussed things such as; who was there, what the Defendant was doing, whose car he was driving in, where they went, and the balloon release after the funeral.

52. Mr. Bushell stated that if he called too many alibi witnesses, the jury would tune out. He felt like there may be value to calling more witnesses unless they were cumulative. However, he felt like a defense loses some of its strength if the same thing is presented over and over. He indicated that the 3 alibi witnesses, that they presented, were sufficient.

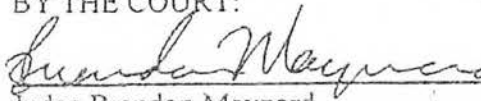
53. Mr. Bushell testified that Defendant never told him about the garage code. He further testified that he would not have brought that up at trial, as the theory of the case was that the Defendant was not there – it was cut and dry that it couldn't have been the Defendant. To indicate different, he felt, would not have made sense. He would have never presented alternate theories – because the defense was, it wasn't the Defendant, he was with friends.

54. Mr. Bushell testified that he never heard of Nicholas Seymour until trial and would have never used him as a possible alternative suspect, as the connections were not significant. He said that, if it was discussed, with no contact information or any way to contact him it would have been frivolous. Likewise, he felt that he would have had no chance of getting anything in at trial. His practice is not a shotgun approach to see what sticks.

55. Mr. Bushell talked to his witnesses and felt prepared for trial. He said it was not true that he had only spent about an hour meeting with the Defendant. Mr. Bushell submitted his alibi list 11 days before trial.

56. Mr. Bushell stated that all of his alibi witnesses testified at trial and he did not have any other alibi witnesses to call. He felt that Matt Bishop was very strong because he was the driver of the car the Defendant was in. He had no other names other than Ally. However, she could not be further identified or located. Mr. Bushell did not feel like he needed a private investigator. He testified that the Defendant couldn't have afforded one.

DATED this 29th day of April, 2019.
BY THE COURT:


Judge Brandon Maynard



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.

MANUAL EMAIL: COURT OF APPEALS courtofappeals@utcourts.gov

MANUAL EMAIL: BRIAN P DUNCAN bduncan@boxeldercounty.org

MANUAL EMAIL: KAREN A KLUCZNIK kklucznik@agutah.gov

MANUAL EMAIL: SCOTT L WIGGINS swiggins@awpc.net

04/29/2019

/s/ KATHI JOHNSTON

Date: _____

Deputy Court Clerk

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

MAY 15 2019
20160249-CA

STATE OF UTAH, Plaintiff, vs. CULLEN CRISTOPHER CARRICK, Defendant.	SUPPLEMENTAL FINDINGS OF FACT Case No. 141100418 Judge Brandon Maynard
---	--

THIS MATTER IS BEFORE THE COURT pursuant to the Order of Further Remand Pursuant to Rule 23B of the Utah Court of Appeals filed May 8, 2019. The Court hereby enters the Supplemental Findings of Fact:

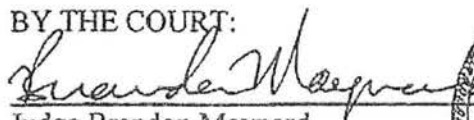
1. There were a few meetings that took place with Mr. Bushell and the Defendant. Erin Moore and Coree Buck accompanied the Defendant and were present during at least one meeting each, however, Erin Moore and Coree Buck never attended the same meeting. A discussion of alibi witnesses occurred during a meeting where Erin was present. In that meeting Mr. Bushell wrote down the names and contact information the Defendant gave him. Erin Moore indicated that only the people that rode in the Defendant's vehicle to the funeral were discussed. These names did not include Edith Dawson or Cheryl Stoker. Although the Defendant indicates that he mentioned two other "older ladies" to Mr. Bushell, neither Mr. Bushell nor Erin Moore corroborate that Mr. Bushell was told about them by the Defendant. If Mr. Bushell had been given other alibi witness names, he

would have written them down. The Court finds that the Defendant failed to disclose additional alibi witnesses and that Mr. Bushell was not aware of them.

2. During another meeting between the Defendant, Mr. Bushell, and Erin Moore, a strategy and timeline of events was discussed wherein Mr. Bushell told the Defendant that he would be preparing a time chart for the trial. This was important to establish and show that the Defendant could not be in two places at the same time. A discussion of the events led to the Defendant indicating that he had the garage code and would have no need to go through the window. Erin Moore said that during the meeting, the Defendant told Mr. Bushell that he had the garage code at April's home and, therefore, would not need to go through the window. During this discussion, Mr. Bushell was focused on trial strategy relating to the impossibility of the Defendant being at the burglary scene – later indicating that the garage code would not have been significant to him because it was not part of the theory and strategy of the defense and he would not have presented alternate theories. Although Mr. Bushell indicated that he was not told about the Defendant's knowledge of the garage code, Erin Moore corroborated the Defendant's disclosure relating to the code. The Court finds that, during the meeting, the Defendant disclosed that he knew the garage code and would not need to go through the window.

DATED this 15th day of May, 2019.

BY THE COURT:


Judge Brandon Maynard



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.

MANUAL EMAIL: COURT OF APPEALS courtofappeals@utcourts.gov

MANUAL EMAIL: BRIAN P DUNCAN bduncan@boxeldercounty.org

MANUAL EMAIL: KAREN A KLUCZNIK kklucznik@agutah.gov

MANUAL EMAIL: SCOTT L WIGGINS swiggins@awpc.net

05/15/2019

/s/ KATHI JOHNSTON

Date: _____

Deputy Court Clerk