

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

CHRISTOPHER KIM LEECH,
Defendant/Appellant.

Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from convictions for one count of aggravated murder, a first degree felony, in violation of Utah Code §76-5-202; two counts of aggravated kidnapping, first degree felonies, in violation of Utah Code §76-5-302; two counts of aggravated robbery, first degree felonies, in violation of Utah Code §76-6-302; and one count of obstructing justice, a first degree felony, in violation of Utah Code §76-8-306(1), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Randall Skanchy presiding.

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BRIEF OF APPELLANT

INTRODUCTION

Leech was charged with aggravated murder, two counts of aggravated kidnapping, two counts of aggravated robbery, and obstructing justice. The charges stemmed from the alleged kidnapping and robbery of Andy Beck and Cleat Knight; the shooting death of Knight; and subsequent destruction of evidence. The alleged offenses occurred in three locations: The Mann Way home, **Uncle Chris' apartment, and Snowbasin Resort (Snowbasin)**. There was almost no physical evidence of the offenses. The physical evidence recovered included a handgun; and two shell casings and two bullets that did not match the gun. Therefore, witness credibility was critical.

At the preliminary hearing, co-defendant Theron Myore's **testimony** was a critical for the State to establish the offenses against Leech. Leech cross-

examined Myore at the hearing, but structural and other limitations did not give **Leech a similar motive or opportunity to challenge Myore's credibility. All the testimonies of the State's** witnesses materially conflicted. The ability of Leech to undermine **Myore's credibility through cross-**examination regarding his numerous inconsistent statements was imperative to **Leech's** overall defense.

The day before trial, the State informed Leech that Myore had threatened to refuse to testify. However, it was not until the first day of trial that Leech was given notice of Myore's actual refusal. And, it was not until the second day of trial, after the jury had been selected, that the trial court ruled on **Myore's** availability and subsequent admissibility of his preliminary hearing testimony. **The court ruled Myore's** testimony was admissible under rule 804, Utah Rules of Evidence. Leech's request for a continuance was denied. **Myore's testimony was** admitted through a district attorney who sat on the witness stand, and in **response to the questions asked by counsel from the transcript, read Myore's** answers.

Leech raises two arguments on appeal. First, the trial court erred by finding Myore unavailable under rule 804, **and admitting Myore's preliminary** hearing testimony at trial. The State did not meet its high burden of proving that Leech had a **similar motive and opportunity to challenge Myore's credibility** through cross-examination at the preliminary hearing. This error warrants **reversal because absent the admission of Myore's testimony a reasonable**

likelihood existed that the result of the trial would have been more favorable to Leech.

Second, the **cumulative effect of the trial court's errors in admitting Myore's preliminary hearing testimony establishes prejudice.**

STATEMENT OF THE ISSUES

Issue I: Whether the trial court erred by admitting the preliminary hearing testimony of a critical State witness.

Standard /Preservation: “When reviewing rulings on hearsay, [this Court will] review ‘[l]egal questions regarding admissibility ... for correctness, ... questions of fact ... for clear error,’ and the final ‘ruling on admissibility for abuse of discretion.’” *State v. Garrido*, 2013 UT App 245, ¶10 (citation omitted). “An ‘error warrants reversal only if ... a reasonable likelihood exists that absent the error, the result would have been more favorable to the defendant.’” *State v. Goins*, 2017 UT 61, ¶48 (citation omitted).

Issue II: Whether the cumulative effect of multiple errors was prejudicial.

Standard of Review/Preservation: Issues raised under the cumulative error doctrine need not be preserved. This Court will “apply the ‘standard of review applicable to each underlying claim or error.’” *State v. Davis*, 2013 UT App 228, ¶16.

STATEMENT OF THE CASE

Leech was charged by with the following: Aggravated murder, a first degree felony, in violation of Utah Code §76-5-202; two counts of Aggravated

Kidnapping, first degree felonies, in violation of Utah Code §76-5-302; two counts of Aggravated Robbery, first degree felonies, in violation of Utah Code §76-6-302; and Obstructing Justice, a first degree felony, in violation of Utah Code §76-8-306(1). R.1-4, 121-22, 403-07. At the conclusion of the preliminary hearing, Leech was bound over. R.116-22, 1251-1621.

A six-day jury trial was held in September 2016. R.544-50, 562-64, 727-28, 739-41. Leech was found guilty on all counts. R.739-48; Addendum A. He was sentenced as follows: Aggravated Murder, life in prison without parole (LWOP); Aggravated Kidnapping, two indeterminate term of 15 years-to-life; Aggravated Robbery, two indeterminate terms of 5 years-to-life; Obstructing Justice, an indeterminate term of 5 years-to-life. R.805-08. The court ordered the Aggravated Murder conviction to run consecutively to one Aggravated Kidnapping conviction, all other counts were run concurrently. *Id.* Leech timely appealed. R.809-14.

The supreme court stayed **Leech's appeal** pending decisions in *State v. Pham*, 20160502-SC, and *State v. Goins*, 20160485-SC. *See* Addendum C (Order dated February 15, 2017). **Leech's appeal** was poured over to this Court. *See* Addendum D (Letter dated March 15, 2018).

STATEMENT OF FACTS

The Offense.

Cleat Knight's body was discovered in a remote area of Snowbasin on January 6, 2014. R.2231, 2282-283, 2413, 2422-428; StEx.73. **Knight's body**

under 2-3 feet of snow at the bottom of a small embankment. R.2285-288; StEx.21. He died from two gunshot wounds—one to his torso and one to his head. R.2249-250, 2257-264. The bullets entered and exited **Knight's body**. R.2249-253, 2294. **Knight's hoodie** had holes consistent with the entry and exit torso wounds. R.2238-240, 2293-296; StExs.40-41. Entry and exit wounds were found on the upper thigh and shin of his left leg and corresponded with the wounds on his torso—if his legs had been extended out in front of him. R.2243-2245, 2254-257, 2269-270; StExs.40-41. Knight had on socks but no shoes. R.2233-36, 2247-248, 2264, 2292-293. Speaker wire was wrapped loosely around his clothed wrists but they were not bound together. **Id.** No personal effects were found on Knight. R.2293-294.

The State's case.

The State alleged that on November 22-23, 2013, Christopher Leech and co-defendants Tina Soules, Theron Myore, and Viliamu Seumanu (Juice) were involved with the kidnapping and robbery of Andy Beck and Knight. R.1-4, 403-07. After being bound, robbed and blindfolded, Andy and Knight were driven to Snowbasin and Leech shot Knight in the back and forced Andy to shoot him. R.583-626, 1852-1902. The alleged offenses took place over three locations: the **Mann Way home, Uncle Chris' apartment, and Snowbasin.**

Leech destroyed clothing and weapons. R.629-33, 1907-08, 2365-72, 2511-17. The only physical evidence of the offense recovered was a handgun—found in Vernal; and shell casings and bullets that did not match the gun. **Id.** The majority

of evidence **establishing Leech's guilt** came from the testimony of Andy, Tawnie Gallegos—**Andy's friend**; Dawnie Soules—**Tina's sister and Juice's wife**; and the preliminary hearing testimony of Myore—**Tina's boyfriend**. R.565-724, 1802-2004, 2030-2169.

Background.

Andy reported Knight's death after his arrest by Agent Smiley for violating his FBI agreement. R.1922, 1942-43. Andy had agreed to work with Smiley in exchange for federal drug dealing charges being dropped against him. R.1922, 1942-43.

High-ranking member of Soldiers of the Aryan Culture (SAC). Andy served almost 10 years in prison for violating the federal Racketeer Influenced and Corrupt Organizations (RICO) act—committing a violent crime in furtherance of an organization. R.1977-78. While in prison, Andy was a SAC **“General”**—commanding 150 fellow inmates. R.1978, 1997. As a general, he was responsible for the physical punishment of those **who “stepped out of line.” R.1978-79**. Andy was convicted of felony assault by a prisoner for cutting another gang member with a knife during an ongoing gang war. R.1977-78, 2000. He was released from prison in 2009. R.1830-33, 1978. Andy has also been convicted of several felonies and crimes of dishonesty. He was on probation in November 2013, after being convicted of felony theft by receiving and theft in October and November 2012. R.1830-31, 1932-33.

Cartel drug dealing. Andy was dealing drugs for a cartel when he was arrested in June 2013, and charged with numerous offenses for possession of controlled substances and forgery. R.1931-34, 1942, 1979-80. He was desperate to get out of jail because he feared going back to prison. R.1935. Agent Smiley came to the jail to inform Andy that federal drug dealing charges would be filed unless he agreed to connect Smiley with the drug cartel. R.1922, 1942-43. To avoid prison, Andy agreed to work with Smiley in exchange for charges not being filed. *Id.* After his release, Andy reneged on his agreement and disappeared. R.1943. He continued to deal drugs while he moved from motel to motel to avoid being found. *Id.*

Andy's rearrested. Police arrested Andy in a motel, sometime between November 27 and 30, 2013, for possession of a weapon—brass knuckles. R.1920-21, 1935-44. Andy was now desperate to get out of jail before Smiley could locate him. R.1943. He tried writing the court to order his released. R.1937. He also called Tina Soules and his girlfriend, Jen, to bail him out. R.1921-22, 1937. Jen **paid Andy's bail** and he was released at the end of November. R.1921-22, 1937-1942. **On the way to Jen's home,** Andy told her about **Knight's** death, and discussed contacting the FBI. R.1922, 1944. Jen called Agent Smiley. *Id.* When Andy woke the next day, Smiley was waiting for him. *Id.*

Andy report's Knight's death. Andy admitted lying about “everything” during his interviews with law enforcement. R.1923-27, 1950-51. He claimed he **lied because he has “been a criminal for most of [his] life, so it's hard to tell the**

police the truth.” R.1959-60. Andy could not remember when he stopped lying in these interviews, but claimed he told the truth when he testified in court. R.1927, 1938-39, 1947-51, 1992.

FBI Agents interviewed Andy 3 or 4 times **about Knight’s death**, between late November and December 6, 2013. R.1922-23, 1942-45. Andy’s **version** of events kept changing, so after he failed twice to lead the agents **to Knight’s body**, Andy was booked back into jail. R.1926-27, 1944-48. Smiley said he was done with Andy, and turned the case over to Detective McCarthy with West Valley Police. *Id.*

In his December 12 interview with McCarthy, Andy said he would not talk **about Knight’s death until McCarthy released him from jail. R.1947-508, 2417.** On December 31, McCarthy drove **Andy to Snowbasin to look for Knight’s body**, but Andy failed to locate it. R.1928, 1950, 2417. On the way back to jail, Andy began to cry because he thought McCarthy did not believe him. R.2421.

Myore led detectives to Knight’s body, about 200-feet from where Andy told detectives to look. R.2422-23. Andy was charged with obstructing justice for lying to law enforcement. R.1950-51, 1973. If Andy testified truthfully, the State agreed to recommend a sentence of probation—no prison. R.1998.

Trial Testimony-Law Enforcement Interviews.

Friendship with Knight, Tina, and others. Andy testified as follows: He had known Knight almost 20 years and considered him his best friend, R1829; the two began hanging out a few months prior to November 2013, after Knight was

released from a halfway house, R.1829-30; Knight and Andy sold drugs and got high on methamphetamines (meth), R.1829-30.

Andy had dated Tina Soules in high school, and knew her older sister Dawnie, but had not seen them in 13-years, R.1821-26, 2107-08; A week prior to November 22-23, 2013, Andy got back in touch with Tina, and met Myore—her boyfriend, R.1821-26, 1965; Andy met Juice—**Dawnie's husband**—two weeks earlier when Dawnie sold him bath salts—a synthetic speed, similar to meth, R.1823-26; Andy had been using bath salts for a few months, and had previously used meth, R.1824-25; Andy met Tawnie Gallegos when he and Knight moved into a home in Magna—two weeks before Thanksgiving 2013. R.1835-37, 2035-36, 2061-62.

Andy purchased meth for Tina. Andy testified as follows: He began helping Tina sell drugs, R.1966, 1972; On November 22, 2013, Tina called and asked him to buy meth from his supplier, R.1833-34; Tina gave Andy \$2,200, for the meth, and loaned him a rented white Dodge to pick up the meth, **Id.**; **Andy's supplier** only had half of the amount of meth Tina wanted, but would receive more the next day, R.1835-37; Andy hid the meth he purchased in the rental car, R.1838-39.

Tina gave Andy permission to use some of her money to stay at a motel, with his friend Courtney, until he purchased the remaining meth. R.1835-39, 1929-30. The next day, Andy gave Courtney the rental car to pick up belongings he and Knight left at the Magna home, R.1837, 1929-30. After unsuccessfully

trying to reach his supplier, Andy drove to Taylorsville to pick up Knight, R.1837-38; They **went to a friend's home to get high on bath salts**, R.1839-40; Tina called and told Andy to hurry with the meth because her customer was waiting, but Andy still could not reach his supplier, R.1840-41.

Knight, the rental, and the meth went missing. Andy testified as follows: Knight told Andy he could buy the meth Tina wanted in Kearns, but it would cost more, R.1841-42; Andy gave Knight **the rest of Tina's money** and the rental car, and Knight left, R.1841-42; Andy claimed he did not tell Knight about the meth hidden in the rental's **trunk**, R.1842; Andy continued to communicate with Tina to let her know he was waiting on the suppliers and he would be over soon, R.1843; Andy waited several hours for Knight to return, R.1843; Andy had been communicating with Knight, but Knight stopped answering **Andy's calls**, R.1843; Tina kept calling Andy, but after Knight stopped **answering Andy's calls**, Andy **stopped answering Tina's**, R.1843-44; A few hours later, Andy told Tina to pick him up, R.1844-45; Knight was still **not answering Andy's calls**, R.1844.

Knight, the rental, and the meth went missing—Andy's interviews. In interviews with the FBI, Andy claimed the following: Knight came into possession **of Tina's rental car after** Knight took it, without permission, from the where **Andy's motel**, R.1960, 1993-94; Andy **had left the rental's** keys on his motel dresser, **id**; Andy called Knight, gave him **the motel's name**, and left the room keys downstairs for Knight before falling asleep, **id**; The next morning the rental was gone and Andy believed Knight took it, **id**.

Andy refused the **FBI's request to wear a wire when he was with Tina**, R.1945-46; When agents continued **to question Andy's changing version of** events, he **insisted "that is exactly** how everything happened... **I'm not trying to** hide stuff" **and "I told you, I have been real with you. I haven't lied to you about** anything...**I'm being straight with you. There is nothing** more. I have told you everything," R.1926-27, 1953-54.

Mann Way Home—first scene. Tina lived in a home in West Valley, on Mann Way (Mann Way home); along with her mother, her sister Teresa—**Leech's** girlfriend; and Leech. R.1846-47, 2107-12.

Andy testified as follows: Tina and her customer—a Caucasian man from Vernal—picked Andy up before sundown, R.1845-46; On the way to the Mann Way home, Andy explained that Knight had taken the rental car and gone to purchase **Tina's** meth, *id.*

At the Mann Way home, Andy and Tina left to drive around with Myore and look for the Knight, and the rental car, R.1848; Failing to locate Knight or the car, they returned to the home 20-minutes later, R.1848-49; Andy entered through the **home's** front door and went with Tina straight to the garage to smoke a cigarette and to continue texting Knight, R.1849-51; **Tina's customer came into** the garage a few times, and they smoked meth together, R.1851, 1961; Otherwise, Tina and Andy were alone in the garage, while Andy attempted to contact Knight, R.1850-52;

After they heard a truck pulled, Tina **told Andy “that we need to figure this** out because [Leech] was [t]here and he was going to freak out,” then Tina went inside, **id**; Andy had not met Leech before that night, R.1852-53; Leech came into the garage, pointed a gun at Andy, and asked what was going on, R.1852-54; **Leech’s gun was “a black glock-style, plastic, synthetic pistol,” R.1853**; Andy responded that Knight had taken the rental to buy **Tina’s** meth, and Andy was taking care of the situation, R.1853; Leech responded that if Andy **“didn’t get it taken care of it was [Andy’s] ass,” R.1853**; Andy was not tied up or blindfolded while he was in the garage, R.1866.

Leech **stayed in the garage until an “Asian guy” arrived**, R.1855-61; Leech told the Asian guy watch Andy and not let him go anywhere, R.1855-60, 1961-62; The Asian guy sat in a chair by the **garage’s** back door, **id**; The Asian guy held a gun in his lap while he smoked meth; **id**; Andy did not feel free to leave, R.1856, 1867.

Andy continued **for “at least an hour”** to reach Knight “before [Leech] took [his] phone,” R.1861-63; He had texted **Knight that “this isn’t a joke... you need to get ahold of me...you’re going to get me shot,” R.1862-63**; Andy fell asleep in the garage, after a few hours, because he was coming down from bath salts and adrenaline, R.1860-61; Leech nudged him awake, and Andy heard Dawnie and Juice from the kitchen reading his text messages, R.1861-62; Dawnie yelled for **Leech to “ask him what was in the suitcase,” which** referenced the text Andy sent Knight about picking up their belongs from the Magna home, but not the

suitcase, R.1863-64; Leech asked if the meth was in the suitcase, R.1864; Andy **told Leech** “just what [he] told Juice, [that it was] just the suitcase that was left out at the house in Magna,” R.1864.

Andy attempted to go inside, through the kitchen, to use the bathroom, R.1854-55, 1864-65; But when he opened the kitchen door, Leech told him to get back in the garage, *id*; Leech was not holding a gun, R.1855; Andy saw his friend Tawnie inside the kitchen with Leech, Dawnie, Juice, and Tina, R.1864-67; An hour later, Leech told Andy it was time to leave, *id*; Andy walked out of the **home’s** front door unassisted, he was not bound or blindfolded at this time, R.1865-67; The Asian guy stayed behind and Andy never saw him again, R.1988-89.

Andy got into the backseat of **Myore’s truck**, with Leech, R.1867-68; Myore drove, and Juice sat in front, R.1867-68; Leech told Myore, “**You know where we’re going. Let’s go,**” but no other conversation took place, R.1868-69; Andy could see where they were going, but eventually Leech told him to put his hood up and keep his head down, R.1868; Leech was the only one Andy heard directing the events, R.1880-81.

Mann Way Home—**Andy’s interviews.** **Andy’s** version of events to law enforcement differed completely.

Andy claimed the following: Leech led Andy directly to the garage, Andy never entered the home through the front door, R.1948-59, 1989-90; Leech was the only one with him in the garage, R.1948-50, 1955-64; Only Leech had a gun,

id; Leech bound and blindfolded him while he was in the garage, *id*; He was held in the garage for two days. R.1959; He never saw Tawnie in the kitchen or at the Mann Way home at all, R.1985 (FBI interview); Told **McCarthy, he was “not telling [him] anything that was not true and [he would] need [him].”** R.1955.

Andy did not report the following: Being held in a garage belonging to Tina, R.1958; Myore or his involvement, R.1984 (FBI); Any attempt to enter the home and use the bathroom, R.1958; Being guarded by an Asian man with a gun, R.1948-50, 1955-59, until asked in a subsequent interview about another Asian guy with a gun. Then **Andy responded, “I didn’t see him with a gun ... just [Leech] ... [and] I’d just be making something up”** if he said that he could remember, R.1962-64; that anyone wore a bandana over their face, or being taken to another apartment, R.1950.

Leaving the Mann Way home, Andy claimed Leech lead him directly from the garage to the truck, and Knight was already sitting inside the truck before Andy got inside. R.1950.

Mann Way Home—Tawnie’s trial testimony/interviews. **Tawnie’s version** of events at the Mann Way home differed completely from **Andy’s** and the other witnesses’ **testimony**. R.2034-2101.

Tawnie claimed the following: Tawnie lived at the Magna home for a month before Andy and Knight moved in, R.2034-35, 2061-62, 2091; They all became friends, *id*; Right before Thanksgiving, Knight and Andy quit talking to her, **and began acting “weird ... kept to the[m]selves,”** then moved out, *id*; Andy

and Knight had not left any of their belongings when they moved out, R.2036; **Andy “always talked about robbing somebody,” R.2091-93**; The next night, her friend Chris Clyde, came over with Tina around 9 or 10 p.m., R.2036-38, 2063; Tina asked her to help find Knight, R.2037-48, 2057; Clyde drove them to the Mann Way home in his gray car, R.2037-39, 2057-61; Tina insisted Tawnie come inside—grabbed her hand, told her not to worry, she would not hurt her. R.2039, 2057.

As she entered the Mann Way home: A tall, white man was sitting on the couch with a bandana around his face, R.2042, 2080; and Myore wore a bandana around his neck, R.2042-46, 2066, 2083; She explained the difference in preliminary hearing testimony –that Myore had a bandana over his face—by claiming Myore wore a bandana over his face at first, but later put it around his neck, R.2080-81.

Inside the Mann Way home: Tawnie stayed in the kitchen with Clyde, Tina, Leech, Myore, “Asian Tony,” and Teresa, R.2046, 2082-84; Tawnie did not know anyone, except Clyde, R.2036-46, 2058; Juice was never there, R.2081; Andy came out of the garage to use the bathroom, and looked scared, R.2045, 2058, 2097; Myore and Leech pointed their guns **at Andy’s head**, told **him to “get back in the room,” while** they shoved him back into the garage, R.2045-46, 2058-59, 2067-68; After the door shut, Tawnie could not hear anything inside the garage, R.2060; Leech and Myore were the only ones with guns, R.2045-46.

Tawnie said Leech was mad, R.2047, He said he would make Knight and **Andy** “pay for what they did,” R.2047; And “**he was going to shoot [them]**” for “**what they took from Tina,**” R.2047, 2083-84; Leech and Myore went through **Andy’s phone, reading text messages,** and Leech read one out loud, R.2048-49; **Leech wrote down a list of numbers from Andy’s phone,** and said he was trying to locate Knight, R.2049-50; Leech appeared to be the leader of the group, R.2054-56, 2087.

Inside the garage: Tawnie went in the garage with Leech, Myore and Clyde, R.2050, 2084-86; Andy was alone, sitting in a chair, R.2050, 2085-86; **Andy’s** hands were tied behind his back, but Tawnie did not know if they were **tied with “tape, or zip ties or a rope,” id.**; She and Clyde smoked a cigarette for a few minutes, no one spoke, so it was awkward, R.2051, 2086-87; No one in the garage smoked meth, bath salts, or had a drug pipe, R.2087.

Leaving Mann Way home: A short time later, Leech and Myore said they found Knight, R.2051-54, 2088-90; Tawnie had been at the home for twenty to thirty minutes, *id.* **Andy was “escorted” out to Myore’s truck,** R.2052-53; A bandana covered **Andy’s** face and eyes, and his hands remained tied behind his back, R.2052, 2080; Andy was put in the **truck’s backseat,** Tina and Leech got in the truck too, and Myore drove them away, R.2052-53; Asian Tony, Teresa, and the white male, who had the bandana over his face, left in a different truck, R.2041-44, 2053, 2066-67, 2087, 2107; Clyde drove Tawnie back to the Magna home, she spent the night, then moved out the next day because she was scared,

R.2053-54, 2088-90; Tawnie did not attempt to call and warn Knight because she had asked someone else to do it, R.2090; She went into hiding for a month, and did not tell anyone what happened, until law enforcement found her, R.2055, 2088-90; Tawnie never saw Andy or anyone from the Mann Way home again. R.2054-55.

Contrary to her interview statements, Tawnie denied or claimed she could not remember telling law enforcement the following: Andy and Knight acted “**weird**” because Tawnie had overheard them discussing a plan to rob Tina, R.2063-65, 2091-92; It was **Leech and “Asian Tony”** who had guns and shoved Andy back into the garage, not Myore, R.2065; “**Everyone [in the home] had a gun,**” not just Leech and Myore, R.2077, 2094; Leech did not pointed his gun at Andy or anyone else, R.2075-78 (Tawnie identified her voice on an interview recording telling McCarthy that Leech never pointed a gun at anyone, and did not pointed a gun at Andy when he came in from the garage); Tawnie could hear, through the kitchen door, **Andy “being struck several times,”** while he was in the garage, R.2060, 2066; **Andy “wasn’t duct-taped or tied or anything like that”** in the garage, R.2078-79.

Uncle **Chris’ apartment**—second scene. Andy testified as follows: Andy was taken to **an apartment in South Salt Lake belonging to “Uncle Chris”**—uncle to Tina, Dawnie, and Teresa, R.1986-87; Andy had never been to Uncle Chris’ apartment before, R.1869, 1986; When Andy arrived, a “**Mexican guy**” (Uncle Chris), whom Andy did not know, went into **the apartment’s** back room, R.1987-

88; Andy sat on the couch, and never saw Uncle Chris again, R.1869-72, 1987, 2111-12.

Soon after, Tina and Dawnie arrived and said they had reached Knight, and he would be coming over, R.1870-72, 1988; Leech then told Andy to lie on the floor, R.1872-73, 1987; Andy did **not remember seeing Leech's gun, *id.***; Leech emptied **Andy's** pockets, taking his necklace, money, and meth, R.1873; Leech **took Andy's shoes**, and pulled **Andy's** hoodie over his head, R.1874-76; His hands were tied behind his back, but he could not see who tied them, or what had been used, R.1874.

Knight came through the door and said, "**What's** going on? I got all your shit," **R.1875**, 1987; Leech responded "**It's too late for all that. Get down on the floor—next to [Andy],**" **R.1875**; When Knight got on the floor, Knight said he **knew of a "come up"**¹ they could commit, R.1876; Leech said it was too late, ***id.***; Leech ordered Knight to be searched and Andy could hear someone go through **Knight's pockets** and take off his shoes, R.1876-79; Knight's hands were tied behind his back, but Andy could not see who tied them, R.1877; Someone cut a hole in their hoods and tied them to the zipper, R.1879-80; Andy could not see with his hood covering his face, R.1880-82; Andy only heard Leech giving orders, R.1880-81.

Andy did not hear anyone tell Leech, or the others, to stop what they were doing, R.1880-81; **Andy and Knight were walked out to Myore's truck**, and Leech

¹ Andy testified that a "come up" usually means a robbery or crime. R.1965.

said **“Fucking get him in the truck,” R.1882-83**; Andy believed Juice guided him to the **truck’s** passenger-side backseat, R.1883; Knight sat in the middle of the backseat next to Andy, and Leech sat beside Knight, R.1883-84; Myore drove, and Juice sat in the front seat, R.1883-84; Leech told the others to turn off their phones, R.1907; And directed **Myore to “go up the canyon,” R.1884.**

Uncle Chris’ apartment—Dawnie’s trial testimony. Dawnie had been using bath salts in January 2014, and lied during her first interview with law enforcement, R.2105, 2152-53; She had been high on heroin, and also lied when **she testified at the Leech’s preliminary hearing, *id***; Dawnie claimed her prior testimony and interviews were inconsistent with her testimony today because she had been high on bath salts at the time and had not been able to remember a lot, **except “the tragic things,”** and not because she intentionally lied. R.2114-15, 2152-53. Dawnie insisted she was sober at a March 2015 hearing, and during a subsequent hearing, because she had been held in jail before she testified, R.2106; And, Dawnie claimed she was sober **as she testified at Leech’s trial, *id***; But she admitted she lied oath about her sobriety in those other hearings, and **Juice’s trial, R.2150-52.**

On November 22, 2013, Dawnie and Juice, her husband at the time, spent the day smoking bath salts, R.2102-13, 2154-56; Dawnie admitted she had been a drug dealer, and having been convicted of several felonies, ***id***; Dawnie and Juice had not been to the Mann Way home that day, R.2154; Instead, a male friend had dropped her and Juice off that evening **at her Uncle Chris’ apartment, R.2154;**

Dawnie went there to meet Tina and get more bath salts, *id*; When she arrived, **Myore's truck** was parked outside. R.2116-17, 2155-57. Tina had arrived with **Myore's truck with him**—Leech and Andy **had not come in Myore's truck, id**.

Dawnie, Tina, Myore and Uncle Chris hung out in the apartment and talked, R.2115-18; Andy, Leech and **an "Asian kid" arrived an hour later. R.2118-22, 2157-59**; Andy and Leech arrived together **in Teresa's truck, and the Asian kid** arrived in his own vehicle, R.2128, 2160; Dawnie said Leech looked mad, and Andy looked scared, R.2122-23, 2157-61; And Leech had a gun in his hand, *id*; Andy was not tied up or blindfolded, R.2159; Dawnie, considered Andy like a little brother, and asked Leech what was going on, but he told her not to worry about it, R.2124-25, 2161-62.

Andy and the Asian kid sat on the couch, R.2123-25; Andy started talking to everyone about bath salts, *id*; **Leech's phone rang, and** he told Juice to answer, R.2125; It was Knight calling, and **Juice relayed Leech's message that if Knight** brought the rental car back right then, nothing would happen to him, R.2125-26, 2161; Dawnie and Knight were also friends, R.2108-09, 2127; Knight arrived with the rental car 20-minutes later, R.2126-27, 2161; Dawnie, Juice and Leech went outside to meet him, *id*.

Once Knight was inside the apartment, Leech pointed his gun at Knight and Andy, and told them to get on the floor, Andy had not been tied up before that point, R.2130-31, 2161; Leech asked Myore to get something to tie them up with, and Myore left the apartment, R.2131; Dawnie told Andy to say something,

and he responded, **“I’ve known these guys all my life. I would never hurt them,”** R.2142-43; Leech told Andy to shut up, ***id***; Myore returned with speaker wire and his gun, R.2132, 2160; Leech told Myore to tie them up, ***id***; Myore bound Andy and Knights hands, and Leech tied their hoodies over their faces with the speaker wire, R.2133-38; Leech removed everything from **Andy’s and Knight’s** pockets, and stood them up, ***id***; Uncle Chris and Tina continued to talk in the kitchen, while Dawnie, Juice, and the Asian kid watched, R.2134; Dawnie cried because she thought no one would be coming back alive, including her husband Juice, R.2162-63; So while he was tied up, Dawnie asked Andy where his bath salts were, R.2143, 2164; Andy told Dawnie they were back at his motel, ***id***.

Dawnie told Leech he was “not taking [her] husband with [him],” R.2140; But Leech pointed his gun at her, and **“Juice automatically went out the door with him,” *id***. Leech and Myore walked Andy and Knight **outside to Myore’s truck,** R.2139; **Leech told Dawnie he was just “going to take their shoe from them and they’re going to walk down the mountain with their bare feet,” R.2138-41;** Leech was in charge of the events, ***id***; Leech told Dawnie and Tina to go home, ***id***; Myore drove off with Leech, Juice, Andy, and Knight, ***id***; Dawnie did not try to call police, R.2164; And she did not try to call Juice because Leech had taken **everyone’s phone, R.2164;** Dawnie told police Leech had smashed **everyone’s** phone, but admitted at trial that Juice called her from his phone the next morning, R.2165.

Dawnie left in the rental car, **and drove to Andy's motel to look for his bath salts**, R.2144, 2164; Dawnie asked the girl in **Andy's room where Andy kept his bath salts**, R.2144; The girl did not know, **but showed her Andy's** belonging, *id*; **Dawnie loaded all of Andy's** belongings—two crates and a bag—into the rental car and returned to the Mann Way home, R.2144-45; She arrived around midnight, and Tina was asleep on the couch, *id*; Dawnie returned to her home in West Jordan, *id*.

At dawn, Juice called Dawnie to pick him up at the Mann Way home, R.2146; Dawnie thought Juice seemed distant, but they never talked about what happened, R.2146-49; Andy had been taking a shower, R.2147; Andy looked sad but did not talk about what happened, *id*; Five days later, Leech came over to **Dawnie's home and smoked** bath salts with her and Juice, R.2149; As they were smoking, **"water dripped on Juice's** foil and he said it was a tear drop from [Knight]," *id*; Dawnie knew then what had happened, *id*.

Dawnie claimed she could not remember, from law enforcement interviews or previous testimony, stating the following: Telling law enforcement that **Juice's** sister dropped them off **at Uncle Chris' apartment**, not a male friend, R.2156; Leech did not pull out his gun until after Knight arrived, not that he had it in his hand when he arrived, *id*; The Asian kid had been the one to walk Andy and Knight out to the truck with Leech, not Myore, R.2165; Juice had never gone up the canyon with Leech, R.2153.

At Juice's trial, testifying Leech sat with Andy and the Asian kid on the couch, holding his gun the entire timer.2157-59; Andy had appeared normal, not alarmed, *id*; **At Leech's preliminary hearing, testifying Leech** was the only one who had a gun, not that Myore had a gun too, *id*.

Uncle Chris' apartment—Uncle Chris' testimony. Chris admitted he lied to law enforcement when first interviewed, R.2176-77, 2216; He claimed to have lied because he was afraid of Leech and the others, R.2177; He could not remember every version he told, but said everyone lies, R.2215; He claimed to law enforcement that he had not witnessed what occurred inside his apartment, on the date of the incident, because he went to his bedroom when everyone arrived. R.2177, 2206.

Chris testified as follows: Teresa called and had asked Chris if Tina could meet someone at his apartment who owed her drug money, R.2178, 2216-17; Tina and Dawnie were drug dealers, R.2208; But Tina was like a daughter to Chris, although he was not close to Teresa or Dawnie, R.2181-82, 2208.

Leech, Myore, Juice, and Andy were the first to arrive, R.2180-81; an Asian kid also showed up with them, R.2180; Chris had only seen Juice four or five times before, he did not know him well, R.2182; Chris had only met Myore once before, R.2183; Chris had never met Leech, R.2182-83, 2208-11; But Chris was not surprised to see Andy at the apartment because he had come over with Tina, a month or two before, R.2183, 2210. Andy, Juice and Myore sat on the couch, while Leech stood, R.2188.

Fifteen minutes later, Tina and Dawnie arrived, R.2181, 2187; Knight arrived last and walked inside **“like nothing was happening,” R.2188**; Leech asked Knight **for “the money or whatever,” Knight handed it to** Leech and told him everything was there, R.2188-89; Juice then pulled out a big black gun, 2189-94; Without being told, Myore left to get speaker wire, R.2189-90; When Myore returned, Leech pointed his nickel-plated gun at Andy and Knight, told them to lay on the floor, and Myore tied them up, R.2189-94; Leech took the stuff from their pockets, and took their shoes, R.2191-93; Leech tied their hoods to the zipper of their hoodies with the speaker wire, R.2192-95; Leech and Juice were the only ones with guns, not Myore or the others, R.2199.

Leech and Juice, not Myore, picked up Knight and Andy, and walked them out to the truck, R.2195-99; Chris and everyone else watched, R.2198; There was no discussion, R.2198; Chris said Leech controlled what happened, R.2199; Chris never talked to anyone who had been at his apartment again, R.2203.

Snowbasin—final scene. Andy testified as follows: He fell asleep on the way up the canyon, R.1885-87; Myore stopped for gas and Andy heard Leech tell Myore **“just to be cool,” R.1885**; Knight asked Leech to let them go, but Leech told him to shut up, “it was too late,” R.1886; Back on freeway, Leech gave Myore directions, R.1885; Andy was **“coming in and out of sleep,” so he** was unaware how long they drove, R.1885-87; Andy claimed he was able to sleep because he **“was shutting down...thought [he] was going to be dead,” R1886.**

Myore stopped in Snowbasin, Andy did not know where, R.1888; Leech took Knight out of the truck and told Juice to get Andy, R.1888; Juice helped Andy from the truck, pushed his head under a gate, and held his arm as they walked for a few hundred feet, R.1888-90; Andy could feel dirt and ice under his socks as they walked downhill, R.1889-90; Andy slipped on ice, but Juice caught and held him by the hood until the ground flattened out, R.1890; Andy heard Leech ahead telling Juice and Myore not to step in the snow, R.1889-91; No other conversation occurred, ***Id.***; Andy sat on a berm with Knight seated to his left, and their hoods were cut open allowing them to see, R.1891-92, 1895-96; Andy said it was “**pretty light out there**” and had no trouble seeing, R.1892; But he could not see where Myore, Juice or Leech were standing, R.1895-97.

While sitting, Knight looked at Andy and said, “**Sorry, bro, I guess this is it,**” R.1896-97; Leech then shot Knight once, in the back, R.1896-97; Knight said “**I’m dead**” as he fell forward, rolled a few feet, and did not move, R.1890, 1898; Andy looked back and saw Leech a few feet behind him, pointing a gun, R.1895-97; Andy waited to be shot but his hands were cut loose instead, R.1898-99; Leech stood Andy up, **and said “There is your homeboy. Finish it or you’re next,”** R.1899-1900; **Andy said “All right,”** R.1900; Leech handed a gun to Andy, and said **not to “get any stupid ideas,”** *id*; Leech held **another gun to Andy’s head,** R.1900.

Andy pointed the gun at Knight and pulled the trigger, but the gun jammed, R.1900-01; Andy handed the gun back, over his shoulder, to Leech and

saw Myore and Juice standing off to the right, R.1901; Leech gave his gun to Juice, and told him to watch Andy, while he unjammed the gun, R.1901-02; Leech handed the gun back to Andy, and Juice gave Leech back the other gun, R.1902-03; Leech put the gun back **to Andy's head, R.1902-03**; Knight was a few feet in front of Andy when he shot him once, R.1902; Andy did not know where he shot Knight, R.1902; Andy handed the gun back to Leech, R.1902-03.

After the shooting. Andy testified as follows: Myore and Juice lead the way back up to the truck, and Andy and Leech followed, R.1904; Andy saw that all three men had guns, R.1903; Everyone got into the truck, sans Knight, sitting in the same seats as before, R.1905; Leech told Andy to pull his hood up and keep his head down, **Id.**; At the bottom of the Weber canyon, **Leech pulled Andy's hood** down, gave him a cigarette, and they returned to the Mann Way home, R.1905-09; Leech told Andy to look for Knight as if nothing happened, so Leech would **not have to come after Andy's family**, R.1906-09; **Leech told Myore to "shampoo and vacuum the truck anywhere that [Knight and Andy] had been and told Juice to get all of [their] clothes and ... belonging and burn them."** R.1908. Leech said he would take care of the guns. **Id.**

It was close to daylight when they arrived back at the Mann Way home, R.1910; Leech told Andy to take a shower and put his clothes outside the bathroom door, R.1910-11; Tina brought Andy a change of clothes, R.1911; Andy was not given his property back, R.1912; Andy used **Tina's phone to call** Courtney to pick him up, and they returned to the motel, R.1912-15; He did not tell anyone

what happened to Knight, R.1914, 1921; Courtney told Andy that Dawnie had taken all of his and **Knight's** belongings, R.1915.

Andy left the motel to spend the night at a business where his friend worked, R.1916; The next morning, Tina picked Andy up, took him to back to the Mann Way home, **and returned his phone, R.1916; Andy's call log and** text messages had been deleted, R.1917; Two days later, Andy and Tina stayed at Embassy Suites together, R.1918-20, 1967-71; When Myore, Leech, and Dawnie came over, Andy left, returning only after Leech and the others left, *id.*

Andy and Tina stayed at a different motel the next day, R.1920; Andy **continued to help Tina with drug dealing by driving a woman to her doctor's** appointment to ensure that she received the prescription pills she owed Tina, R.1966-67; The following morning, Andy was arrested, R.1920.

Myore's Preliminary Hearing Testimony.

Myore was charged with murder, and two counts of aggravated kidnapping, R.634; He cooperated with the State with hope to limit his exposure to punishment, R.634-35; Myore did not want to be convicted of murder and sentenced to a long period of time in prison, R.634-35; He hoped by testifying, his punishment would be as low as probation, R.635; Myore had not been told a conviction for aggravated kidnapping carries a possible sentence of life in prison, R.1413; Myore would be upset if he went to prison and was not eligible for parole for decades. *Id.*

Myore testified as follows: In November 2013, he had been dating Tina for about a year, R.567-68; he would drive Tina around Salt Lake and Vernal to sell drugs and collect money, R.572-73, 660-61, 702; And Andy would also drive Tina around to collect drug debts, R.662.

Myore visited Tina at the Mann Way home on November 23, R.567-68; He had known Juice for about a year, and also knew Dawnie, R.569-70; Myore met Leech a few times, *id.*; but had never before met Andy or Knight, R.570-71; and did not know a Chris Clyde, R.640-49. Tina, her mother, Teresa, and Leech were at the home when Myore arrived, R.574-76; a **white “cowboy” guy from Uinta Basin** was also at the home, R.654; Myore testified no one had been wearing a bandana covering their face, R.640-49.

Tina complained to Myore that Andy had not returned her rental car, R.573-76; When Juice and Dawnie arrived, Myore drove them and Tina around Kearns to look for the rental car, Andy had not been with them. R.576-79, 637; As they drove, Tina tried to contact Andy, R.578-79; Myore did not remembering Tina telling him that Knight had the rental, R.579; That night was the first time Myore heard Knights name, R.580; Myore drove them around for an hour, but was unsuccessful at locating the rental, so they returned to the Mann Way home, R.581.

Myore sat in the kitchen and saw Leech go into the garage two or three times, R.581-82, 590; Leech acted agitated, R.590; Leech had a square black handgun in his pants, but never threaten anyone with it, R.590-91; Myore did not

know anything was going on until Leech flashed his gun and said things about being mad, R.591; Myore could not hear if anything was happening in the garage because the door was closed, R.586; Myore said Tina never went inside the garage, R.586; Myore was unaware Andy was in the garage until Myore went out there to smoke, R.582-83; Andy and an Asian guy were sitting together, passing a drug pipe back and forth, and smoking meth, R.585, 638, 651-52; Andy passed the pipe to Myore, and he got high with them, ***Id.***; Myore was in the garage for about 10 minutes, but did not speak to Andy or the Asian guy, R.584, 651-52; Myore had seen Andy come into the home to use the bathroom and then return to the garage, R.585.

Myore heard Leech and Tina whispering, but could not hear what they said, R.587; He did not remember telling the district attorney they were mad at Andy for not knowing where Knight was with the rental car, R.588-89; Myore did not remember saying Dawnie and Juice were also involved in this whispered conversation, R.589-90.

Myore brought his gun in from the truck to show Leech, then returned it, R.592, 656-57; Tina said she found Knight and that he would meet them at Uncle **Chris' apartment, R.593**; Leech asked Myore to drive him, Andy, and Juice to the apartment, R.593-94; Andy had not been bound or blindfolded when he got into **Myore's truck, R.594**-95; Leech sat in the front seat, and Juice sat in the backseat, R.595; No conversation occurred on the way to the apartment, R.597.

Uncle Chris was alone when they arrived, R.597; Everyone either sat on the couch, or smoked a cigarette, while they waited for Knight, R.598; Tina, Dawnie, and the Asian guy arrived 10-15 minutes later, R.598-99; Myore did not know how the Asian guy got there, R.598-99; Leech told Myore to wait outside for Knight, R.598-99; Myore did not see Knight arrive, but said he showed up about 20-25 minutes later, R.600; Leech escorted Knight into the apartment, R.601-03; Leech pointed his gun at Knight and Andy, and told them to lay on the floor, R.601-03; Leech was the only person with a gun, **Myore's gun was in his truck**, and Juice did not have a gun, R.608-09.

Leech asked Myore for get something to tie up Knight and Andy; Myore brought in speaker wire from his truck, R.604; Leech told Myore to tie them up, R.604; Tina, Dawnie, and Juice watch what happened, R.605-07; But Chris stayed in his bedroom, and only came out a few times, R.605; Chris had not come out while Knight was there, R.605.

Leech helped with tying them up after the speaker wire kept breaking, R.606; Leech tied up one, and told Myore how to tie up the other, R.606; Leech emptied their pockets, R.607-08; Myore went and waited outside in his truck, R.609-10; When **Juice escorted Knight out, Knight's hood** had been tied around his face, R.610; Juice put Knight in the middle of the backseat and got in next to him, R.610-11; Leech brought Andy out, his hood had also tied around his face, and put him in the backseat, R.611-12; Leech got in front, and told Myore to start

driving, R.612; No conversation occurred other than Myore asking for directions, R.612-17.

Myore drove through Parley's Canyon towards Park City, R.613; When he stopped for gas, he **said "shit" when he** noticed three police officers at the gas station, R.614-15; Leech did not say anything about the officers, but told Myore to pay with cash, R.615; Myore returned to the freeway and ended up at Snowbasin, R.615-17; Leech directed Myore to a road that had a metal gate, R.617.

After Myore parked, Leech asked for his gun, R.617-18; Leech carried **Myore's gun in his hand**, and kept his own gun in his waistband, R.618-623; Juice did not have a gun, R.619; Leech held both Andy's and Knight's **arms**, while he escorted them under the gate, and down a small hill, R.619-21; Snow covered a bit of the ground, but it was melting and mud covered most of the road, R.621; The moonlight allowed them to see, R.620; Leech lead the way to where they were going, Myore and Juice followed, R.620-21; No one talked, R.621-22.

They walked down to a small tree on the side of the road, R.622; Myore did not see Andy ever slip, R.685; Leech told Andy and Knight to kneel a couple feet in front of him, R.623-25; Myore stood 15 feet away, R.623; Leech shot Knight once in the back, R.623. Myore did not know which gun Leech used, R.623; Knight fell and rolled down the embankment, about 10 feet, R.625; Leech said something to Andy and Andy was somehow untied, R.625-28; Andy walked with **Leech down to Knight's body**, R.626-28; Leech handed Andy a gun, and Andy shot Knight, R.626; No talking occurred between Leech and Andy before Andy

shot Knight, R.695; They came back, walked passed Myore and Juice, and lead the way back to the truck, R.626-27.

Leech returned Myore's gun, R.628; They arrived back at the Mann Way home around 5 or 6 in the morning, R.630; Tina, Dawnie, Teresa, and their mom were at the home, R.630; Myore gave his gun back to Leech to destroy, R.628-29; Leech told Myore to have his truck detailed, but Myore said he did not do it, R.631-32; Myore gave his boots, but not his clothes, to Juice to be burned, R.631; Andy showered and also gave his clothes to Juice, R.632.

Myore contacted police after he learned they were looking for him, R.698; He was interviewed by law enforcement 5 or 6 times, **and lead police to Knight's body**, R.699; Myore spoke to police and testified because he did not want to spend his life in prison for a murder he did not commit, R.700.

Admissibility Determination.

Myore's refusal to testify. The possibility of Myore refusing to testify was raised for the first time during the final pretrial conference on September 1, 2016—two days before trial.² **R.1626. Myore was still “engaged in plea negotiations” with the State**, and his counsel **did not “know at this point if he is going to assert his Fifth Amendment ... or if he intends to take the stand at the trial next week.”** R.1626-27. The State noted that it had **first learned of Myore's unwillingness to testify two days prior**. R.1627.

The State noted Myore had **made “several statements to law enforcement”**

² The first day of trial began Tuesday, September 6, 2016. R. Monday, September 5, was a holiday—Labor Day. R.1632.

and lead police to Knight's body. R.1627-28. Myore had subsequently made "several other statements," "testified at the preliminary hearing against all the defendants," and testified against Juice, at Juice's trial. R.1628. Upon learning of Myore's potential refusal to testify, the State prepared a conditional use immunity letter. R.1628. Under the State's use immunity, Myore could "be compelled to testify [but the State] ... cannot use anything ... in this case against [him]." R.1628. The State informed Myore of the potential penalties he faced should he refuse to testify. R.1629-30. The State requested that Myore "take the stand, and ... either testify or refuse to testify and then the Court can order him to testify. If ... he refuses ... the Court can hold him in contempt, he is unavailable, and the State ... will use his preliminary hearing transcript ... as an unavailable witness under Rule 804." R.1631.

A telephone conference was conducted the next day, September 2, where Leech was told of the possibility of Myore refusal to testify. R.1632, 1643-44.

On the first day of trial, before jury selection, Leech noted that the "specter of Mr. Myore refusing to testify" still needed to be addressed, and it could not be "overstate[d] how big a deal" that prospect would impact his defense. R.1650. Presuming the State "move[d] to introduce Myore's transcript" by reading it into the record, Leech opposed such motion. R.1650. And, "depending on the Court's ruling, [Leech] might [seek] a continuance or leave to file interlocutory review." R.1650. The court determined that it would hear arguments the next day. R.1650. But the court "indicate[d] that the inability or unwillingness of one of the parties

to testify makes **them unavailable by definition,**” so if the defense “**need[ed] to prepare an interlocutory appeal, [it] should be about it right now.**” R.1651.

The next day, without the jury present, the State called Myore to the stand. R.1758. Myore invoked the 5th Amendment. R.1759-60. Given the conditional use immunity he had been granted, the court ordered Myore to testify, but he continued to refuse. R.1761. **The State moved to admit Myore’s preliminary hearing testimony,** arguing Leech had been given the opportunity to cross-examine him. R.1778-82.

Leech’s objection. Leech objected, arguing that he did not have a similar motive or prior **opportunity to challenge Myore’s credibility** through cross-examination. R.1763-86. Leech argued that both Utah law and court practice made it clear that credibility is not an issue during a preliminary hearing. R.1763-64. Because **“this was an aggravated murder trial where there is almost zero physical evidence,”** Leech argued **Myore’s credibility** and **“the credibility of [the] other witnesses is the only issue.”** R.1769-70. Leech argued there was a **“huge volume of material[] that [he] did not have at the time of [Myore’s] ... the preliminary hearing.”** R.1768. Leech referenced a **“binder of all of the statements [Myore] has made, double sided, ... and, literally, not a page goes by where there is not something different than the previous time, or contradicts a later statement.”** R.1769. And just a **“week and a half [before trial, counsel received] more stuff about [Myore] from another interview [the State conducted] over the**

summer.” R.1770. Defense counsel requested that the court either grant a continuance or exclude **Myore’s testimony**. R.1777-84.

Trial court’s determination. The court ruled Myore’s unavailability met the requirements of rule 804, Utah Rules of Evidence. R.1786, 2341. The trial court found that Myore was **“unavailable as a witness” for “refusing to testify about the subject matter despite a court order to do so.”** R.1786. The court determined **Myore’s preliminary hearing** testimony was admissible because Leech had the opportunity to cross-examine Myore at the preliminary hearing. R.1765, 1786. **Myore’s preliminary hearing testimony** was read into the record. R.565-726. In doing so, a district attorney sat on the stand **and read Myore’s testimony in response to either the prosecutor’s or defense counsel’s questions**, as asked in the preliminary hearing. R.565-726, 2393.

SUMMARY OF ARGUMENT

Point I. The trial court violated Utah Rule of Evidence 804 by admitting the preliminary hearing testimony of Myore—a critical State witness. Preliminary hearing testimony is only admissible under the rule if the witness is (1) unavailable and (2) the defendant had a prior opportunity and similar motive to cross-examine the witness. Those admissibility requirements were not satisfied here. Both defense counsel and the magistrate recognized that the limited purpose of the preliminary hearing was to determine whether probable cause existed. Due to this, and other limitations, Leech did not have a prior opportunity **and similar motive to develop Myore’s testimony. Where Myore’s** testimony

failed to meet these conditions, rule 804 precluded, as a matter of law, its admission **at trial. Absent the admission of Myore’s testimony**, a reasonable likelihood of a more favorable result for Leech existed, requiring reversal of his convictions and a new trial.

Point II. This Court should consider the cumulative prejudice of these errors.

ARGUMENT

I. Admission of the preliminary hearing testimony of Myore—a critical State witness—violated rule 804, because Leech did not have a similar opportunity or motive to develop Myore’s testimony.

This Court should grant Leech a new trial where the trial court erred in admitting the preliminary hearing testimony of Myore—a critical State witness—because Leech did not have a similar opportunity or motive to develop the testimony at the preliminary hearing, as he would have had at trial. *See State v. Goins*, 2017 UT 61; *State v. Ellis*, 2018 UT 2; Utah R. Evid. 804; Utah Const. art. I, §12 (limiting the purpose of preliminary hearings to establishing probable cause). Admission **of Myore’s** preliminary hearing testimony was prejudicial—requiring reversal and remand for a new trial. *See Goins*, 2017 UT 61, ¶48 (holding **admission of witness’s preliminary hearing testimony under rule 804 was error, warranting reversal because** “a reasonable likelihood exist[ed] that absent the error, the result would have been more favorable to the defendant”).

Myore’s **preliminary hearing testimony was hearsay**, and its admission implicated the rule against hearsay. Utah R. Evid. 804. Myore’s **testimony “was therefore admissible only if it qualified under an exception to the bar on hearsay”**

under rule 804. *Ellis*, 2018 UT 2, ¶24; Utah R. Evid. 804. For preliminary hearing testimony to be admissible under rule 804, (1) the declarant must be unavailable; **and (2) the declarant’s testimony must have been “given ... at a trial, hearing, or lawful deposition;” and is “now offered against a party who had ... an opportunity and similar motive to develop it by direct, cross-, or redirect examination.”** Utah R. Evid. 804 (b)(1)(A)-(B); *Goins*, 2017 UT 61, ¶25.

Under the first admissibility prong, the court found Myore “**unavailable as a witness**” for “**refusing to testify about the subject matter despite a court order to do so.**” Utah R. Evid. 804(a)(2). Under the second admissibility prong, the court found Leech had been allowed to cross-examine Myore at the preliminary hearing, therefore, he **had “an opportunity and similar motive to develop” Myore’s** testimony. Utah R. Evid. 804 (b)(1)(B); R.1784-87. The court determined Myore’s unavailability met the rules requirements, and admitted the testimony. *Id.*

Recent, our Supreme Court held that rule 804 precludes, as a matter of law, the admission of preliminary hearing testimony at trial. *See Goins*, 2017 UT 61, ¶29 (overruling per se rule—that **the rules of evidence do “not preclude, as a matter of law, testimony given in a preliminary hearing from being admitted at trial”** in *State v. Brooks*, 638 P.2d 537 (Utah 1987)). Therefore, the trial court’s **admission of Myore’s testimony** under rule 804 was error, prejudicing Leech and his right to a fair trial.

Myore’s testimony was inadmissible because defense counsel did not have

an adequate opportunity and similar motive to develop it during the preliminary hearing. *See Goins*, 2017 UT 61, ¶34. At the time of the preliminary hearing, Leech was without the benefit of important, later-obtained, discovery. *See infra* Point IA. And based on the structural limitations imposed on preliminary **hearings, details critical to Leech’s defense were not developed. *Id.*** Due to these and other errors, defense counsel did not have an adequate opportunity and similar motive to develop Myore’s **testimony during the preliminary hearing**, making it inadmissible, as a matter of law, under rule 804. *See Goins*, 2017 UT 61, ¶34. In addition, **Myore’s was a critical State witness and** the admission of his testimony was prejudicial because **“a reasonable likelihood exists that absent the error, the result would have been more favorable”** to Leech. *Id.* ¶48; Point IB, *infra*.

- A. *Myore’s preliminary hearing testimony was inadmissible because Leech did not have an adequate opportunity and similar motive to develop the testimony during the preliminary hearing.*

Under rule 804(b)(1), former testimony of an unavailable witness “is admissible against a defendant only if defense counsel had both (1) an opportunity and (2) similar motive to develop the testimony at the preliminary **hearing.”** *Goins*, 2017 UT 61, ¶29; *see id.* ¶30 n.8 (noting *Brooks’* court discussed predecessor to rule 804). In 1987, the supreme court announced a per se rule that **did “not preclude, as a matter of law, testimony** given in a preliminary hearing from being admitted at trial” under the rules of evidence. *State v. Brooks*, 638 P.2d 537 (Utah 1987) (**holding “cross-examination takes place at preliminary**

hearing and at trial under the same motive **and interest**”) *superseded by constitutional amendment as stated in Ellis*, 2018 UT 2, ¶37; *Goins*, 2017 UT 61, ¶30 (acknowledging *Brooks* created per se rule allowing the admissibility of preliminary hearing testimony “so long as the requirements of unavailability and an opportunity to cross-examine are satisfied”).

Under *Brooks*, confrontation considerations regarding the admissibility of preliminary hearing testimony at trial were determined under the Sixth Amendment by using the two-pronged test outlined in *Ohio v. Roberts*, 448 U.S.56 (1980). *See Brooks*, 638 P.2d at 539. At the time, neither Utah’s Constitution, nor its rules of evidence, provided a separate basis for analyzing determinations of admissibility. *Id.* But recently, our supreme court overruled *Brooks’* per se rule, finding that the premise of its “decision had been overtaken by a constitutional amendment—an amendment limiting the function of preliminary examinations...to determining whether probable cause exists.” *Ellis*, 2018 UT 2, ¶38 (cleaned up); *Goins*, 2017 UT 61, ¶29.

The supreme court recognized the amendment to article I, section 12 of the Utah Constitution, “undermine[d] one of *Brooks* key premises—that defense counsel’s motive and interest are the same in either setting.” *Id.* ¶31 (quotation cleaned up). “Since 1994, preliminary hearings—at least those that function as the amended constitution envisions—potentially limit the scope of cross-examination such that the blanket statement issued in *Brooks* no longer rings true.” *Id.* ¶32. This is because the amendment “specifically limit[ed] the purpose

of preliminary hearings in a manner that can undercut defense counsel's opportunity to cross-examine witnesses at a preliminary hearing and thereby modif[ied] the interest counsel has in developing testimony on cross-examination." *Id.* ¶41. Given this limitation, "a defense attorney...does not have an incentive to prepare to thoroughly cross-examine on credibility." *Id.* ¶34; *see id.* ¶33 (recognizing "by and large, article I, section 12 places most credibility determinations outside the reach of a magistrate at a preliminary hearing").

In this case, the record reflects that both the magistrate and defense counsel recognized that the purpose of the preliminary hearing was limited to a determination of probable cause. R.832-33, 1763-86. The magistrate began the hearing by clarifying, to Leech and the co-defendants, that "this is a probable cause hearing, it's not a trial" and "[d]ifferent standards of proof apply." R.833. He stated the "purpose of th[e] proceeding" was "for the State to put on evidence in an effort to demonstrate probable cause that the offenses charged were committed and that you were the ones who committed those offenses." R.832-33. And he explained that "[o]ne of the most important" differences between a preliminary hearing and a trial was "that any doubts or questions about evidence . . . get resolved in favor of the State and against the defendants." R.833. The magistrate continued by saying, "If probable cause is found under that analysis, then the case would be bound over for further proceedings at which time you would all be afforded your entire complement of constitutional rights." R.833. The magistrate's explanation denotes its understanding of the limited purpose of

the preliminary hearings. *See Goins*, 2017 UT 61, ¶34; *Ellis*, 2018 UT 2, ¶38.

Similarly, defense counsel also referenced the long-established understanding among criminal practitioners that witness credibility has little to “**no bearing on the issue of probable cause,**” and a **magistrate** “may limit or prohibit [such] cross-examination.” *Goins*, 2017 UT 61, ¶35; R.1763-86. Counsel argued rule 804, was not a blanket rule allowing for the automatic admission of a **witness’s preliminary hearing testimony based solely on unavailability**, and counsel’s **technical** opportunity to cross-examine. *Id.* ¶29; R.1762-63; *See Patterson v. Patterson*, 2011 UT 68, ¶12 (“An issue is preserved ... when it has been ‘presented to the district court in such a way that the court has an opportunity to rule on [it]’”).

Specifically, counsel argued the trial **court must look at “the motive at the preliminary hearing” when determining** whether preliminary hearing testimony was subject to “the right[s] to confrontation and ... due process,” encompassed within rule 804. R.1763; *Goins*, 2017 UT 61, ¶29. Counsel further contended that it has been made “**very clear that credibility is not an issue at preliminary [hearings].**” R.1763; *Goins*, 2017 UT 61, ¶33 (recognizing “by and large, article I, section 12 places most credibility determinations outside the reach of a **magistrate at a preliminary hearing**”).

Defense counsel recounted that in his years of doing preliminary hearings, he could not “count how many times [he] had been told ‘Credibility is not an issue. Move on, counsel. That’s for a trier of fact.’” R.1763-64. And he agreed that

was “a correct statement of law.” R.1764. However, counsel pointed out that it would be a “little disingenuous to not recognize ...the differences between a prelim[inary hearing] and a trial.” R.1764. Most significantly, is “the practice in this jurisdiction to limit cross-examination at preliminary hearing[s].” *Id.* Due to these limitations, counsel argued “Myore was not asked about any of his prior statements ... he was not cross-examined as to his credibility ... and that wasn’t done because ... it’s not relevant at the prelim[inary hearing but] that ...absolutely would have been done at trial.” *Id.*; *Goins*, 2017 UT 61, ¶34.

Like in *Goins*, the State here relied on *Brooks*, and subsequent case law, to support its argument for the admission of Myore’s testimony at trial. *See Goins*, 2017 UT 61, ¶30; R.1780-82. The State argued that defense counsel relied on “the same arguments that Counsel made 35 years ago [in *Brooks*] ... that the very nature of a preliminary is different in motive and interest.” R.1781. The State contended that under state and federal case law, it had been settled that “[d]efense counsel’s motive and interest are the same in either setting. He acts in both situations in the interest of and motivated by establishing innocence of his client. Therefore, cross-examination takes place at [a] preliminary hearing and at trial, [with] the same motive and interest.” *Id.* The trial court agreed. R.1765, 1786.

But in *Ellis*, the supreme court recognized that “the premises of the *Brooks* decision had been overtaken by [] constitutional amendment ... [and] that ‘[its] blanket statement ... no longer rings true.’” *Ellis*, 2018 UT 2, ¶40 (discussing the

Goins' decision's foreclosure of the admissibility of preliminary hearing testimony at trial absent a "showing that 'defense counsel really did possess the same motive and was permitted a full opportunity for cross-examination'"). As a result, "Ellis [was] entitled to the benefit of the *Goins* analysis. *Id.*

Like the defendant in *Ellis*, Leech too "is entitled to the benefit of the *Goins* analysis" where his case was pending on direct review when the new rule in *Goins* was announced. *Id.* (citing *State v. Guard*, 2015 UT 96, ¶67, 371 P.3d 1). The State provided no basis to "conclude that [Leech's] preliminary hearing motive to cross-examine was similar to what would have existed at trial." *Ellis*, 2018 UT 2, ¶40 (citation omitted). Therefore, the trial court erred in admitting Myore's preliminary hearing testimony under rule 804. *Ellis*, 2018 UT 2, ¶40; *Goins*, 2017 UT 61, ¶46.

B. *The error was prejudicial.*

The improper admission of preliminary hearing testimony at trial warrants reversal where there is a reasonable likelihood that the evidence affected the outcome. *State v. Richardson*, 2013 UT 50, ¶40 (recognizing errors in interpreting rules of evidence require reversal when "there is a 'reasonable likelihood' that the verdict would have been different" (citation omitted)). In other words, Leech need not show "the jury would have more likely than not" returned a different verdict but for the improperly admitted evidence. *State v. Hales*, 2007 UT 14, ¶92. Rather, error is prejudicial if there is "a probability sufficient to undermine confidence in the [jury verdict]." *Id.* ¶86. "Prejudicial

analysis is counterfactual” in this context, requiring the Court to “assess the likely outcome of a trial in which [Myore’s] preliminary hearing testimony is eliminated and the jury is left to consider the remainder of the prosecutor’s case.” *Ellis*, 2018 UT 2, ¶42.

Myore’s was a critical State witness whose testimony “provided key pieces of evidence that the jury likely credited” and was necessary for the State’s to establish Leech’s culpability. *Id.* ¶43. Admission of Myore’s testimony was prejudicial because (1) a critical aspect of Leech’s defense strategy—the opportunity to undermine Myore’s credibility through cross-examination—was rendered substantially ineffective; (2) the State relied heavily on Myore’s testimony in both its opening statement and closing argument; (3) Leech was denied a continuance to explore the likely possibility that Myore would become available to testify or to allow the opportunity to prepare its defense in light of the court’s admissibility ruling; and (4) without the admission of Myore’s testimony, the remaining evidence was so inherently unbelievable that the jury would have been unlikely to rely on it to convict.

1. Leech was prejudiced by the admission of Myore’s testimony because a critical aspect of Leech’s defense strategy—the opportunity to undermine Myore’s credibility through cross-examination—was rendered substantially ineffective.

Undermining Myore’s credibility, through cross-examination of his inconsistent statements, formed the crux of Leech’s defense. *See* Utah R. Evid. 801 (d); *State v. King*, 2012 UT App 203, ¶36 (referencing supreme court’s suggestion” that inconsistent statements are ‘not limited to diametrically opposed

answers but may be found in evasive answers, inability to recall, silence, or **changes of position**”). But **Myore’s testimony was ruled admissible on the second** day of trial, after the jury was selected. R.1786. Accordingly, a key aspect of **Leech’s defense** strategy—challenging the believability of Myore—was severely impacted by **admission of Myore’s testimony**. *See infra* subpart 3.

In objecting, Leech emphasized **“this was an aggravated murder trial where there is almost zero physical evidence,”** making Myore’s credibility and **“the credibility of [the] other witnesses the only issue.”** R.1769-70. Juror observation of **Myore’s demeanor** was imperative to **Leech’s** overall defense in not only undermining **Myore’s** credibility, but in undermining the credibility of the State’s other witnesses. Leech pointed to a binder filled with contradictory statements made by Myore to support his argument of the prejudice to his defense. R.1770.

Leech argued that without Myore taking the stand, his efforts to **“cross-examine or impeach or prove that a little stack of papers is lying ... [would be] completely ineffective.”** R.1770. Furthermore, admitting Myore’s testimony allowed the State to **“not only get that evidence in,”** but to also improperly **“bolster [the] other witnesses when we’re trying to attack all of their credibility ... violat[ing his] right[s] to confrontation, ... a fair trial, [and] due process.”** R.1770. Counsel argued **“The** only thing that matters from our perspective is that Mr. **Leech get a fair trial. And I do not believe that is possible ... with** a transcript of **Myore’s testimony. [Again], it is ineffectual to cross-examine a piece of paper ...**

and allowing [it] to come in ... to bolster the other witnesses who all have massive credibility issues, is just patently unfair.” R.1773.

Absent **Myore’s testimony**, the jury was left with the testimony of Andy and the other State witnesses, all of which conflicted on every key point in the evidence. *See Ellis*, 2018 UT 2, ¶43. **Myore’s** testimony was the only other alleged account **of Knight’s shooting**. And, **without corroboration Andy’s** narrative was so inherently unreliable the jury would not have credited it **to establish Leech’s guilt**. *State v. Bujan*, 2006 UT App 322, ¶¶31-32 (finding prejudice in the admission of hearsay testimony corroborating complainant’s testimony where “there was no physical evidence of [the offense], and no testimony directly supporting [complainant’s] account”), *aff’d* 2008 UT 47; *State v. Rimmasch*, 775 P.2d 388, 407-08 (Utah 1989) (concluding there was a reasonable likelihood of a more favorable outcome where the case “hinged on a determination of credibility,” there was no corroborating physical evidence, and the victim’s version of events was bolstered principally by inadmissible expert testimony). The evidence established Myore also had a motive to fabricate his testimony in order to mitigate his culpability and avoid a life prison sentence. R.634-35. This, and the improper bolstering of **Andy’s** testimony, prejudiced Leech.

Attempting to mitigate some of the prejudice, Leech moved to have Myore take the stand so his refusal to testify was done in the **jury’s presence**. R.2340–41. The court ruled **that other than for “theatrics,” it would** be inappropriate to put Myore on the stand just so jurors could witness his refusal. *See* R.2342; *State v.*

Bond, 2015 UT 88, ¶ 25 (“Though a prosecutor may not call a witness simply to ‘impress[] upon the jury . . . the claim of privilege,’ there are legitimate reasons to call a witness who has indicated she will invoke the privilege to remain silent.” (alternations in original) (citation omitted)). Given it is the province of the jury to “serve[] as the exclusive judge of both the credibility of the witnesses and the weight to be given particular evidence,” *State v. Prater*, 2017 UT 13, ¶ 31, Leech had a legitimate reason for jurors to witness Myore’s refusal—so jurors could exercise their exclusive prerogative of judging his credibility. *Id.*

Leech noted the particular importance witness credibility played, and having Myore take the stand would allow the jury to glean something of his demeanor and assess his credibility. R.2342 (explaining that putting Myore on the stand provided jurors “some means to assess his credibility, however small”). The court’s denial to allow for Myore to make his refusal in front of the jury further hindered Leech’s efforts to mitigate the prejudice admitting Myore’s testimony had on the defense.

The prejudicial effect of admitting Myore’s testimony was exacerbated by the manner in which the testimony was admitted. Myore’s testimony was not just simply read verbatim into the record, instead, the State had attorneys parade as actors to play out the preliminary hearing for the jury:

[Referring to the preliminary-hearing transcript,] [s]o we provided a copy to [Leech’s counsel], to the Court, and we have a representative from the District Attorney’s Office, Tad May, who is here to read the part of Myore . . . I will be reading the part of the prosecutor, who

was actually me anyway. And [Leech's counsel] will read the cross-examination questions that were presented at the prelim.

R. 2393. May, a district attorney, sat on the witness stand as the other attorneys played their parts. R.2395–96. The reading of the preliminary hearing lasted approximately two hours. R.563.

The means of introducing **Myore's testimony, imbued** the testimony with the imprimatur of the State, which likely induced the jury to give more weight to **Myore's testimony than it** otherwise would have. In doing so, the State also **succeeded in bolstering the credibility of Andy's testimony. *State v. Sibert*, 310 P.2d 388, 390, 392-93 (Utah 1957)** (prejudice where the case focused on inconsistent statements and the prosecution used inadmissible hearsay to bolster the witness). Denying jurors the ability to see, however briefly, and to assess **Myore's credibility**, prejudiced Leech. Combined, these errors created “**a probability sufficient to undermine**” this Court's confidence in the jury's verdict. *Hales*, 2007 UT 14, ¶92. Absent the improper **admission of Myore's testimony**, a reasonable likelihood exists that the result of the trial would have been more favorable to Leech. *Id.*

2. Leech was prejudiced by the **State's** reliance on **Myore's testimony** in its opening statement and closing arguments.

In its opening statement, the State admitted to jurors **that the “majority of evidence [would] come from the testimony of witnesses who were there that night.” R.1813.** And, although **the witnesses were “not people without their issues ... lifestyle choices ... drug [use] ... criminal histories ... and all of these different**

things,” they would all “tell [the jury] the same thing about what happened that night.” R.1814. The State explained **that it had to rely on these witnesses’** testimony because there was no physical evidence tying Leech to the offenses. R.1813. **Knight’s body could not tie Leech to the shooting** because it **had “been subject to weather conditions” and animal predation for an extended period of** time. R.1812-13. Leech had allegedly destroyed evidence of clothing, shoes, and guns so he could not be linked to the offenses in that manner. R.1813. And, other than the recovery of **one weapon, no “DNA, blood spatter, or fingerprints”** existed to tie Leech to the offenses. R.1813.

Instead, **Myore’s testimony** was relied on to link Leech to the offenses. R.1805-14. Jurors were told **that Myore’s testimony, was given “under oath,”** and would explain **“what was going on in that house” on Mann Way;** that Leech **doesn’t just have his own gun, but has [Myore’s gun],** he has two weapons on **him;”** and **that it would** explain where speaker wire used to tie up Andy and Knight came from. R.1807-10.

In closing arguments, the State’s reliance on Myore’s testimony went further. R.2602-32, 2669-94. **Myore’s testimony was used** to corroborate and bolster the following: (1) Leech committed two counts of aggravated robbery by taking property from **Andy’s and Knight’s** pockets, R.2607-09 (admitting Andy **did not know who took Knight’s property, but referencing Myore’s** testimony to argue it was Leech), 2682; (2) Leech obstructed justice by telling Myore to clean his truck, telling Juice to burn things, and getting rid of the weapons, R.2609,

2626 (“[Myore’s] testimony is he gave Andy’s clothes[, boots] to Juice to burn” and gave Leech his gun); (3) where the speaker wire came from, that Leech asked for it, and that it was old and kept breaking when used to tie Andy and Knight up, R.2614-15, 2682; (4) **Leech was “leading the charge, R.2616-18;** (5) **Myore’s truck** was at a gas station in Summit County and timeline of events, R.2619; and (6) **Leech’s culpability in the shooting death of Knight, 2622-32, 2682.**

Here, the prejudice resulting from the State’s heavy reliance on Myore’s improperly admitted testimony, together with the other errors argued, **undermines the confidence in the jury’s verdict and “substantially affected [Leech’s] right to a fair trial.”** *State v. Todd*, 2007 UT App 349, ¶31; *State v. Dibello*, 780 P.2d 1221, 1225 (Utah 1989).

3. Leech was prejudiced by the trial court’s refusal to grant a continuance.

The trial court’s refusal to grant a continuance as a remedy to mitigate some of the substantial prejudice that the late notice, **and court’s finding of Myore’s unavailability, had on Leech’s defense**, requires reversal. *See State v. Taylor*, 2005 UT 40, ¶8.

Defense counsel requested a continuance as a remedy for the late notice of **Myore’s refusal to testify**, and the trial **court’s subsequent determination allowing** the admission of **Myore’s** testimony at trial. R.1777. Counsel argued **that “nobody was on notice”** that Myore would not be testifying **because he “was in custody and ... had apparently agreed” to the State’s plea offer. R.1767.** Counsel noted that the defense was not made aware **this “was even a possibility”** until a day before trial.

R.1628-32, 1643-44. Before that time, **no one “had any inkling that [Myore] would be unavailable.” R.1768.** And, it was not until the second day of trial that the court addressed the issue and made its finding. R.1760-61.

The court understood the defense’s **“arguments associated with the last-minute notice associated with [Myore’s unavailability]”** but was not persuaded that **“[Myore’s] unavailability should result in th[e] trial not going forward.”**

R.1771-72. The court contended that at the pretrial conference, defense counsel represented the defense was ready to proceed, but now is arguing he possesses **“a year and a half of additional statement, ... information, and [] evidence ... critical to [the defense’s] case” R.1772.**

Counsel responded it was **“with the anticipation that Myore was going to take the stand” that he** represented the defense was ready to proceed. R.1772. Had he known **about Myore’s refusal to testify, he “would have sought” other remedies.** R.1772. Counsel argued a continuance would allow time for the defense to evaluate whether Myore would soon **agree to the State’s plea offer,** making him available to testify. R.1777. Because it was only when Myore was recently **informed that he was facing decades in prison under the State’s current offer** that he suddenly **became “reluctant to testify.”** R.1777.

Counsel pointed out that Myore’s **current “position [was] untenable”** since he had already **“implicated himself in two kidnappings, one of which resulted in death.”** R.1777. And, because **“he [did] not want a trial” “a substantial likelihood”** existed that he would soon change his position on testifying. R.1783. Counsel

recognized that the jury had been selected, “**and everybody wants this thing to go** [forward, but] the only thing that matters from [the **defense’s**] perspective is that **Mr. Leech get[s] a fair trial.**” R.1773. So “the fact that it’s coming up last minute shouldn’t change the calculus and the remedies available” to the defense. R.1771.

Here, **the denial of a continuance violated Leech’s rights** to due process and a fair trial. *See* Utah Const. art. I, §12; U.S. Const. amend XIV. Leech’s substantive rights were prejudiced by **the trial court’s failure to grant a** continuance as a remedy to mitigate some of the prejudice the lack of notice of **Myore’s refusal to testify** and subsequent admission of his testimony, had on **Leech’s defense.** *Id*; *Taylor*, 2005 UT 40, ¶18.

The record reflects counsel diligently prepared the defense’s theory “**with the anticipation that Myore was going to take the stand.**” R.1772. Counsel had scoured and investigated two years of **discovery in order to gain “a deeper understanding of the case.”** R.1768. From this discovery, some of which was received just over a week before trial, counsel noted he was prepared to challenge **Myore’s credibility with a binder** full of his contradictory statements. R.1768-70. The fact the **court’s finding of Myore’s unavailability was determined after the** jury was selected, was not due to any dilatory behavior attributable to defense counsel. R.1771-73.

In fact, it was defense counsel who reminded the trial court, before the jury had been selected, of the potential **of Myore’s refusal to testify was still** looming. R.1650 (Leech reminding court of **the “specter of Mr. Myore refusing to testify”**).

Counsel raised the issue because of the significant prejudice Myore not testifying would have on his ability to effectively defend against the charges. *Id.* (Leech **noting he could not “overstate how big a deal”** the prospect of Myore refusal would have on the defense). Counsel stressed his objection to any motion the State would make **to “introduce Myore’s transcript”** and noted remedies it might pursue if the court allowed its admission. *Id.* (counsel noting that **“depending on the Court’s ruling, [Leech] might [seek] a continuance or leave to file interlocutory review”**). It was the trial court who decided not to address the issue until the next day—after jury selection. R.1650. But regardless, **Leech’s “right to a fair trial outweighed any inconvenience to the court [and] opposing party ... that may have been caused by a continuance.”** *State v. Peraza*, 2018 UT App 68, ¶43 (citation omitted).

Because the **State’s** case centered around witness credibility, **counsel’s** ability to effectively **undermine Myore’s credibility was critical to Leech’s right to a fair trial.** *Taylor*, 2005 UT 40, ¶8. A continuance would have given Leech time to prepared his defense in light of the unavailability ruling. *Id.* Or it would have given Leech the opportunity to evaluate whether Myore’s **unavailability would be** resolved by his pending criminal case. *Id.* **Therefore, the trial court’s failure to grant a continuance violated Leech’s substantive** rights, resulting in prejudice. *Id.*

4. **Absent admission of Myore’s testimony, the remaining** witnesses were so inherently unbelievable that a reasonable jury would have acquitted.

Admission of Myore testimony was essential **to the State’s ability to implicate Leech. Myore’s testimony permitted the State to corroborate key**

aspects of Andy's and the other witnesses' version of the events; bolstered Andy's narrative of Knight's death—the only other eyewitness account; and, bolster Myore's own credibility—attributed with leading detectives to Knight's body. *See supra*.

Andy, a convicted felon and admitted liar, had a strong motive to minimize his culpability by fabricating his role in the events leading to Knight's death. Andy admitted to lying about principle events in each of his interviews with law enforcement. R.1923-51. The testimonies of the other witnesses lacked any materially consistency that would have been credited by the jury. And Andy's testimony was so inherently unreliable and unbelievable on its own that absent corroboration and bolstering from Myore, regarding key evidence, the jury's verdict would likely have been different. *See Ellis*, 2018 UT 2, ¶43. Thus, the overwhelming prejudice warrants reversal. *See id.* ¶¶43, 45.

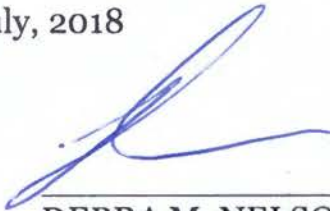
II. The cumulative effect of any combination of errors establishes prejudice.

The cumulative prejudice of any combination of the errors requires reversal. Under the doctrine of cumulative error, this Court will reverse if the cumulative effect of multiple errors undermines the Court's confidence in the verdict. *State v. Campos*, 2013 UT App 213, ¶61. That was the case here, where multiple errors compromised the fairness of the trial. *See supra* Parts IA-B.

CONCLUSION

Leech respectfully requests that this Court reverse his convictions and remand for a new trial.

SUBMITTED this 30th day of July, 2018



DEBRA M. NELSON
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 13,989 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted from the foregoing brief of defendant/appellant.



DEBRA M. NELSON

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 2nd day of August, 2018.



DEBRA M. NELSON

DELIVERED this _____ day of August, 2018.

ADDENDUM A

The Order of the Court is stated below:

Dated: November 02, 2016
03:08:31 PM

/s/ RANDALL SKANCHY
District Court Judge



3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 141900235 FS
CHRISTOPHER KIM LEECH,	:	Judge: RANDALL SKANCHY
Defendant.	:	Date: November 2, 2016
Custody: Salt Lake County Jail		

PRESENT

Clerk: saram

Prosecutor: VINCENT B MEISTER
NATHAN J EVERSLED

Defendant

Defendant's Attorney(s): PATRICK W CORUM
WOJCIECH S NITECKI
LACEY C SINGLETON
MELISSA G STIRBA

DEFENDANT INFORMATION

Date of birth: August 15, 1978

Sheriff Office#: 243621

Audio

Tape Number: N42 Tape Count: 12:36

CHARGES

1. AGGRAVATED MURDER - 1st Degree Felony
Plea: Guilty - Disposition: 09/13/2016 Guilty
2. AGGRAVATED KIDNAPPING - 1st Degree Felony
Plea: Guilty - Disposition: 09/13/2016 Guilty
3. AGGRAVATED KIDNAPPING - 1st Degree Felony
Plea: Guilty - Disposition: 09/13/2016 Guilty
4. AGGRAVATED ROBBERY - 1st Degree Felony
Plea: Guilty - Disposition: 09/13/2016 Guilty
5. AGGRAVATED ROBBERY - 1st Degree Felony
Plea: Guilty - Disposition: 09/13/2016 Guilty

6. OBSTRUCTING JUSTICE - 1st Degree Felony

Plea: Guilty - Disposition: 09/13/2016 Guilty

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED MURDER a 1st Degree Felony, the defendant is sentenced to life in prison without parole.

Based on the defendant's conviction of AGGRAVATED KIDNAPPING a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than fifteen years and which may be life in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED KIDNAPPING a 1st Degree Felony, the defendant is sentenced to life in prison without parole.

Based on the defendant's conviction of AGGRAVATED ROBBERY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED ROBBERY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of OBSTRUCTING JUSTICE a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Counts one and three are to run consecutive to each other. All other counts are to run concurrent.

ALSO KNOWN AS (AKA) NOTE

ASIAN CHRIS

Case No: 141900235 Date: Nov 02, 2016

CRAZY CHRIS

Restitution Amount: \$850.00 Plus Interest
Pay in behalf of: VICTIM

This restitution is to be paid joint and severally with the co-defendants.

CUSTODY

The defendant is present in the custody of the Salt Lake County jail.

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

Case No: 141900235 Date: Nov 02, 2016

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 141900235 by the method and on the date specified.

EMAIL: TRANSPORTATION ADC adc-transportation@slco.org

EMAIL: TRANSPORTATION UDC udc-transportation@utah.gov

EMAIL: RECORDS UDC udc-records@utah.gov

11/02/2016
Date: _____

/s/ SARA MOFFITT

Deputy Court Clerk

ADDENDUM B

Utah Const. art. I, § 12

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

U.C.A. 1953 § 76-5-302

§ 76-5-202. Aggravated murder

(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(a) the homicide was committed by a person who is confined in a jail or other correctional institution;

(b) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed;

(c) the actor knowingly created a great risk of death to a person other than the victim and the actor;

(d) the homicide was committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, child abuse as defined in Subsection 76-5-109(2)(a), or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, or kidnapping, or child kidnapping;

(e) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which the actor committed the crime of abuse or desecration of a dead human body as defined in Subsection 76-9-704(2)(e);

(f) the homicide was committed for the purpose of avoiding or preventing an arrest of the defendant or another by a peace officer acting under color of legal authority or for the purpose of effecting the defendant's or another's escape from lawful custody;

(g) the homicide was committed for pecuniary gain;

(h) the defendant committed, or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide;

(i) the actor previously committed or was convicted of:

- (i) aggravated murder under this section;
- (ii) attempted aggravated murder under this section;
- (iii) murder, Section 76-5-203;
- (iv) attempted murder, Section 76-5-203; or
- (v) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(i);
- (j) the actor was previously convicted of:
 - (i) aggravated assault, Subsection 76-5-103(2);
 - (ii) mayhem, Section 76-5-105;
 - (iii) kidnapping, Section 76-5-301;
 - (iv) child kidnapping, Section 76-5-301.1;
 - (v) aggravated kidnapping, Section 76-5-302;
 - (vi) rape, Section 76-5-402;
 - (vii) rape of a child, Section 76-5-402.1;
 - (viii) object rape, Section 76-5-402.2;
 - (ix) object rape of a child, Section 76-5-402.3;
 - (x) forcible sodomy, Section 76-5-403;
 - (xi) sodomy on a child, Section 76-5-403.1;
 - (xii) aggravated sexual abuse of a child, Section 76-5-404.1;
 - (xiii) aggravated sexual assault, Section 76-5-405;
 - (xiv) aggravated arson, Section 76-6-103;
 - (xv) aggravated burglary, Section 76-6-203;
 - (xvi) aggravated robbery, Section 76-6-302;
 - (xvii) felony discharge of a firearm, Section 76-10-508.1; or

(xviii) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(j);

(k) the homicide was committed for the purpose of:

(i) preventing a witness from testifying;

(ii) preventing a person from providing evidence or participating in any legal proceedings or official investigation;

(iii) retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation; or

(iv) disrupting or hindering any lawful governmental function or enforcement of laws;

(l) the victim is or has been a local, state, or federal public official, or a candidate for public office, and the homicide is based on, is caused by, or is related to that official position, act, capacity, or candidacy;

(m) the victim is or has been a peace officer, law enforcement officer, executive officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official, juror, probation officer, or parole officer, and the victim is either on duty or the homicide is based on, is caused by, or is related to that official position, and the actor knew, or reasonably should have known, that the victim holds or has held that official position;

(n) the homicide was committed:

(i) by means of a destructive device, bomb, explosive, incendiary device, or similar device which was planted, hidden, or concealed in any place, area, dwelling, building, or structure, or was mailed or delivered; or

(ii) by means of any weapon of mass destruction as defined in Section 76-10-401;

(o) the homicide was committed during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance;

(p) the homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity;

(q) the victim was a person held or otherwise detained as a shield, hostage, or for ransom;

(r) the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death;

(s) the actor dismembers, mutilates, or disfigures the victim's body, whether before or after death, in a manner demonstrating the actor's depravity of mind; or

(t) the victim, at the time of the death of the victim:

(i) was younger than 14 years of age; and

(ii) was not an unborn child.

(2) Criminal homicide constitutes aggravated murder if the actor, with reckless indifference to human life, causes the death of another incident to an act, scheme, course of conduct, or criminal episode during which the actor is a major participant in the commission or attempted commission of:

(a) child abuse, Subsection 76-5-109(2)(a);

(b) child kidnapping, Section 76-5-301.1;

(c) rape of a child, Section 76-5-402.1;

(d) object rape of a child, Section 76-5-402.3;

(e) sodomy on a child, Section 76-5-403.1; or

(f) sexual abuse or aggravated sexual abuse of a child, Section 76-5-404.1.

(3)(a) If a notice of intent to seek the death penalty has been filed, aggravated murder is a capital felony.

(b) If a notice of intent to seek the death penalty has not been filed, aggravated murder is a noncapital first degree felony punishable as provided in Section 76-3-207.7.

(c)(i) Within 60 days after arraignment of the defendant, the prosecutor may file notice of intent to seek the death penalty. The notice shall be served on the defendant or defense counsel and filed with the court.

(ii) Notice of intent to seek the death penalty may be served and filed more than 60 days after the arraignment upon written stipulation of the parties or upon a finding by the court of good cause.

(d) Without the consent of the prosecutor, the court may not accept a plea of guilty to noncapital first degree felony aggravated murder during the period in which the prosecutor may file a notice of intent to seek the death penalty under Subsection (3)(c)(i).

(e) If the defendant was younger than 18 years of age at the time the offense was committed, aggravated murder is a noncapital first degree felony punishable as provided in Section 76-3-207.7.

(4)(a) It is an affirmative defense to a charge of aggravated murder or attempted aggravated murder that the defendant caused the death of another or attempted to cause the death of another under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) The reasonable belief of the actor under Subsection (4)(a) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(c) This affirmative defense reduces charges only as follows:

(i) aggravated murder to murder; and

(ii) attempted aggravated murder to attempted murder.

(5)(a) Any aggravating circumstance described in Subsection (1) or (2) that constitutes a separate offense does not merge with the crime of aggravated murder.

(b) A person who is convicted of aggravated murder, based on an aggravating circumstance described in Subsection (1) or (2) that constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

(1) An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping:

(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) acts with intent:

(i) to hold the victim for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;

- (ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;
- (iii) to hinder or delay the discovery of or reporting of a felony;
- (iv) to inflict bodily injury on or to terrorize the victim or another;
- (v) to interfere with the performance of any governmental or political function; or
- (vi) to commit a sexual offense as described in Title 76, Chapter 5, Part 4, Sexual Offenses.

(2) As used in this section, "in the course of committing unlawful detention or kidnapping" means in the course of committing, attempting to commit, or in the immediate flight after the attempt or commission of a violation of:

- (a) Section 76-5-301, kidnapping; or
- (b) Section 76-5-304, unlawful detention.

(3) Aggravated kidnapping is a first degree felony punishable by a term of imprisonment of:

(a) except as provided in Subsection (3)(b), (3)(c), or (4), not less than 15 years and which may be for life;

(b) except as provided in Subsection (3)(c) or (4), life without parole, if the trier of fact finds that during the course of the commission of the aggravated kidnapping the defendant caused serious bodily injury to another; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the aggravated kidnapping, the defendant was previously convicted of a grievous sexual offense.

(4) If, when imposing a sentence under Subsection (3)(a) or (b), a court finds that a lesser term than the term described in Subsection (3)(a) or (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) for purposes of Subsection (3)(b), 15 years and which may be for life; or

(b) for purposes of Subsection (3)(a) or (b):

(i) 10 years and which may be for life; or

(ii) six years and which may be for life.

(5) The provisions of Subsection (4) do not apply when a person is sentenced under Subsection (3)(c).

(6) Subsections (3)(b) and (3)(c) do not apply if the defendant was younger than 18 years of age at the time of the offense.

(7) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

Credits

Laws 1973, c. 196, § 76-5-302; Laws 1974, c. 32, § 12; Laws 1983, c. 88, § 15; Laws 1995, c. 337, § 4, eff. May 1, 1995; Laws 1995, 1st Sp.Sess., c. 10, § 5, eff. April 29, 1996; Laws 1996, c. 40, § 6, eff. April 29, 1996; Laws 1998, c. 69, § 2, eff. May 4, 1998; Laws 2001, c. 301, § 4, eff. April 30, 2001; Laws 2007, c. 339, § 11, eff. April 30, 2007; Laws 2013, c. 81, § 3, eff. May 14, 2013.

U.C.A. 1953 § 76-5-302

§ 76-5-302. Aggravated kidnapping

(1) An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping:

(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) acts with intent:

(i) to hold the victim for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;

(ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;

(iii) to hinder or delay the discovery of or reporting of a felony;

(iv) to inflict bodily injury on or to terrorize the victim or another;

(v) to interfere with the performance of any governmental or political function; or

(vi) to commit a sexual offense as described in Title 76, Chapter 5, Part 4, Sexual Offenses.

(2) As used in this section, "in the course of committing unlawful detention or kidnapping" means in the course of committing, attempting to commit, or in the immediate flight after the attempt or commission of a violation of:

(a) Section 76-5-301, kidnapping; or

(b) Section 76-5-304, unlawful detention.

(3) Aggravated kidnapping is a first degree felony punishable by a term of imprisonment of:

(a) except as provided in Subsection (3)(b), (3)(c), or (4), not less than 15 years and which may be for life;

(b) except as provided in Subsection (3)(c) or (4), life without parole, if the trier of fact finds that during the course of the commission of the aggravated kidnapping the defendant caused serious bodily injury to another; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the aggravated kidnapping, the defendant was previously convicted of a grievous sexual offense.

(4) If, when imposing a sentence under Subsection (3)(a) or (b), a court finds that a lesser term than the term described in Subsection (3)(a) or (b) is in the interests

of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) for purposes of Subsection (3)(b), 15 years and which may be for life; or

(b) for purposes of Subsection (3)(a) or (b):

(i) 10 years and which may be for life; or

(ii) six years and which may be for life.

(5) The provisions of Subsection (4) do not apply when a person is sentenced under Subsection (3)(c).

(6) Subsections (3)(b) and (3)(c) do not apply if the defendant was younger than 18 years of age at the time of the offense.

(7) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

Credits

Laws 1973, c. 196, § 76-5-302; Laws 1974, c. 32, § 12; Laws 1983, c. 88, § 15; Laws 1995, c. 337, § 4, eff. May 1, 1995; Laws 1995, 1st Sp.Sess., c. 10, § 5, eff. April 29, 1996; Laws 1996, c. 40, § 6, eff. April 29, 1996; Laws 1998, c. 69, § 2, eff. May 4, 1998; Laws 2001, c. 301, § 4, eff. April 30, 2001; Laws 2007, c. 339, § 11, eff. April 30, 2007; Laws 2013, c. 81, § 3, eff. May 14, 2013.

U.C.A. 1953 § 76-6-302

§ 76-6-302. Aggravated robbery

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;

(b) causes serious bodily injury upon another; or

(c) takes or attempts to take an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be “in the course of committing a robbery” if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

Credits

Laws 1973, c. 196, § 76-6-302; Laws 1975, c. 51, § 1; Laws 1989, c. 170, § 7; Laws 1994, c. 271, § 1; Laws 2003, c. 62, § 1, eff. May 5, 2003.

U.C.A. 1953 § 76-8-306

§ 76-8-306. Obstruction of justice in criminal investigations or proceedings --
Elements--Penalties--Exceptions

(1) An actor commits obstruction of justice if the actor, with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense:

- (a) provides any person with a weapon;
- (b) prevents by force, intimidation, or deception, any person from performing any act that might aid in the discovery, apprehension, prosecution, conviction, or punishment of any person;
- (c) alters, destroys, conceals, or removes any item or other thing;
- (d) makes, presents, or uses any item or thing known by the actor to be false;
- (e) harbors or conceals a person;
- (f) provides a person with transportation, disguise, or other means of avoiding discovery or apprehension;
- (g) warns any person of impending discovery or apprehension;
- (h) warns any person of an order authorizing the interception of wire communications or of a pending application for an order authorizing the interception of wire communications;
- (i) conceals information that is not privileged and that concerns the offense, after a judge or magistrate has ordered the actor to provide the information; or
- (j) provides false information regarding a suspect, a witness, the conduct constituting an offense, or any other material aspect of the investigation.

(2)(a) As used in this section, "conduct that constitutes a criminal offense" means conduct that would be punishable as a crime and is separate from a violation of this section, and includes:

(i) any violation of a criminal statute or ordinance of this state, its political subdivisions, any other state, or any district, possession, or territory of the United States; and

(ii) conduct committed by a juvenile which would be a crime if committed by an adult.

(b) A violation of a criminal statute that is committed in another state, or any district, possession, or territory of the United States, is a:

(i) capital felony if the penalty provided includes death or life imprisonment without parole;

(ii) a first degree felony if the penalty provided includes life imprisonment with parole or a maximum term of imprisonment exceeding 15 years;

(iii) a second degree felony if the penalty provided exceeds five years;

(iv) a third degree felony if the penalty provided includes imprisonment for any period exceeding one year; and

(v) a misdemeanor if the penalty provided includes imprisonment for any period of one year or less.

(3) Obstruction of justice is:

(a) a second degree felony if the conduct which constitutes an offense would be a capital felony or first degree felony;

(b) a third degree felony if:

(i) the conduct that constitutes an offense would be a second or third degree felony and the actor violates Subsection (1)(b), (c), (d), (e), or (f);

(ii) the conduct that constitutes an offense would be any offense other than a capital or first degree felony and the actor violates Subsection (1)(a);

(iii) the obstruction of justice is presented or committed before a court of law; or

(iv) a violation of Subsection (1)(h); or

(c) a class A misdemeanor for any violation of this section that is not enumerated under Subsection (3)(a) or (b).

(4) It is not a defense that the actor was unaware of the level of penalty for the conduct constituting an offense.

(5) Subsection (1)(e) does not apply to harboring a youth offender, which is governed by Section 62A-7-402.

(6) Subsection (1)(b) does not apply to:

(a) tampering with a juror, which is governed by Section 76-8-508.5;

(b) influencing, impeding, or retaliating against a judge or member of the Board of Pardons and Parole, which is governed by Section 76-8-316;

(c) tampering with a witness or soliciting or receiving a bribe, which is governed by Section 76-8-508;

(d) retaliation against a witness, victim, or informant, which is governed by Section 76-8-508.3; or

(e) extortion or bribery to dismiss a criminal proceeding, which is governed by Section 76-8-509.

(7) Notwithstanding Subsection (1), (2), or (3), an actor commits a third degree felony if the actor harbors or conceals an offender who has escaped from official custody as defined in Section 76-8-309.

Credits

Laws 2001, c. 209, § 10, eff. April 30, 2001; Laws 2001, c. 307, § 2, eff. April 30, 2001; Laws 2003, c. 179, § 1; Laws 2004, c. 140, § 2, eff. May 3, 2004; Laws 2004, c. 240, § 3, eff. March 22, 2004; Laws 2005, c. 13, § 27, eff. March 1, 2005; Laws 2009, c. 213, § 1, eff. May 12, 2009.

Utah R. Evid. 804

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* In a civil or criminal case, a statement made by the declarant while believing the declarant's death to be imminent, if the judge finds it was made in good faith.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

Credits

[Amended effective October 1, 1992; November 1, 2004; December 1, 2011.]

ADDENDUM C

The Order of the Court is stated below:

Dated: February 15, 2017
03:48:50 PM

/s/ Thomas R. Lee
Associate Chief Justice



IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Appellee,

v.

Christopher Kim Leech,
Appellant.

ORDER

Appellate Case No. 20160995-SC

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This Court has elected to provisionally retain the above-entitled appeal on its docket. The prior order of transfer to the Court of Appeals is vacated; however, the Court retains its discretion to transfer the appeal at a later time if circumstances warrant. This matter also is stayed pending the issuance of decisions in *State v. Pham*, 2016 0502, and *State v. Goins*, 2016 0485. The Court will then determine whether it will summarily dispose of this case or request briefing.

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

Kidnapping, first degree felonies, in violation of Utah Code §76-5-302; two counts of Aggravated Robbery, first degree felonies, in violation of Utah Code §76-6-302; and Obstructing Justice, a first degree felony, in violation of Utah Code §76-8-306(1). R.1-4, 121-22, 403-07. At the conclusion of the preliminary hearing, Leech was bound over. R.116-22, 1251-1621.

A six-day jury trial was held in September 2016. R.544-50, 562-64, 727-28, 739-41. Leech was found guilty on all counts. R.739-48; Addendum A. He was sentenced as follows: Aggravated Murder, life in prison without parole (LWOP); Aggravated Kidnapping, two indeterminate term of 15 years-to-life; Aggravated Robbery, two indeterminate terms of 5 years-to-life; Obstructing Justice, an indeterminate term of 5 years-to-life. R.805-08. The court ordered the Aggravated Murder conviction to run consecutively to one Aggravated Kidnapping conviction, all other counts were run concurrently. *Id.* Leech timely appealed. R.809-14.

The supreme court stayed Leech's appeal pending decisions in *State v. Pham*, 20160502-SC, and *State v. Goins*, 20160485-SC. See Addendum B (Order dated February 15, 2017). Leech's appeal was poured over to this Court. See Addendum C (Letter dated March 19, 2018).

STATEMENT OF FACTS

The Offense.

Cleat Knight's body was discovered in a remote area of Snowbasin on January 6, 2014. R.2231, 2282-283, 2413, 2422-428; StEx.73. Knight's body

ADDENDUM D

The Order of the Court is stated below:

Dated: March 15, 2018
02:23:10 PM

/s/ Thomas R. Lee
Associate Chief Justice



IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Appellee,

v.

Christopher Kim Leech,
Appellant.

ORDER

Appellate Case No. 20160995-SC

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Pursuant to the Court's Order of February 15, 2017, this case was stayed pending the issuance of decisions in State v. Pham, #20160502-SC and State v. Goins, #20160485-SC. Those cases have now been resolved. Therefore, the stay is lifted.

The February 15, 2017 order, also notified the parties that it had elected to provisionally retain this case on its docket but that it possessed the discretion to transfer the appeal at a later time if circumstances warranted. The Court has now determined that circumstances do warrant transfer. Accordingly, the appeal is transferred to the Utah Court of Appeals pursuant to Rule 42 of the Utah Rules of Appellate Procedure.

All further pleadings and correspondence should be directed to that Court. The address for the Utah Court of Appeals is:

Utah Court of Appeals
Office of the Clerk
450 South State Street
P.O. Box 140230
Salt Lake City, UT 84114-0230

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