

Case No. 20170498-CA

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IN THE  
UTAH COURT OF APPEALS

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STATE OF UTAH,  
*Plaintiff/Appellee,*

*v.*

REYNALDO THOMAS MARTINEZ,  
*Defendant/Appellant.*

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Brief of Appellee

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Transferred appeal from convictions for aggravated robbery, a first degree felony, and leaving the scene of an accident, a class A misdemeanor, in the Third Judicial District, Salt Lake County, the Honorable Paul B. Parker presiding

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	III
INTRODUCTION .....	1
STATEMENT OF THE ISSUES .....	3
STATEMENT OF THE CASE.....	4
A. Summary of relevant facts.....	4
B. Summary of proceedings and disposition of the court.....	10
SUMMARY OF ARGUMENT .....	12
ARGUMENT.....	13
I. Martinez has not shown that his counsel was ineffective.....	13
A. Counsel was not ineffective by not challenging the admission of surveillance photos and eyewitness identifications and by not seeking a <i>Long</i> instruction. ....	16
1. Martinez cannot show prejudice because the evidence of his identity – which included DNA and a fingerprint – was overwhelming.....	17
2. Martinez has not shown that no reasonable attorney would have proceeded as counsel did here.....	19
a. Counsel could reasonably decide not to challenge admissible surveillance photos and not to present a photo lineup to the jury.....	19
b. Defense counsel could reasonably decide not to request a <i>Long</i> instruction on eyewitness identification.....	22
B. Martinez has not shown that his counsel was ineffective by not objecting to hearsay evidence that counsel used to argue third-party guilt. ....	23

II. Martinez has not shown cumulative prejudice from five largely unpreserved claims because they were either not errors or not prejudicial. .... 25

CONCLUSION ..... 31

CERTIFICATE OF COMPLIANCE..... 33

ADDENDA

Addendum A: Body camera video transcript, R1399-1424

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Burt v. Titlow</i> , 571 U.S. 12 (2013) .....	15, 19
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011) .....	15
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986) .....	24
<i>Premo v. Moore</i> , 562 U.S. 115 (2011).....	13, 15
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	<i>passim</i>

### STATE CASES

<i>Codianna v. Morris</i> , 660 P.2d 1101 (Utah 1983) .....	16
<i>Harvey v. Cedar Hills City</i> , 2010 UT 12, 227 P.3d 256 .....	21
<i>Rose v. Office of Professional Conduct</i> , 2017 UT 50, 424 P.3d 134 .....	16, 17, 26
<i>State v. Barney</i> , 681 P.2d 1230 (Utah 1984) .....	28
<i>State v. Bowdrey</i> , 2019 UT App 3, 882 Utah Adv. Rep. 11 .....	23
<i>State v. Brunn &amp; Diderickson</i> , 2017 UT App 182, 405 P.3d 905.....	26
<i>State v. Clopten</i> , 2009 UT 84, 223 P.3d 1103 .....	19
<i>State v. Cooper</i> , 2011 UT App 412, 275 P.3d 250 .....	28
<i>State v. Dean</i> , 2004 UT 63, 95 P.3d 276 .....	26
<i>State v. Dominguez</i> , 2003 UT App 158, 72 P.3d 127 .....	28
<i>State v. Dunn</i> , 850 P.2d 1201 (Utah 1993) .....	14, 21, 27
<i>State v. Gailey</i> , 2015 UT App 249, 360 P.3d 805 .....	27
<i>State v. Garrido</i> , 2013 UT App 245, 314 P.3d 1014 .....	25
<i>State v. Griffin</i> , 2016 UT 33, 384 P.3d 186.....	4
<i>State v. Hall</i> , 946 P.2d 712 (Utah App. 1997).....	26, 29

<i>State v. Heywood</i> , 2015 UT App 191, 357 P.3d 565 .....	22
<i>State v. Kell</i> , 2002 UT 106, 61 P.3d 1019.....	20
<i>State v. Kelley</i> , 2000 UT 41, 1 P.3d 546 .....	27
<i>State v. King</i> , 2008 UT 54, 190 P.3d 1283 .....	29, 30
<i>State v. Litherland</i> , 2000 UT 76, 12 P.3d 92 .....	16, 26
<i>State v. Long</i> , 721 P.2d 483 (Utah 1986) .....	19, 22
<i>State v. Lucero</i> , 2014 UT 15, 328 P.3d 841 .....	14
<i>State v. Lujan</i> , 2015 UT App 199, 357 P.3d 20.....	20
<i>State v. Martinez-Castellanos</i> , 2018 UT 46, 428 P.3d 1038 .....	31
<i>State v. McNeil</i> , 2016 UT 3, 365 P.3d 699.....	27
<i>State v. Munguia</i> , 2011 UT 5, 253 P.3d 1082.....	15, 16
<i>State v. Nielsen</i> , 2014 UT 10, 326 P.3d 645 .....	4, 6
<i>State v. Taylor</i> , 947 P.2d 681 (Utah 1997).....	14
<i>State v. Wager</i> , 2016 UT App 97, 372 P.3d 91.....	20
<i>State v. Yalowski</i> , 2017 UT App 177, 404 P.3d 53.....	31

**STATE STATUTES**

Utah Code Ann. 76-3-203.8 .....	12
---------------------------------	----

**STATE RULES**

Utah R. App. P. 21 .....	33
Utah R. App. P. 23B.....	16
Utah R. App. P. 24 .....	16, 17, 26, 33
Utah R. Evid. 402 .....	20
Utah R. Evid. 617 .....	21

Utah R. Evid. 801.....17





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**INTRODUCTION**

A man was in a series of altercations with Erika Vigil as several neighbors watched. When one of the neighbors tried to take a picture of the man with his cell phone, the man robbed him at gunpoint, taking his wallet and cell phone. The man fled by car, caused an accident, then fled on foot. Two people followed him to a nearby Harmons grocery store, where surveillance cameras recorded him entering and leaving the store.

Police did not find the man that day. But they knew that Vigil had a boyfriend named Reynaldo Martinez; that Martinez matched both eyewitness descriptions and the surveillance footage, right down to the facial tattoo; that the robbery victim's wallet was found inside the grocery store;

that a hat at the accident scene had “a lot” of Martinez’s DNA on it and was similar to those Martinez wore in Facebook pictures; and that Martinez’s fingerprint was inside the car at the accident scene.

Martinez raises three claims on appeal.

*Eyewitness identification.* Before trial, no witness had identified Martinez as the suspect. At trial, one eyewitness and one police officer said that Martinez was the man in the surveillance footage. Martinez faults his trial counsel for not objecting to these in-court identifications and other identity evidence, for not presenting the jury with a photo lineup, and for not requesting an instruction on the limits of eyewitness testimony. These claims all fail for lack of prejudice because the evidence of Martinez’s identity was overwhelming. But counsel could also reasonably decide not to challenge admissible evidence, not to treat the jury as eyewitnesses, and not to seek a jury instruction where the evidence of identity was so strong. And counsel could have even conceded Martinez’s identity without conceding his guilt, because there was evidence of a third-party assailant (“Joey”).

*Hearsay testimony.* Vigil did not testify at trial, but her statements to police – which were recorded by a body camera – were admitted at trial. In the footage, she identifies a man named “Joey” as her assailant, but does not provide further information about him. Martinez claims that his counsel was

ineffective for not objecting to this testimony—that her assailant was someone other than Martinez—but this claim fails for lack of prejudice due to the overwhelming evidence of Martinez’s guilt. It also fails because defense counsel reasonably used this evidence to argue that police had not done enough to track down “Joey” and that this raised a reasonable doubt about Martinez’s guilt.

*Cumulative prejudice.* Martinez also argues cumulative prejudice from five more unpreserved alleged errors: (1) lack of foundation for the Harmons surveillance photos; (2) an officer testifying that a witness had identified Martinez when the witness had not; (3) one of the jurors knowing one of the testifying officers; (4) the trial court allegedly coaching a witness; and (5) an officer testifying that he knew Martinez’s father. These claims are inadequately briefed. Martinez thus has not met his burden of persuasion on appeal. And for each, he can show either no error or no prejudice. Because there is no prejudice to accumulate, this claim fails.

### **STATEMENT OF THE ISSUES**

1. Was counsel ineffective for (a) not challenging eyewitness identification evidence and requesting a *Long* instruction where DNA, fingerprints, surveillance footage, and circumstantial evidence conclusively

established Martinez’s identity; and (b) not challenging hearsay evidence that was useful to – and used by – counsel during closing argument?

*Standard of Review.* An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. *State v. Griffin*, 2016 UT 33, ¶16, 384 P.3d 186.

2. Does cumulative prejudice based on five alleged errors justify overturning the jury verdict?

*Standard of Review.* None applies.

## STATEMENT OF THE CASE

### A. Summary of relevant facts.<sup>1</sup>

One wintry January morning, Mindy Sipes stood on her porch having a smoke. R598, 623; SE1 (photo of Sipes). She heard honking and looked about four houses down the street, where she saw a girl trying to get out of a white car. R598-99; SE3 (map with markers showing relative positions); SE2, 4 (views of street); SE6 (car). Just then, a man came “running out of the house” where the car was parked, “grabbed” the girl, “threw her on the ground and started hitting her.” R599. After a minute or two, the girl “got up and took off

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<sup>1</sup> Consistent with appellate standards, the State recites the facts in the light most favorable to the jury’s verdict. *State v. Nielsen*, 2014 UT 10, ¶46, 326 P.3d 645.

running.” R600. The man got into the car and started driving around the neighborhood. R602. Sipes ran to her garage, called 911, and got in her car to follow him. R605.

Sipes said the man appeared to be in his mid-twenties, had “short hair,” “a tattoo or something on [the] left side of his face,” and was 5’ 4” or 5’ 5”. R601. He was wearing “some black baggy sweatpants and a white T-shirt and a zipped up gray hoodie.” R601.

At about this time, David Barnes was removing the snow from his parents’ home nearby when the girl ran up to him. R671; SE10-11 (photos of Barnes). She had no coat on and looked “very distraught” – crying, “shaking, the whole bit”; she “said she needed help.” R671, 673. She asked to borrow his phone to call her mother, and he obliged. R672. She said she was worried “about him getting [her] kids,” but refused to call police. R673-74. Just then, the man pulled up in the white car. R674. The girl tried – unsuccessfully – to hide, and the man yelled at her, “Get in the fucking car, bitch.” R676. Barnes tried to take a picture of the car with his cell phone; a “split second” later, the man got out of the car and came toward Barnes with a gun. R676-77. The gun appeared to be a long-barreled revolver. R677-78.

Barnes described the man as “slender,” of “medium height,” 5’ 6” or 5’ 7,” and Hispanic. R685, 692. He was wearing a maroon bandana, a Raiders hat and a hoodie. R677.

The man pointed the gun at Barnes’s head and demanded his phone and wallet. R679-80. Barnes obliged. *Id.* When a neighbor – Troy Martinez<sup>2</sup> – stuck his head out of his house and said that police were on their way, the man ran back to the white car and fled. R682, R1038. As the man left the neighborhood, both Barnes and Sipes saw him cause a traffic accident with another car. R609, 684; SE3.

Seconds after the crash, he jumped out of the car and started running toward a nearby Harmons supermarket. R609-09, 615; SE3. No one else was in the white car. R628, 657, 791. The driver of the other car, Annie Vu, only saw the man from the back, but noted that he was wearing a hoodie. R781. As he ran, he left his Raiders hat behind. SE21-22.

Two people followed him as he ran. One was Sipes; the other was Lee Clay, who had seen the accident while driving. R647-48. They both watched him enter the Harmons. R609-10, 651. Clay saw that the man was wearing a gray hoodie and black pants, that he had a “[s]mall build,” was “younger,”

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<sup>2</sup> Though he shares the defendant’s last name, nothing in the record suggests that the two were related.

and had "lots of tattoos," one on his face. R653-54, 656-57. After five or ten minutes, the man came out of the Harmons, but left behind both Barnes's wallet and his image on surveillance footage.<sup>3</sup> R685, SE34-48. He ran toward a Les Schwab store, at which point Sipes and Clay lost sight of him. R611-12, 653; SE3.

Police found the girl, however. Her name was Erika Vigil. R616; SE12, 13. She claimed to have "never been" in the neighborhood where they found her, and to have no relatives or friends in the area. R1400. She claimed that the driver was a black man named "Joey," but never gave any details about him. R389, 702, 769, 854, 923, 948, 1023-25, 1416. She claimed that she had been walking to a convenience store in Rose Park or Magna when "Joey" drove by and began "yelling at her." R1401, 1408-10. Because she had "been wanting to talk to him" and thought he was "cute," she got in his car. R1401. When "Joey" began to accuse her of being a police informant, she looked for "any opportunity" to "jump out of the car and take off" because she "didn't know what this guy was going to do" to her. R1402-03, 1410. It allegedly took her about an hour and half to escape. R1411.

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<sup>3</sup> Police had a Harmons employee pull the surveillance footage from the time that Clay said he watched the suspect go inside. R939.

Vigil did not cooperate with the investigation; she refused to fill out a witness statement, and gave police a non-existent address. R922, 927, 937. Police searched for her on Facebook and saw pictures of Vigil with Martinez, who had a facial tattoo, a Raiders hat, and looked like the suspect in the surveillance footage. R924-25; SE13, 48, 49, 50, 51, 75.<sup>4</sup> Both of them were friends with a man named Jacob “Stevey” Manzanares, who owned the suspect car, but had no facial tattoos and looked nothing like the suspect. R919, 921, 926-27; SE20.1, 20.2, 20.3. Though Vigil was Facebook friends with a man named Joey, he looked nothing like the suspect and had no visible tattoos. R1028-29. An officer went to the home where Sipes had seen the whole thing begin, but no one there knew who “Joey” was. R948-49.

Forensic evidence confirmed that the suspect was Defendant Reynaldo Martinez: the Raiders hat at the crash scene had “a lot” of Martinez’s DNA on it, and both his and Vigil’s—but not Manzanares’s—fingerprints were found inside the white car. R801-05, 808-09, 815, 1081-85; SE23-27, 72.<sup>5</sup>

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<sup>4</sup> SE49 and 75 are mirror images, as evidenced by “Raiders” on the hat being spelled backwards. *See also* R930 (officer testifying that SE75 is a “mirrored picture”).

<sup>5</sup> Police found Barnes’s cell phone near the scene in the snow, but were unable to get any helpful pictures or fingerprints from it. R1019, 1044; SE19.



After police spoke with Vigil's family and friends to try and figure out where she lived, her and Martinez's Facebook accounts were deleted. R927. They later found her living with Martinez and his family. R946. The apartment manager confirmed that Vigil and Martinez were "frequently" together and used the white car. R893-98; SE76 (car at apartment), *compare with* SE5, 19, 21 (car after crash).

Police searched the apartment, including a bedroom that Vigil and Martinez shared. R878, 877, 946. There, they found .40 caliber ammunition—which would fit a long-barreled revolver—as well as a holster and a long-barreled BB hand gun. R868-69, 876; SE61-63, 66. They did not find the revolver. R1065.

When police confronted Vigil with the forensic and other evidence, she changed her story. She admitted that the man in the Harmons surveillance photos was Martinez and that he had been in the car, but claimed that "Joey" had been in the car too. R948-51, 1026-27. When police told her to tell the truth, she said that they "already knew the truth," so "what did [they] need her for."<sup>6</sup> R949, 1032.

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<sup>6</sup> One officer testified that victims of domestic violence cases can be reluctant to cooperate. R859-60.

## **B. Summary of proceedings and disposition of the court.**

The State charged Martinez with aggravated robbery, possession of a firearm by a restricted person, failure to stop at the scene of an accident, and domestic violence assault. R337-40.

*Pre-trial identification attempts.* Police showed photo line-ups – which included Martinez’s picture – to two witnesses: Barnes’s neighbor Troy, and Clay, who had witnessed the traffic accident. R1037. Troy identified another man in the lineup as the robber.<sup>7</sup> R1038. Clay did not identify anyone in the lineup, but went back and forth between Martinez’s picture and another picture, trying (unsuccessfully) to settle on one. R1040.

*Trial identification testimony.* At trial, two witnesses said that Martinez was the man in the surveillance photos. First, Sipes identified the man in the Harmons surveillance stills as the man driving the white car. R616; SE34-37, 44-47. He had on “exactly” the same clothes, and had the same short hair. R617. The prosecutor then asked her if she thought that she “could recognize that individual today”; she said yes, and identified Martinez.<sup>8</sup> R621. Second,

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<sup>7</sup> Troy was deceased by the time of trial. R1037-38.

<sup>8</sup> Clay said that the man in the surveillance photos was the driver, but was not asked to identify Martinez in court. R655.

Officer Hill identified Martinez as the man in the surveillance photos. R945. Defense counsel did not object to either identification. R621, 945.

*Body camera footage.* The jury saw a video of one officer's interview with Vigil, in which she accuses "Joey" of being the suspect. R853.<sup>9</sup> Because Vigil did not testify at trial, defense counsel used this evidence—along with a stipulation, R389—to argue that the police investigation was inadequate because they did not pursue "Joey" enough. R1174-75.

The jury convicted Martinez of aggravated robbery and failure to stop at the scene of an accident. R381-82.<sup>10</sup> The trial court sentenced him to a short jail term on the traffic count and five years to life in prison on aggravated robbery, with a consecutive term of five to ten years for having a prior violent felony conviction involving the use of a dangerous weapon. R1276-78, 1356-57; *see* Utah Code Ann. 76-3-203.8(4). Martinez timely appealed to the Utah Supreme Court, which transferred the case to this Court. R403-08, 411-16.

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<sup>9</sup> The body camera footage was admitted as an exhibit at trial, but not sent back with the jury during deliberations. *See* R843-46. A transcription of the video is at R1399-1429, attached as Addendum A.

<sup>10</sup> The parties bifurcated the possession of a dangerous weapon charge from the other charges. R998-1001. Because the jury did not find that Martinez used an actual gun during the robbery, that count was never sent to the jury. R1259-60.

## SUMMARY OF ARGUMENT

Martinez argues that his counsel was ineffective for not challenging eyewitness identification evidence, not showing the jury a photo lineup, and not getting an eyewitness identification instruction. These claims all fail for lack of prejudice because the other evidence of Martinez's identity was overwhelming—DNA, fingerprints, video, and circumstantial evidence proved beyond any reasonable doubt that Martinez was the suspect. Further, defense counsel could reasonably decide that Martinez's now-proposed alternatives did not have legal support or would not have been very helpful.

Martinez next argues that counsel should have objected to the prosecutor playing a video of his girlfriend's police interview because it was hearsay. This claim also fails for lack of prejudice, because the evidence of Martinez's guilt was overwhelming. It also fails because counsel reasonably used Vigil's hearsay statements from that interview to argue that "Joey" was the real culprit.

Martinez finally argues that this Court should reverse for cumulative prejudice from five alleged errors. These errors are mostly unpreserved and all inadequately briefed. And for each one, Martinez has shown either no error or no prejudice.

## ARGUMENT

### I.

**Martinez has not shown that his counsel was ineffective.**

Martinez argues that his trial counsel was ineffective for (1) not seeking to suppress the surveillance pictures and eyewitness identifications or to get a *Long* instruction on factors that might affect the reliability of an eyewitness identification, Aplt.Br. 15-24; and (2) not objecting to alleged hearsay on the ground that its admission violated the Confrontation Clause, Aplt.Br. 31-34. These claims all fail because Martinez cannot prove prejudice where the evidence of Martinez's identity—which included both DNA and fingerprints—was overwhelming. But they also fail because he has not demonstrated deficient performance.

To prove ineffective assistance, Martinez must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). If he fails to prove either element, his claim fails. *Id.* at 687, 697.

For the deficient performance element, *Strickland's* guiding principle is reasonableness. *Id.* at 687 (“[T]he proper standard for attorney performance is that of reasonably effective assistance.”); see also *id.* at 688-89; *Premo v. Moore*, 562 U.S. 115, 126 (2011) (similar). So long as counsel acts reasonably,

the defendant has received the sort of assistance that the Sixth Amendment guarantees.

Mere reasonableness gives counsel a “wide range” to operate in. *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997). The range is wide because “[e]ven the best criminal defense attorneys would not” necessarily “defend a particular client in the same way,” meaning that there are “countless ways to provide effective assistance in any given case.” *Strickland*, 466 U.S. at 689 (citation omitted). In addition, reviewing courts are to “eliminate the distorting effects of hindsight” and “evaluate the conduct from counsel’s perspective at the time.” *Id.* The point of the *Strickland* analysis is to ensure a fair trial, not to “grade counsel’s performance,” *Strickland*, 466 U.S. at 687, 697, or to weigh the relative merits of alternative strategies, *State v. Lucero*, 2014 UT 15, ¶¶41-43, 328 P.3d 841, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, ¶¶54-55, 391 P.3d 1016. Reasonableness is also not viewed in hindsight, but “from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. This includes the law in effect at the time. *See State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993) (“To establish a claim of ineffective assistance based on an oversight or misreading of law, a defendant bears the burden of demonstrating why, *on the basis of the law in effect at the time of trial*, . . . counsel’s performance was deficient.”) (emphasis added).

Reviewing courts must indulge the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689. This deference also recognizes that, “[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

In short, a defendant cannot prove deficient performance unless she proves that “no competent attorney” would have proceeded as her counsel did. *Moore*, 562 U.S. at 124.

On the prejudice element, Martinez must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

Proving both deficient performance and prejudice requires actual proof—neither can be “a speculative matter but must be a demonstrable reality.” *State v. Munguia*, 2011 UT 5, ¶30, 253 P.3d 1082 (cleaned up). “It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel” rendered “reasonable professional assistance.” *Burt v. Titlow*, 571 U.S. 12, 23 (2013) (citation and quotation omitted). Thus, any record gaps are construed in favor of finding both that counsel performed adequately and that the defendant suffered no prejudice.

*State v. Litherland*, 2000 UT 76, ¶17, 12 P.3d 92; *see also Codianna v. Morris*, 660 P.2d 1101, 1113 (Utah 1983).

**A. Counsel was not ineffective by not challenging the admission of surveillance photos and eyewitness identifications and by not seeking a *Long* instruction.**

Martinez contends that counsel was ineffective for not moving to suppress the surveillance photos and the eyewitness identifications. He also contends that counsel was ineffective for not asking for a *Long* instruction on the factors that may affect the reliability of an eyewitness identification.<sup>11</sup>

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<sup>11</sup> Martinez briefly asserts that counsel should have “present[ed] an expert witness” on eyewitness identification. Aplt.Br. 16. This argument is inadequately briefed, because he provides nothing but bare assertion to support it and does not identify the factors in evidence meriting such testimony here. *See* Utah R. App. P. 24(a)(9); *see, e.g., Rose v. Office of Professional Conduct*, 2017 UT 50, ¶¶64-66, 424 P.3d 134. It is also speculative because he does not identify an expert who would have testified if asked or what they would have said, nor moved for remand under rule 23B, Utah Rules of Appellate Procedure, to supplement the record with that information. Speculation cannot support an ineffective assistance claim. *See Munguia*, 2011 UT 5, ¶30. He thus has not proven deficient performance.

Martinez also briefly asserts that counsel should have objected on hearsay grounds to Officer Hill’s saying what he saw on the video and what Clay had said about following the suspect to Harmons. Aplt.Br. 18 (citing R939). This claim is conclusory and inadequately briefed. *See* Utah R. App. P. 24(a)(9); *see, e.g., Rose v. Office of Professional Conduct*, 2017 UT 50, ¶¶64-66, 424 P.3d 134. It also fails for lack of prejudice as explained above. But reasonable counsel could conclude that objecting was baseless because these statements were offered to show why his investigation proceeded as it did, not for their truth. *See* Utah R. Evid. 801 (defining hearsay as a statement “offere[d] in evidence to prove the truth of the matter asserted”).



These claims fail at the outset because he has not proven prejudice. He also has not shown deficient performance.

**1. Martinez cannot show prejudice because the evidence of his identity – which included DNA and a fingerprint – was overwhelming.**

Where it is easier for a court to resolve an ineffective assistance claim for lack of prejudice, “that course should be followed.” *Strickland*, 466 U.S. at 697. This Court should take that course here. Even if counsel had challenged the identification evidence and asked for a *Long* instruction, it would have made no difference. The remaining evidence, and reasonable inferences from it, show beyond any doubt that Martinez was the assailant: a large amount of his DNA was in the hat that the suspect was wearing and left behind when fleeing the accident scene; his fingerprint was inside the car; his girlfriend (Vigil) was with him, in a car that they used; and several witnesses confirmed that there was no one else in the car during the crimes. R628, 791, 802-05, 897-98, 1081-86; SE23-27, 72. He fit all the descriptions of the assailant, down to the distinctive facial tattoo. R601, 653-57, 685. And Barnes’s wallet – that he took during the robbery – was inside the Harmons that he fled to. R685. Given this overwhelming evidence, it did not matter that counsel did not seek to exclude some evidence, have the jury do a photo line-up, or get a limiting instruction on eyewitness identification. There was no probability – let alone

a reasonable one – that the jury would have found differently in light of all the other identity evidence.

Martinez insists that the identification evidence was “far from overwhelming” because Barnes would have been nervous due to the robbery, Barnes and Sipes were never shown a photo lineup, Clay never identified the man in the car accident, and Vu saw the man only from behind. Aplt.Br. 16-18. But he ignores the consistency of the descriptions that they gave, the forensic evidence, Vigil’s statements and her relationship with him, the victim’s wallet being found in the store, and that no other person was seen in the car.

He also argues prejudice from this ruling because Detective Hill identified Martinez as the man in the surveillance photos. Aplt.Br. 18 (citing R945). But this would have been cumulative of Vigil’s identifying him. And as shown, the forensic and other evidence conclusively showed that it was him.

This court should affirm for lack of prejudice alone. But he also has not shown deficient performance.

2. **Martinez has not shown that no reasonable attorney would have proceeded as counsel did here.**
  - a. **Counsel could reasonably decide not to challenge admissible surveillance photos and not to present a photo lineup to the jury.**

Martinez asserts that defense counsel has a duty to ask the trial court to “screen [the] eyewitness identification evidence to determine whether it should or should not be admissible at trial.” Aplt.Br. 15. He then asserts that the surveillance photos themselves were eyewitness identification testimony. *Id.* at 15-16. Both assertions are wrong.

Eyewitness identification evidence is evidence from a person who points out someone based on their memory. Because human memory is fallible, courts are sometimes required to give a limiting instruction or to admit expert testimony on the subject under rule 702 when the defense requests it and the evidence merits it. *See generally State v. Clopten*, 2009 UT 84, 223 P.3d 1103; *State v. Long*, 721 P.2d 483 (Utah 1986).

But concerns about the fallibility of human memory do not apply to a machine’s audio or visual recording of an event. Though such files are stored in a computer’s “memory,” their content—unlike human memories—is not affected by the passage of time and may be viewed objectively. For this reason, audio-visual records concerning a crime are admissible so long as they are relevant, there is sufficient foundation for them, and their probative

value is not substantially outweighed by the danger for unfair prejudice. *See* Utah R. Evid. 402 (relevant evidence generally admissible), 403 (danger for unfair prejudice), 901 (authenticating or identifying evidence); *see, e.g., State v. Kell*, 2002 UT 106, ¶¶29-44, 61 P.3d 1019 (holding videotape of prison murder admissible); *State v. Wager*, 2016 UT App 97, ¶¶10-17, 372 P.3d 91 (holding foundation sufficient to admit photograph of the defendant using drugs).

The State is not aware of – and Martinez has not cited – any case or rule requiring that video or pictures from the time of the crime are subject to any additional rules in order to be admissible. He cites *State v. Lujan*, 2015 UT App 199, 357 P.3d 20, Aplt.Br. 15-16, but that case involved a person, not a machine. He also cites a proposed rule of evidence on eyewitness identification. Aplt.Br. 19-24. But this reliance is doubly flawed. First, the proposed rule, if adopted, would apply to “eyewitness identification,” not machine files.<sup>12</sup> *See* Proposed Utah R. Evid. 617, available at <http://www.utcourts.gov/utc/rules-comment/wpcontent/uploads/sites>

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<sup>12</sup> Though the not-yet-in-effect rule also refers to the admissibility of photographs, this is for photos used in “an identification procedure” – like mugshots – not photos taken during the crime. *See* Proposed Utah R. Evid. 617(d), available at <http://www.utcourts.gov/utc/rules-comment/wpcontent/uploads/sites/31/2018/09/URE-Rule-617-for-comment.pdf> (last visited Feb. 4, 2019).

/31/2018/09/URE-Rule-617-for-comment.pdf (last visited Feb. 4, 2019).  
Second – as Martinez admits, Aplt.Br. 19 – the proposed rule was not in effect at the time of trial, and (as of the filing of this brief) has still not been adopted by the Supreme Court. Absent rare exception – and Martinez points to none here – rules and statutes do not apply retroactively. *See generally Harvey v. Cedar Hills City*, 2010 UT 12, ¶14, 227 P.3d 256. And they certainly do not apply until they are adopted. As shown, counsel’s performance is evaluated based on the law in effect at the time of trial. *Dunn*, 850 P.2d at 1228. Even if the “principles” underlying the proposed rule existed at the time of trial, Aplt.Br. 24, none of them required exclusion of evidence based solely on whether certain procedures were not followed. At very least, reasonable counsel could see it that way.

Martinez also appears to argue that counsel should have given the jury other “realistic choice[s]” to consider – that is, the jury should have been given a photo lineup of other men besides Martinez to choose from. Aplt.Br. 16. But the State is not aware of any case, and Martinez has cited none, sanctioning – let alone requiring – in-trial line-ups for non-witnesses. It thus fails for the same reasons as above.

**b. Defense counsel could reasonably decide not to request a *Long* instruction on eyewitness identification.**

Martinez argues that his counsel was ineffective for not requesting an instruction under *State v. Long*, 721 P.2d 483 (Utah 1986), to explain eyewitness identification issues. Aplt.Br. 24-30. Because the evidence of Martinez's identity was so overwhelming, defense counsel could reasonably decide not to ask for such an instruction. *See, e.g., State v. Heywood*, 2015 UT App 191, ¶37, 357 P.3d 565 (holding counsel not ineffective for not seeking *Long* instruction where factors did not justify it). Further, because none of the witnesses identified Martinez before trial, counsel could reasonably decide that there was no reason to seek such an instruction.

Martinez asserts that a *Long* instruction would have been helpful to explain the descriptions of the assailant. Aplt.Br. 29-30. But he has cited no case—and the State is aware of none—applying eyewitness identification factors to suspect *descriptions* (this is what the person looked like), rather than *identifications* (that is the person).

To the extent that two witnesses identified Martinez at trial – Sipes and Detective Hill – they did so right after discussing the photos.<sup>13</sup> R621, 945. Reasonable counsel could decide that the jury was capable of making the same comparison themselves, and that no limiting instruction was necessary. *Cf. State v. Bowdrey*, 2019 UT App 3, ¶¶16-17, 882 Utah Adv. Rep. 11 (holding that *Long* does not apply to “real-time” identifications).

In sum, Martinez’s claims on eyewitness identification fail because the evidence of identification here – which included DNA and fingerprints – was overwhelming. And he has not shown that counsel acted unreasonably.

**B. Martinez has not shown that his counsel was ineffective by not objecting to hearsay evidence that counsel used to argue third-party guilt.**

Martinez next faults his counsel for not objecting when the prosecution played a body camera video showing a brief interview with Vigil in which she identifies “Joey” as the suspect. Aplt.Br. 31-34. This, he says, violated both the hearsay rule and his Sixth Amendment confrontation right. *Id.* But whether something is objectionable is not the issue; the issues are whether

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<sup>13</sup> Martinez asserts that Nathan Evans also did an “in-court identification[.]” of him. Aplt.Br. 30. This is true, but misleading. Evans was the property manager of the apartments where Vigil and Martinez were living. R891. He said that Martinez and Vigil were “frequent[ly]” together and that they drove the white car. R893-98. He never identified Martinez as the suspect.

reasonable counsel could decide not to object (he could), and whether it reasonably affected the result (it didn't). See *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

This Court should take the same course that the State recommends on Martinez's other ineffectiveness claims and hold there is no prejudice here. The evidence of Martinez's guilt was overwhelming: his and Vigil's fingerprints were in the car; his DNA was in the suspect's hat; two people followed him to the store where surveillance footage matched his appearance, right down to the facial tattoo; he matched every suspect description; no witness saw a third person in the car; and Barnes's wallet was found inside the store where Martinez fled. Whatever Vigil said in the body camera footage did not materially add to evidence of Martinez's guilt—indeed, it was exculpatory. Thus, even if it had not come in, there is no reasonable likelihood that the jury would have acquitted Martinez.

For similar reasons, counsel could reasonably decide not to object. As Martinez acknowledges, Aplt.Br. 31-32, counsel used the body cam discussion (as well as a stipulation, R389) to argue that the police had not done enough to find "Joey," which showed reasonable doubt. R1174-75, 1182-83 (defense closing). Though Vigil discussed more than just "Joey's" alleged identity in the video, Aplt.Br. 32-33, she ascribed all the criminal behavior to



him, and none of it to Martinez. *See* R1399-1429. Thus, counsel could have reasonably decided that the body camera footage was helpful because it was exculpatory. *See, e.g., State v. Garrido*, 2013 UT App 245, ¶21, 314 P.3d 1014 (holding counsel did not perform deficiently by not cross-examining alleged victim because her testimony was exculpatory).

Martinez argues that letting in the body camera footage was “particularly questionable” because defense counsel undermined Vigil’s credibility by asking whether she was arrested for obstruction of justice. Aplt.Br. 33 (citing R1022, 1048). But counsel’s actions were not inconsistent, because counsel argued that Vigil’s obstruction was an act of self-preservation – to protect herself from “Joey.” R1182 (defense closing).

## II.

**Martinez has not shown cumulative prejudice from five largely unpreserved claims because they were either not errors or not prejudicial.**

Martinez finally argues that this Court should reverse for cumulative prejudice from five different alleged errors: (1) lack of authentication for the surveillance photos; (2) an officer testifying that a witness had identified Martinez when the witness had not; (3) one of the jurors knowing one of the testifying officers; (4) the trial court allegedly coaching a witness; and (5) an officer testifying that he knew Martinez’s father. Aplt.Br. 34-38.

These claims are inadequately briefed. Each consists of a few conclusory sentences with little or no analysis, with all five occupying a mere page and a half. *See* Aplt.Br. 35-36. Martinez thus has not carried his burden of persuasion on appeal. *See* Utah R. App. P. 24(a)(9); *see, e.g.,* *Rose*, 2017 UT 50, ¶¶64-66. They are also meritless. Because most of these claims are unpreserved, he raises them under the rubrics of ineffective assistance and plain error. *Id.* Martinez has shown no error or no prejudice for each one.

As explained, to show ineffective assistance, he must prove both deficient performance and prejudice. *Strickland*, 466 U.S. at 687. To show plain error, he must prove obvious, prejudicial error. *State v. Dean*, 2004 UT 63, ¶15, 95 P.3d 276. Though plain error and ineffective assistance are distinct doctrines focusing on different actors, their analyses often overlap. *See State v. Brunn & Diderickson*, 2017 UT App 182, ¶39, 405 P.3d 905 (noting that obviousness element of plain error and deficient performance element of ineffective assistance both depend on law in effect at time of decision). The prejudice standard for both doctrines is identical. *State v. Litherland*, 2000 UT 76, ¶31 n.14, 12 P.3d 92 (explaining that plain error and ineffective assistance share a “common” prejudice standard). It is often true that counsel acts reasonably by not raising non-obvious errors. *See State v. Hall*, 946 P.2d 712, 720 (Utah App. 1997) (“[I]f an error was not obvious to the trial court, it most

likely was not obvious to trial counsel.”). And if there is no underlying error, both claims necessarily fail. *See, e.g., State v. Kelley*, 2000 UT 41, ¶26, 1 P.3d 546 (“Failure to raise futile objections does not constitute ineffective assistance of counsel.”); *State v. Gailey*, 2015 UT App 249, ¶7, 360 P.3d 805 (“Defendant’s claim of plain error is unavailing because there was no error, plain or otherwise.”).

Further, to reverse on a cumulative prejudice, the Court would have to conclude that the combined prejudice from all these alleged errors undermines its confidence in the fairness of the proceedings. *Dunn*, 850 P.2d at 1229. That cannot be said here.

Martinez first asserts that counsel should have objected that the surveillance photos were never properly authenticated. Aplt.Br. 18, 35-36. He cannot prove prejudice on this claim because the State was prepared to call a witness from Harmons to authenticate them had Martinez objected. *See* R253 (State’s witness list); Aplt.Br. 18 (stating that State listed a Harmons employee as foundational witness); *see, e.g., State v. McNeil*, 2016 UT 3, ¶¶39-45, 365 P.3d 699 (holding no prejudice from lack of foundation objection where prosecutor could have laid foundation if required).

Martinez next asserts that Detective Hill “skirt[ed] well-established principles of photo lineups by suggesting that Clay had identified” Martinez

“when he had not.” Aplt.Br. 18-19, 36. But that was not Hill’s testimony. He said merely that two witnesses had thought that Martinez “looked familiar” or similar to the suspect, and that Clay had lingered on Martinez’s picture and gone back and forth between it and another suspect photo.<sup>14</sup> R1011-14, 1039-40. Reasonable counsel and the court could conclude that there was no error, because Clay never said that Martinez was the motorist he saw get into the accident with Vu.

Martinez next argues that the trial court should have struck a juror who had previously worked with one of the testifying officers. Aplt.Br. 36. True, one of the witnesses worked with the officer – apparently before he was an officer – at Home Depot. R749. Though they were work “acquaintances” seven years before, neither supervised the other or did anything socially

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<sup>14</sup> Before trial, the prosecutor stipulated not to go into Hill’s observations during photo lineups in which witnesses did not identify anyone. R476-77. But during cross-examination, defense counsel elicited Hill’s testimony that Troy Martinez and Clay thought that Martinez “looked familiar” or similar to the suspect. R1011-14. On redirect, the prosecutor then explored the witness’s actions during the line-up. R1039-40. Because defense counsel opened the door to the prosecutor’s questions about the lineup and Martinez does not argue that counsel was ineffective for doing so, his claim fails. Cf. *State v. Barney*, 681 P.2d 1230, 1231 (Utah 1984) (holding that defense counsel cannot request a mistrial based on evidence he elicited); *State v. Cooper*, 2011 UT App 412, ¶¶21-22, 275 P.3d 250 (similar); *State v. Dominguez*, 2003 UT App 158, ¶¶28, 40, 72 P.3d 127 (similar). And as shown, there is no prejudice because the evidence of Martinez’s identity was overwhelming.

together. R749-51. The juror said that the relationship would not affect her judgment at all. R7521. Defense counsel said he would not move for a mistrial, and thought that the officer's testimony was "fairly mild in nature." R752-53.

If counsel did not care, then any error would not have been obvious to the trial court. *Hall*, 946 P.2d at 720. And Martinez has not proven prejudice because he has not shown—as he must—that the juror was actually biased. *See generally State v. King*, 2008 UT 54, ¶128, 190 P.3d 1283.

Martinez next asserts—in two sentences—that the district court "essentially coached a witness" on how to admit evidence. Aplt.Br. 36. But the court and counsel could reasonably decide that did not happen. The prosecutor was trying to admit evidence that a gun holster was found at Martinez's and Vigil's apartment. R872. Defense counsel objected that it was inadmissible unless the prosecutor "could link it to any gun." R872-73. The prosecutor responded that the revolver was never found, but that the holster could "hold a long-barrel gun that was described by the victim." R873. The court responded, "You got somebody who will say that . . . that's a revolver holster? Because it doesn't look to me like a holster for a revolver." *Id.* The witness responded that "it does look like it could fit a long-barrel revolver[.]" *Id.* The court clarified: "I will allow it on the testimony that it would fit a long-

barreled gun and possibly a revolver. If you can't say that, I won't." *Id.* The witness responded, "I can say that, yeah." *Id.* Defense counsel then withdrew his objection, and the holster evidence came in.<sup>15</sup> R874, 878.

Reasonable counsel and the court could decide that there was no coaching—the court merely said what foundation was necessary for an exhibit under a defense objection that was then resolved. Martinez has shown no error, let alone obvious error, nor deficient performance. And there was no prejudice from the holster where the jury did not find that Martinez used an actual gun to commit the crime.

Finally, Martinez argues that he was prejudiced by an officer mentioning that he knew Martinez's father. Aplt.Br. 36. This claim is preserved, but cursorily briefed. One of the officers executing the warrant was asked who was at the apartment when he got there; as he listed off people, he said that "Reynaldo Martinez, Senior, who I do know well," was there, along with Senior's girlfriend, Vigil, and a young girl. R881. Defense counsel later moved for a mistrial, saying that the "who I do know well" remark was "inappropriate" and "likely to prejudice" the defense. R904-07. The prosecutor said that he did not even hear the "who I do know well"

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<sup>15</sup> The witness also said that the holster could fit the BB gun found at the apartment. R874.

portion, and that it was unlikely to prejudice Martinez where the testimony was not about him. R908-09. The trial court denied a mistrial, ruling that the comment was not the State's fault because it came out on cross-examination, and that there was no prejudice where the comment was brief, was not objected to, and concerned someone other than the defendant. R910-11.

Even if the remark were error, Martinez cannot show prejudice for the reasons the trial court denied the mistrial motion. *See, e.g., State v. Yalowski*, 2017 UT App 177, ¶¶17-22, 404 P.3d 53 (holding that remarks do not require mistrial if the prosecutor does not elicit them, they are "brief, made in passing," and "likely had no effect on the verdict").

Because Martinez has shown either no error or no prejudice from each of his cursory claims, he has not shown cumulative prejudice. *See, e.g., State v. Martinez-Castellanos*, 2018 UT 46, ¶¶39-49, 428 P.3d 1038.

## CONCLUSION

Martinez faults his trial counsel for not challenging eyewitness testimony, but admissible evidence of Martinez's identity was unchallengeable, as it included DNA, fingerprint, video, and strong circumstantial evidence. He also faults his counsel for not objecting to hearsay, but does not acknowledge that it was useful to—and used by—the

defense. Finally, he cursorily argues a number of alleged errors that were either not errors or not prejudicial. This Court should affirm.

Respectfully submitted on February 25, 2019.

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*/s/ John J. Nielsen*  
\_\_\_\_\_  
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## CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 6,921 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

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

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

*/s/ John J. Nielsen*

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JOHN J. NIELSEN

Assistant Solicitor General



## CERTIFICATE OF SERVICE

I certify that on February 25, 2019, the Brief of Appellee was served upon appellant's counsel of record by  mail  email  hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

was filed with the Court on a CD or by email and served on appellant.

will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ Melanie Kendrick

Addenda

Addenda



# Addendum A



\* \* \*

BODY CAM VIDEO OF: ERIKA VIGIL

CONDUCTED BY: OFFICER VICTORIA JEPPSON

\* \* \*

IN RE: REYNALDO MARTINEZ, CASE NO. 20170498



1 \* \* \*

2 **OFF. JEPSON:** Sorry. Like, bouncing from house to  
3 house trying to figure out what's going on?

4 **SPEAKER:** Erika, that's our initial victim.

5 **OFF. JEPSON:** Okay.

6 **SPEAKER:** She's the first victim.

7 **OFF. JEPSON:** Okay.

8 **SPEAKER:** And I'll [inaudible] with her, Rose Park.

9 **OFF. JEPSON:** In Rose Park. Okay. And you live  
10 here? I'm sorry.

11 **ERIKA:** No.

12 **SPEAKER:** No, this is random.

13 **ERIKA:** I've never been here.

14 **OFF. JEPSON:** Random house?

15 **ERIKA:** I was just driving through the neighborhood.

16 **OFF. JEPSON:** Okay. No friends or anything?  
17 Relatives or friends?

18 **ERIKA:** Not that I know of here. Not here, no.

19 **OFF. JEPSON:** Okay. So this is, like, totally  
20 random -- not even his friends or relatives or anything that  
21 lives in this neighborhood or --

22 **ERIKA:** I don't know him. I don't know.

23 **OFF. JEPSON:** You don't know him at all?

24 **ERIKA:** I've heard his name around.

25 **OFF. JEPSON:** Okay.

1           **ERIKA:** I've seen him around.

2           **OFF. JEPPSON:** Okay.

3           **ERIKA:** He offered me a ride, and I got in because  
4 I'd been wanting to talk to him. Because -- I don't know.

5           **OFF. JEPPSON:** Okay. So you got in. And where was  
6 he supposed to be taking you to?

7           **ERIKA:** He hasn't -- he didn't say that he was going  
8 anywhere. Because he was driving through the neighborhood and  
9 then he didn't -- yelling at me.

10          **OFF. JEPPSON:** Okay. What were you going to talk  
11 with him about? You said you wanted to talk with him.

12          **ERIKA:** Him.

13          **OFF. JEPPSON:** Him. You said you wanted a ride and  
14 you were going to --

15          **ERIKA:** No, because -- oh, I've always been wanting  
16 to talk to him. Like, every time I seen him go drive by  
17 because he's cute.

18          **OFF. JEPPSON:** Oh, okay. So drive by in Rose Park?

19          **ERIKA:** Yeah.

20          **OFF. JEPPSON:** Okay. So how did you finally, like,  
21 start chatting with him?

22          **ERIKA:** Because I was [Inaudible] pulled over and  
23 asked me if I wanted a drive [inaudible] and whenever we'd stop  
24 at the store, I [inaudible] store and then he smoked  
25 [inaudible]

1           **OFF. JEPSON:** Okay. So then -- so he didn't stop at  
2 the store, and you're like, what the crap?

3           **ERIKA:** He wanted me to tell him the truth about who  
4 I told on him.

5           **OFF. JEPSON:** Who you told on [inaudible]

6           **ERIKA:** Because, like, a few years ago people have  
7 been accusing me of telling on somebody, and he wanted me to  
8 tell him who I told on, and I told him that I swear to God  
9 [inaudible] I didn't tell on nobody. And he's yeah, right.  
10 Tell me the truth.

11           **OFF. JEPSON:** Okay. So who -- so you had, like,  
12 mutual friends or something or --

13           **ERIKA:** So I don't -- well, I know this girl that  
14 knows -- knew his name because whenever I told her about him --  
15 like, he'd drive by -- he'd drive by, like, the area a lot.  
16 And he said that he asked, like, Joey or whatever.

17           **OFF. JEPSON:** His name is Joey?

18           **ERIKA:** Yeah.

19           **OFF. JEPSON:** Okay. So that's all you know is Joey.  
20 And what's this?

21           **ERIKA:** Her daughter gave it to me. I don't even  
22 know these people's name. They helped me out a lot. They  
23 brought me to their house. I needed a phone, whatever. Like,  
24 I've been trying to find any opportunity I could to jump out of  
25 the car and take off because I didn't know what this guy was

1 going to do to me.

2           **OFF. JEPPSON:** So what -- what started -- I  
3 understand it happened, like, he -- he stopped somewhere or --

4           **ERIKA:** No. We talked right there. And I jumped out  
5 of the car and I took off running to the guy that was  
6 snowmobiling and asked him if I could use the phone, to please  
7 use his phone so I could call my grandma to come and get me.  
8 And when I got on the phone with my grandpa, and this guy seen  
9 me that was over here, he told me, "Hurry. Come here." He's  
10 like, "Go into my house. Go into my house now." So that --  
11 because he didn't want that guy to do anything to me.

12           **OFF. JEPPSON:** Okay. So what was going on? I've got  
13 somebody else that was saying that he's, like, wailing on you.

14           **ERIKA:** He was trying to pull -- no, he's trying --

15           **OFF. JEPPSON:** He was like beating the crap out of  
16 you.

17           **ERIKA:** He was trying to pull me back --

18           **OFF. JEPPSON:** And you've got, like, bruises going on  
19 on the side of your face already.

20           **ERIKA:** Might be [inaudible]

21           **OFF. JEPPSON:** No, it's besides that.

22           **ERIKA:** Well, I think [inaudible] but he was trying  
23 to pull me back in the car.

24           **OFF. JEPPSON:** Okay. So no -- like, one of these  
25 other neighbors saying that he was, like, actively, like,

1 beating on you.

2           **ERIKA:** No, he was trying -- he grabbed me by my hair  
3 and was trying to pull me back into the car.

4           **OFF. JEPSON:** Okay.

5           **ERIKA:** And I was, like -- kept on swinging at him to  
6 try to let me go. [inaudible] that guy.

7           **OFF. JEPSON:** Okay. So then you run in -- so what  
8 was going on -- somebody was saying something about your kids  
9 or -- was he threatening your kids or something?

10           **ERIKA:** Oh, no. I did want to get my kids out of my  
11 apartment because he kind of knows the apartment that I live  
12 in. So I don't -- my aunt was close to my kids.

13           **OFF. JEPSON:** So then you run into here, and then  
14 what?

15           **ERIKA:** And I called my aunt to go get my kids  
16 [inaudible]

17           **OFF. JEPSON:** Okay.

18           **ERIKA:** And I called my grandpa and told him and  
19 asked him if he'd come get me.

20           **OFF. JEPSON:** So then what's going on with the dude  
21 out -- with Joey or whatever?

22           **ERIKA:** He took off. I don't know. He took off. He  
23 hit that car right there. So I ran over there, because I left  
24 my purse in the car. And I guess he took off running. I ran  
25 over there to grab my purse and I asked that lady, like,

1 what -- which way did he go? And she's, like, I don't know.

2 He just hit me [inaudible] out of the car or whatever.

3 **OFF. JEPSON:** Okay. He got your purse?

4 **ERIKA:** Yeah.

5 **OFF. JEPSON:** Oh, where's that at?

6 **ERIKA:** In the house.

7 **OFF. JEPSON:** Okay. That's still in here? Okay.

8 Did they have -- did anybody have you fill out one of  
9 these statements yet?

10 **ERIKA:** I don't want to.

11 **OFF. JEPSON:** You don't want to? It would really  
12 help us to, like, try and figure out and keep everything, like,  
13 in order and figured out.

14 **ERIKA:** I just want to go to my grandpa. I don't --  
15 I don't want him [inaudible] by me. Like, I don't want  
16 [inaudible]

17 **OFF. JEPSON:** Okay. Did we get any of your  
18 information?

19 **ERIKA:** Yeah, I got my ID.

20 **OFF. JEPSON:** Okay. We get current address, all  
21 that?

22 **ERIKA:** Yeah.

23 **OFF. JEPSON:** Sorry. Thanks for letting us kind of  
24 crash at your place here.

25 **MAN:** You got a ride?

1           **ERIKA:** I'm going to call -- is it okay if I use the  
2 phone to call my grandpa again?

3           **OFF. JEPSON:** I can get you a phone.

4           **MAN:** Huh?

5           **OFF. JEPSON:** I'll let her use my phone. That's  
6 okay.

7           Sorry. Go ahead.

8           **MAN:** [inaudible]

9           **OFF. JEPSON:** You're just fine. Sorry.

10          Okay. So -- just so I can have everything written  
11 down too. I'm sorry. I know you gave him your information.

12          **WOMAN:** Is it all right if I take a picture? Because  
13 I know --

14          **OFF. JEPSON:** Um, which guy?

15          **WOMAN:** That guy.

16          **OFF. JEPSON:** I don't know about this guy.

17          **WOMAN:** He's out there taking pictures [inaudible]

18          **OFF. JEPSON:** I don't know. That's the sergeant  
19 right there. We'll go see what's going on with him.

20          **WOMAN:** Okay. Yeah, I was like, who is he?

21          **OFF. JEPSON:** That I don't know.

22          **ERIKA:** Is it okay if I go in?

23          **WOMAN:** Come in. Go ask the sergeant who that guy  
24 was that was taking pictures.

25          **MAN:** Huh?

1           **WOMAN:** Go ask the police officer in the car who that  
2           guy was that was taking pictures.  
3           **ERIKA:** Is it all right if I talk to him?  
4           **OFF. JEPSON:** Yeah. Go in.  
5           **WOMAN:** The police officer will tell you who it was.  
6           **OFF. JEPSON:** Well, we'll find out.  
7           **WOMAN:** Okay. You come [inaudible] dog in the cage.  
8           **OFF. JEPSON:** He's a happy dog [inaudible]  
9           **WOMAN:** Little girl.  
10          **ERIKA:** Thank you.  
11          **WOMAN:** My other one. She's in the bathroom.  
12          [Inaudible]  
13          **OFF. JEPSON:** Okay. What was your name? I'm sorry?  
14          **ERIKA:** Erika.  
15          **OFF. JEPSON:** Which way do you spell it?  
16          **ERIKA:** E-R-I-K-A.  
17          **OFF. JEPSON:** What's your last name?  
18          **ERIKA:** Vigil. V-I-G-I-L.  
19          **OFF. JEPSON:** And what's your birthday?  
20          **ERIKA:** 11-15-90.  
21          **OFF. JEPSON:** And where do you live at?  
22          **ERIKA:** My -- well, address on my car is [inaudible]  
23          7854 West 2500 South.  
24          **OFF. JEPSON:** Which apartment?  
25          **ERIKA:** It's not my apartment. It's my grandpa's



1 address.

2           **OFF. JEPSON:** Oh, that's your grandpa's. Okay. And  
3 that's over here in --

4           **ERIKA:** Magna.

5           **OFF. JEPSON:** Magna. What's a good phone number for  
6 you?

7           **ERIKA:** Um, my phone broke. I'm -- I'm supposed to  
8 get one today.

9           **OFF. JEPSON:** Okay.

10          **ERIKA:** 385-256-5019.

11          **OFF. JEPSON:** I'm sorry, 5019?

12          **ERIKA:** Yes.

13          **OFF. JEPSON:** Okay. What about -- what's your  
14 grandpa's name?

15          **ERIKA:** Frank.

16          **OFF. JEPSON:** Frank what?

17          **ERIKA:** [inaudible]

18          **OFF. JEPSON:** Do you have a phone number for him?

19          **ERIKA:** [inaudible]

20          **OFF. JEPSON:** No, just in case we can't get ahold of  
21 you [inaudible] and say, hey, do you know where Erika is at?

22          **ERIKA:** Okay. 801-628-[inaudible]

23          **OFF. JEPSON:** I'm sorry. Try it again.

24          **ERIKA:** 4773.

25          **OFF. JEPSON:** Okay. I'll write down this is

1 grandpa.

2 So where at in Rose Park did this start at?

3 **ERIKA:** Like around 7 North and Redwood.

4 **OFF. JEPPSON:** Is that where you're staying now?

5 **ERIKA:** Yeah.

6 **OFF. JEPPSON:** Okay. And the guy's name is -- you  
7 only know him as Joey?

8 **ERIKA:** Yeah.

9 **OFF. JEPPSON:** And just that he's just been in the  
10 neighborhood?

11 **ERIKA:** Well, I -- he drives around a lot. I'm  
12 pretty sure he lives up in.

13 **OFF. JEPPSON:** Okay. As you were walking to the  
14 store -- I just want -- I want to write -- since you don't want  
15 to write it down, I just want to make sure I get it correct  
16 since I'm talking, like, 10 people today.

17 You were walking to the store. Which store?

18 **ERIKA:** To 7-Eleven.

19 **OFF. JEPPSON:** For cigarettes?

20 **ERIKA:** Uh-huh.

21 **OFF. JEPPSON:** And he pulled over and asked if you  
22 wanted a ride?

23 **ERIKA:** Uh-huh.

24 **OFF. JEPPSON:** Okay.

25 **ERIKA:** Maybe that's why he's been driving around a

1 lot because [inaudible]

2 **OFF. JEPSON:** So what kind of things did you talk  
3 about?

4 **ERIKA:** He wanted me to tell him the truth about  
5 [inaudible] whatever, if I knew this person [inaudible]

6 **OFF. JEPSON:** This new person and stuff that's  
7 happened in the past?

8 **ERIKA:** Yeah.

9 **OFF. JEPSON:** Like, he thinks that you snitched on  
10 somebody in the past or turned someone in or something?

11 **ERIKA:** He said, I know -- yeah, that I told -- I  
12 don't know if it was, like, snitching or whatever, but he  
13 thinks that I -- I don't know.

14 **OFF. JEPSON:** Okay.

15 **ERIKA:** [inaudible] somebody [inaudible]

16 **OFF. JEPSON:** Okay. Did you tell him to let you  
17 out? Did you tell him to stop at any time? Tell me --

18 **ERIKA:** [inaudible] and I told him the truth and I  
19 told him the truth. And then [inaudible] I don't know,  
20 everything I would tell him -- like, I was like, tell me what  
21 you want me to tell you, so he's like -- he can calm down  
22 because everything else I give you, you get more mad and I  
23 don't want you to get mad.

24 **OFF. JEPSON:** When he got mad, like, yelling or  
25 threatening or screaming?

1           **ERIKA:** Yelling and screaming. Just yelling and  
2 getting into his face.

3           **OFF. JEPPSON:** Okay. So this whole -- how -- about  
4 how long were you in the car for?

5           **ERIKA:** Since [inaudible] about an hour and a half.

6           **OFF. JEPPSON:** Okay. About an hour and a half in the  
7 car.

8           **WOMAN:** [inaudible] We might be a little late, but  
9 we'll get there.

10          **OFF. JEPPSON:** Sorry, we can go and do this in the  
11 car.

12          **WOMAN:** [inaudible]

13          **OFF. JEPPSON:** She went down the hall.

14          **ERIKA:** Sorry. I don't mean to interfere with your  
15 guys' life. Is it okay if I -- I'm going to call my grandpa  
16 [inaudible]

17          **WOMAN:** Sure. Go ahead.

18          **ERIKA:** I think --

19          **WOMAN:** Sure. No problem. You're welcome. You're  
20 welcome.

21          **ERIKA:** Where did your daughter go?

22          **WOMAN:** [inaudible] Oh, she's in the bathroom.  
23 Thanks. Go ahead.

24                 (People in the house talking.)

25          **ERIKA:** Sorry. I just need to get a number on my

1 account.

2           **OFF. JEPSON:** Yeah, that's fine. I left it unlocked  
3 if you want to have her sit in the car and pull it off to the  
4 side of the road or something or even come around -- I don't  
5 know. I might be having this other victim also needing a place  
6 to go because these people need to go somewhere.

7           Sure. Okay.

8           You're fine.

9           **ERIKA:** Hey, Granpy, do you have a ride right now?  
10 Like, um, could you come pick me up?

11           Do you know what the address is down here?

12           **OFF. JEPSON:** We can just meet him at the corner.

13           **ERIKA:** We can meet you at the corner. It's --

14           **OFF. JEPSON:** On 4000 West about 3600 South.

15           **ERIKA:** 4000 West and 3600 South. So just go down 36  
16 South and go to --

17           **OFF. JEPSON:** Where the Harmons is.

18           **ERIKA:** Turn west and right there where the Harmons  
19 is. Can we go to the Harmons?

20           Can you get to the Harmons? Yeah, on 35th. Yeah.

21 Yeah.

22           **OFF. JEPSON:** Did they -- did somebody else get your  
23 name?

24           **ERIKA:** Huh?

25           **OFF. JEPSON:** Did somebody else get your name, sir?

1           **MAN:** Yes.

2           **OFF. JEPPSON:** Okay. Perfect. Just making sure.

3 There's, like, a whole bunch of people involved here. So...

4           (Erika talking on the phone.)

5           **MAN:** Yeah, yeah. Come here.

6           **ERIKA:** The cops are talking to me. So I just need a

7 ride.

8           **MAN:** [inaudible] Just get out of here. I don't

9 care how you do it.

10          **OFF. JEPPSON:** Yeah, I'm taking her out now.

11          **MAN:** Get her out. I have --

12          **OFF. JEPPSON:** Don't need this drama.

13          **MAN:** I do have kids.

14          **OFF. JEPPSON:** Yep, yep.

15          **MAN:** And I wouldn't want -- she's got a contact over

16 here.

17          **OFF. JEPPSON:** No, she's just making this phone

18 call -- in fact, that's what I was trying to tell her, I'll let

19 you use my phone.

20          **MAN:** [inaudible]

21          **OFF. JEPPSON:** So -- yeah, as soon as she gets off

22 your phone, I'm going to take her out. Because your wife is

23 saying we got to go. We're going to be late. I'm like, okay,

24 we're going to go.

25          **MAN:** Yeah.

1           **OFF. JEPSON:** You can sit in the back of my car.  
2 We'll wait for whatever is going on there.  
3           You go to love it.  
4           **MAN:** It's just slippery out there.  
5           **OFF. JEPSON:** Well, rear wheel drive vehicles.  
6           **MAN:** Oh, on.  
7           **OFF. JEPSON:** Rear wheel drive. They're awesome.  
8 So, yeah, we'll get her out.  
9           **MAN:** You got a heck of a job. [inaudible]  
10          **OFF. JEPSON:** One call at a time. One call at a  
11 time.  
12          **MAN:** I really don't -- I'm like, she's got  
13 [inaudible]  
14          **OFF. JEPSON:** We try. We try. She's not being  
15 honest. There's more going on here.  
16          **MAN:** It's like I told the officer, I said, get her  
17 out of here. She's got to go.  
18          **OFF. JEPSON:** Yeah. Yeah. We'll get her out.  
19 We'll get her out.  
20          **ERIKA:** [inaudible]  
21          **OFF. JEPSON:** Okay. And that's your bag; right?  
22          **MAN:** Yeah.  
23          **OFF. JEPSON:** Okay. We've got their stuff.  
24 Perfect.  
25          **ERIKA:** Oh, yeah, I forgot my things.

1           **WOMAN:** Yeah. Okay.

2           **ERIKA:** Thank you.

3           **OFF. JEPPSON:** Perfect. Thank you.

4           **MAN:** Bye.

5           **ERIKA:** Thank you. I appreciate everything you've  
6 done for me.

7           **MAN:** Okay.

8           **OFF. JEPPSON:** Thank you.

9           **MAN:** Okay.

10          **WOMAN:** As long as you don't come back to my house  
11 and try to kill us, it will be okay.

12          **OFF. JEPPSON:** No.

13          **MAN:** We ain't even going to worry about that.

14          **OFF. JEPPSON:** No. Okay. My car is up around the  
15 corner.

16          **ERIKA:** So he took off running that way. That cop  
17 said he dropped somebody else, did you say?

18          **OFF. JEPPSON:** Yeah.

19          **ERIKA:** They didn't catch him yet?

20          **OFF. JEPPSON:** No. He's off on foot.  
21 So my car is down around the corner, and we'll get  
22 you right over to the Harmons there. I'm going to write down  
23 the plate number.

24          Beautiful.

25          **SPEAKER:** Did we identify the male?



1           **OFF. JEPSON:** Oh, she only knows him by a different  
2 name. So...

3           **SPEAKER:** What did he look like?

4           **ERIKA:** He looked black. He has dark skin. Like  
5 black hair.

6           **SPEAKER:** All right. She sits in the back of the  
7 car.

8           **OFF. JEPSON:** Okay.

9           **SPEAKER:** [inaudible]

10          **OFF. JEPSON:** Okay.

11          **SPEAKER:** [inaudible]

12          **OFF. JEPSON:** And you just locked her in. Awesome.

13          **SPEAKER:** [Inaudible]

14          **OFF. JEPSON:** Perfect. Yeah, let me try out the  
15 other side of the car, and we'll have you sit on one side and  
16 you on the other side.

17          **SPEAKER:** Do you need anything else?

18          **OFF. JEPSON:** I have no idea.

19          **SPEAKER:** [inaudible]

20          **OFF. JEPSON:** You're going to come in this car over  
21 here.

22          **SPEAKER:** [inaudible]

23          **OFF. JEPSON:** Yeah. My light is trying to work.

24          **ERIKA:** [inaudible] to this lady?

25          **OFF. JEPSON:** She got hit. Okay. We're going to

1 have a full house.

2 **ERIKA:** [inaudible]

3 **OFF. JEPPSON:** Okay.

4 **ERIKA:** [inaudible]

5 **OFF. JEPPSON:** Um.

6 **ERIKA:** Did you run the name on the car?

7 **OFF. JEPPSON:** Yeah.

8 **ERIKA:** And did you find anything in the car that  
9 would identify him or what?

10 **OFF. JEPPSON:** That part I don't know because I've  
11 been over at all these different houses trying to figure out  
12 what the crap is going on. So those guys are doing the  
13 accident portion. The car is going to go for detective fold.  
14 I don't know whose pen that was, but they just donated it to  
15 me.

16 **ERIKA:** I know. I'm just letting you know that I'm  
17 in the parking lot where I can [inaudible] of the Henry Day  
18 Ford. Do you know where the Harmons' building is? You turn  
19 down -- I'm in the police car [inaudible].

20 Where -- are you on 35th?

21 **OFF. JEPPSON:** Would it be easier for them to go to  
22 Harmons?

23 **ERIKA:** Is it -- she can take me to the Harmons. You  
24 know where the Harmons is; right? It's on 36. You just go  
25 straight down past, you know, like [inaudible]

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**OFF. JEPSON:** On the corner of 4000 West.

**ERIKA:** 4000 West. And 35 --

**OFF. JEPSON:** 3500 South.

**ERIKA:** You know the grocery store on the corner?  
What? There's not -- you know, where the swap meet building  
is? You know on 35th when you keep driving past Bangerter.  
Then there's -- you keep going past Bangerter to the next.  
[inaudible] that corner.

**OFF. JEPSON:** To the big American flag.

**ERIKA:** Yeah, there's a big American flag right  
there.

So you just got off the freeway barely? Are you by  
the mall at least, or no?

So you're -- I know, but are you on -- off 35th or  
no?

**OFF. JEPSON:** Of course, this car wants to come in.

**ERIKA:** You're not even --

I guess there's an accident on the freeway. So he  
hasn't even exited off 35th yet.

**OFF. JEPSON:** Oh, there's an accident everywhere.

**ERIKA:** Yeah. Got to drive [inaudible]

**WOMAN SPEAKER:** So you are the one that he hit?

**ERIKA:** Yeah.

**WOMAN SPEAKER:** Which way did he run?

**ERIKA:** So up the street right here towards the

1 Harmons. But I don't know if he went anywhere else or into  
2 other places or whatever. I just saw him run.

3 **OFF. JEPSON:** Go buddy.

4 **ERIKA:** There's my grandpa.

5 **OFF. JEPSON:** This is your grandpa?

6 **ERIKA:** Yeah.

7 **OFF. JEPSON:** Okay. Let me get just a little bit  
8 more information from you. You actually can't get out.  
9 What's --

10 **ERIKA:** Here's the phone number --

11 **OFF. JEPSON:** Which one?

12 **ERIKA:** The phone number you can get ahold on me is  
13 probably his phone.

14 **OFF. JEPSON:** All right. All right. What's your  
15 address in Rose Park?

16 **ERIKA:** It's 1720 -- I don't know the exact address.  
17 Like 17 -- it's right there by the 7-Eleven on, like, 13 North  
18 and Redwood Road.

19 **OFF. JEPSON:** What's your apartment number?

20 **ERIKA:** It's No. 25.

21 **OFF. JEPSON:** And what's the name of your complex?

22 **ERIKA:** Evergreen or whatever. The ones right behind  
23 the 7-Eleven.

24 **OFF. JEPSON:** Okay. And then what's a good phone  
25 number for --

1           **ERIKA:** To get ahold on me? Right now it's probably  
2 my grandpa's.

3           **OFF. JEPSON:** And what's that?

4           **ERIKA:** It's 801 -- what's your number again?

5           **GRANDPA:** What?

6           **ERIKA:** What's your number again? 638?

7           **GRANDPA:** 638-4703.

8           **OFF. JEPSON:** 638?

9           **GRANDPA:** Yes.

10          **ERIKA:** If anything, they are going to call me on  
11 your phone because I don't have a phone number.

12          **OFF. JEPSON:** Okay. Um, honestly, you need to  
13 report this to Salt Lake too.

14          **ERIKA:** Who? I do?

15          **OFF. JEPSON:** Yeah. For -- basically he kidnapped  
16 you, unlawful detention on that part. And then over here he's  
17 assaulting you. You have a friend that can -- that can tell  
18 you who he is?

19          **ERIKA:** I can ask a friend that --

20          **OFF. JEPSON:** Other than Joey.

21          **ERIKA:** -- told me his name.

22          **OFF. JEPSON:** Okay. Let me give you a case number  
23 and a card. If you want to hop in the truck. Let me give you  
24 that. And then if you can give me a call back just to give me  
25 all that information, that would be great.

1           Okay. Get ahold of your friend. Find out what his  
2 name is. Give me a call back. I mean, obviously this is kind  
3 of a huge frick'n cluster.

4           **ERIKA:** Where -- where is your number at?

5           **OFF. JEPSON:** It's the 840-4000.

6           **ERIKA:** Okay.

7           **OFF. JEPSON:** Okay? And at this point, I mean, all  
8 you are doing is just giving me his information because he hit  
9 and run. He has disorderly contact -- conduct. He -- robbery,  
10 all this other stuff not even involving you. But he's tied to  
11 at least three other different things that we need to figure  
12 out. Okay? Get ahold of me. Let me know what's going on.  
13 All right? Okay? All right. Thanks.

14           **GRANDPA:** Thank you, Officer.

15           **OFF. JEPSON:** You're welcome. Thanks.

16           **GRANDPA:** Have a good day.

17           **OFF. JEPSON:** You too.

18           This is so messed up.

19           **WOMAN SPEAKER:** Yeah, I guess the other officers told  
20 me [inaudible] accidents.

21           **OFF. JEPSON:** Oh, yeah. I wish I read that right  
22 because his plate is covered with snow.

23           Shoot. I didn't.

24           **WOMAN SPEAKER:** She was the one that came up to the  
25 road, though, to ask where he went. [inaudible]

1           **OFF. JEPSON:** Yeah. So this was -- well, let's see.  
2 How do you kind of explain what's all going on with this thing  
3 here. Let me kind of pull over where he might see us. If we  
4 pull -- if we sit by the flag --

5           **WOMAN SPEAKER:** You know what, though, he actually  
6 just lives up the street. If you want to just drop me off to  
7 his house, I can meet him there.

8           **OFF. JEPSON:** Oh, I can do that.

9           **ERIKA:** He just lives right behind the Golden Crown  
10 on 35th.

11          **OFF. JEPSON:** Okay.

12          **ERIKA:** So if you just go up 35th --

13          **OFF. JEPSON:** Yeah, I can do that.

14          **WOMAN SPEAKER:** And I'll just tell him that, that  
15 you're going to take me there.

16          **OFF. JEPSON:** Okay. Yeah.

17                 225. I'm going to be giving a ride to the female in  
18 the car accident to an address up the road. Trying to explain  
19 all this stuff. Like, which one am I doing, cause there's,  
20 like, six -- yeah, it was --

21          **WOMAN SPEAKER:** They're -- the officer's just going  
22 to take me to your house. Okay? I'll just stay at your house.

23                 Yeah, they are going to take me to your house.

24 [inaudible]

25                 So is that car, is it a stolen vehicle or is it his

1 vehicle?

2 **OFF. JEPSON:** We think it is his vehicle.

3 **WOMAN SPEAKER:** Does he have car insurance?

4 **OFF. JEPSON:** Um, that I'm not sure of.

5 **WOMAN SPEAKER:** Honestly, that's what I thought why  
6 he ran is because he didn't have car insurance. I honestly  
7 don't care because I have full coverage on my car.

8 **OFF. JEPSON:** Yeah.

9 **WOMAN SPEAKER:** But I mean, [inaudible]

10 **OFF. JEPSON:** Yeah, so it doesn't kind of -- oh, too  
11 late. I already grabbed another case. Whoops.

12 **WOMAN SPEAKER:** I'm guessing this has been, like, an  
13 all morning thing for you guys?

14 **OFF. JEPSON:** Um, it's been definitely the last hour  
15 and a half.

16 **WOMAN SPEAKER:** [inaudible]

17 **OFF. JEPSON:** Yes. [inaudible] on the phone.

18 Yeah, it's kind of a cluster. It's like a -- I don't  
19 know. She's not being very cooperative. She knows more than  
20 she's saying.

21 **WOMAN SPEAKER:** Well, you know, to be honest, after  
22 he hit me, she came out on foot, is what I told the other  
23 officers, from that area, from that neighborhood. She didn't  
24 have a car or anything. She came and looked in his car,  
25 noticed he was gone. Came, opened my car door. Didn't even



1 ask me if I'm okay or anything, and was just, like, where did  
2 he go? And I was like -- I'm like, he just ran up the road. I  
3 don't know.

4 And then she shut my door. She's like, okay, I'll  
5 call the cop. And shut the door. It looked like she went back  
6 to the car, and she opened the car door like she was looking  
7 for something. Shut the door, and then she started to run.

8 **OFF. JEPSON:** Like towards where he was or back to  
9 where she came?

10 **WOMAN SPEAKER:** No, towards the Harmons, like she was  
11 going to go look for him. And then I don't know where you guys  
12 found her at because I thought they were together, to be  
13 honest. And so I's just like, okay.

14 And then I was telling the officers, I can't believe  
15 none of the other witnesses -- like people that were behind me  
16 or in front of me didn't even stop to, like, say they witnessed  
17 it also.

18 **OFF. JEPSON:** Yeah. People are --

19 **WOMAN SPEAKER:** The street right behind the Golden  
20 Corral, you're going to take a right.

21 **OFF. JEPSON:** Okay.

22 **WOMAN SPEAKER:** And then the first street on the --

23 (End of video.)  
24  
25