No. 20171019-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

EDDIE A. SALAZAR,
Defendant/Appellant.

Appellant is not incarcerated.

BRIEF OF APPELLANT

Appeal from a judgment of conviction for one count of Burglary, a second degree felony, in violation of Utah Code § 76-6-202, and one count of Theft, a class B misdemeanor, in violation of Utah Code § 76-6-404, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Keith Kelly presiding.

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INTRODUCTION

On July 6, 2015, Steve Young broke into Homeowner's house through the back door and stole items including Homeowner's wife's medication. Salazar and his wife met Young for the first time the day of the offense. They drove Young to Homeowner's house. Salazar's defense at trial was that he and his wife did not know Young intended to commit a burglary. After being stopped by police because the car matched the description of a car possibly involved in the burglary, Salazar and his wife recounted to law enforcement that at some point, Young had exited the car, was gone a few minutes, and then got back into the car with some items in his hands. They then drove away. Salazar told police that he initially drove faster to avoid a car that appeared to be following them. But, once that car disappeared, they stopped at a 7-Eleven for gas.

Mrs. Salazar was deceased at the time of the trial. The trial court admitted her out-of-court statements to the detective over Salazar's objection. In those statements Mrs. Salazar referred to Young as a friend to whom they had given a ride. Among other things, she said that she had discarded a bag of pills at the 7-Eleven that Young had stolen from Homeowner's house. This Court should reverse and remand for a new trial because Mrs. Salazar's statements were inadmissible under the Confrontation Clause and Utah Rules of Evidence prohibiting hearsay.

ISSUE AND STANDARD OF REVIEW

Issue I: Whether the trial court erred when it admitted evidence of a deceased witness's statement to police in violation of the Confrontation Clause.

Standard of Review: "Whether a defendant's confrontation rights have been violated is a question of law, reviewed for correctness." *State v. Garrido*, 2013 UT App 245, ¶ 9, 314 P.3d 1014.

Preservation: This issue is preserved by trial counsel's objection and argument in trial. R.440-46,485.

Issue II: Whether the trial court erred when it admitted hearsay evidence under Rule 804(b)(3) of the Utah Rules of Evidence.

Standard of Review: The standard of review on the admissibility of hearsay "often contains a number of rulings, each of which may require a different standard of review." *State v. Rhinehart*, 2006 UT App 517, ¶ 10, 153 P.3d 830 (quoting *State v. Workman*, 2005 UT 66, ¶ 10, 122 P.3d 639 (internal

quotation omitted)). "Legal questions regarding admissibility are reviewed for correctness, and questions of fact are reviewed for clear error." *Id.* The standard of review on the trial court's admissibility ruling is abuse of discretion. *Id.*

Preservation: This issue is preserved by trial counsel's objection and argument in trial. R.427,433-40.

STATEMENT OF THE CASE

The State's Case

On July 6, 2015, Homeowner's house was burgled while no one was home. Homeowner received messages from his burglar alarm company and the Cottonwood Heights Police saying that his house had been burgled. R.401-02. When he came home that afternoon he found his house in disarray. R.402-06. The basement door had been forced open. R.402-03,410-11, State's Exh. 7-8. There were footprints on the stairs and a scuff mark on the home alarm. R.403. Homeowner's sunglasses were missing, along with a money clip, money, his wife's medications, some jewelry, and a microcassette recorder. R.403,405-06, State's Exh. 3-6,9-11.

Homeowner testified that his home was on a hill. R.409. The basement was accessible from the backyard. R.409-10. Because of the hill, no one in front of the home, in the driveway, or in the street would have been able to see what went on behind the house. R.410, State's Exh. 1-2. Homeowner did not know Salazar, Salazar's wife, or Young. R.407. He had never seen Salazar before. R.408. Crime

scene technicians went to Homeowner's house to collect evidence. R.461. There was no evidence that Salazar ever entered the house. R.461.

A witness ("Witness") testified that on July 6, 2015 at around 1:00 p.m. he was looking at homes in Cottonwood Heights. R.465. He saw a car driving slowly, against the curb, maybe ten miles an hour, go around the area twice. R.466-68,472-73. He had never seen the car or its occupants before. R.476. Witness watched for about fifteen minutes. R.468,473. He never saw anyone get out of the car. R.473. The car, a mid-90's Honda, was white with possibly a black car bra on the hood. R.466. It had four doors. R.466. The driver had a shaved head, was a Hispanic male, and had his seat tilted back. R.469. The front passenger was female with dark hair. R.469. Another male, of European, Anglo Saxon descent, trotted from between houses and the car sped up to meet him. R.470,473-74. The second male jumped into the car and the car sped off. R.470,473-74. Witness followed and called police. R.470. Witness thought the car sped up while he followed, so he stopped following. R.471,474-75.

On July 6, 2015, Detective Damien Olson, on duty with the Cottonwood Heights Police Department, was dispatched on a report of a residential burglary. R.411,413-15. The report said to look for an older 90's, white Honda Accord with a black leather bra and three occupants in the car, including possibly a Hispanic male driver with a shaved head. R.415-16. Dispatch said that the vehicle was last seen at Wasatch Boulevard and 9400 South. R.417.

Det. Olson saw a vehicle at 9000 South 1300 East that he believed fit the description of the vehicle he was looking for. R.417,452. The car he saw was a 1990 white Honda Accord with fading white paint and a black leather accessory bra, registered to Salazar. R.417-18,452. Det. Olson, in his unmarked patrol vehicle, did not notice any speeding or erratic or reckless driving. R.416,452,463. He activated signals for the car to pull over. R.452-53. The car pulled into the main parking lot at 7900 South 1300 East. R.418,453.

The car contained three occupants: a possibly Hispanic adult male, a female passenger in the front seat, and an adult white male in the back seat. R.419. Salazar was the driver. R.419-21. Mrs. Salazar sat in the front passenger seat. R.420,449. Young was the backseat passenger. R.420. Salazar was at all times cooperative and compliant. R.453,457. Witness came to the parking lot and confirmed that the vehicle and the occupants were the same vehicle and occupants that he had seen driving earlier. R.420.

Det. Olson read *Miranda* warnings to Young and the Salazars. R.421,449. He read Salazar the *Miranda* warnings even though Salazar was not in custody or in handcuffs. R.455. Salazar said that he understood his rights and agreed to speak to the detective. Salazar told Det. Olson that he had given Young a ride. R.456,423. Salazar said that, at one point, Young exited the car, was gone for a few minutes, and then returned to the vehicle, carrying some items. R.423-24. As they drove away, they observed another vehicle following or chasing them. R.425. Salazar drove faster to lose the vehicle. R.425. They stopped for gas at a 7-Eleven.

R.425. Det. Olson asked Salazar if he knew what Young did at the home. R.426. Salazar said he was unsure but assumed Young had stolen something. R.427. On cross examination, Det. Olson said that he did not witness Salazar do anything illegal. R.462.

Mrs. Salazar also agreed to speak to the detective. R.449. She told the detective that she and Salazar drove Young, their friend, to an address on the east side. R.449-51. She did not know the address because she had been distracted by her cell phone. R.449. They then went to a 7-Eleven store. R.449-50. Young gave her a bag of prescription pills and asked her to discard them. R.449-50. She described the garbage can at the 7-Eleven store where she disposed of the pills. R.451. She was nervous because she was on felony probation at the time. R.451. She did not know to whom the pills belonged. R.451. Neither Salazar nor Mrs. Salazar told Det. Olson that they knew what Young intended to do when they brought him to Homeowner's house. R.461-62. Det. Olson allowed Salazar to leave but arrested Young and Mrs. Salazar. R.457.

Det. Olson obtained the surveillance video from the 7-Eleven. R.426,459; State's Exh. 1A. The video showed no furtive movements in Salazar's car. R.459. Salazar and Mrs. Salazar got out of the car and went into the store. R.459. Then Salazar pumped gas. R.460. In the video, Mrs. Salazar, on the passenger side, is seen interacting with Young, seated in the backseat, and then going to the trash can, away from the gas pump. R.460; State's Exh. 1A. The 7-Eleven was located on a busy, noisy street. R.460.

Det. Olson believed that Young entered the house alone. R.461.

The Defense Case

Young testified for Salazar. R.487-507. He testified that on July 6, 2015, he was at his sister's house because he had been kicked out of the place where he had been staying. R.487-88,500-01. Young's sister knew Mrs. Salazar. R.488. That day, Mrs. Salazar came over to see Young's sister. R.488. Young did not know Salazar or Mrs. Salazar until he met them at his sister's. R.502-03. Young asked Mrs. Salazar for a ride to the house he was renting so he could get his belongings. R.489,503-04. He did not tell anyone that he wanted to go to a house and steal. R.491. The Salazars said they could give him a ride but that it had to be quick. R.489.

Young told Salazar where to drive. R.489. Young said "Stop right here, and I'll . . . run and get my stuff." R.489. Young did not point out the specific house. R.490. He got out of the car, ran around a house, jumped the back fence, ran across the backyard, and kicked in the basement door. R.490-91,505. Once in the house, Young stole a bag of pills and empty boxes. R.491-92. He took the pills because he hoped they were pain pills and he was struggling with a drug addiction. R.491-92,501-02. He went back out the back door and out to the front of the house, where he ran over to Salazar's car and told him to hurry up. R.492. Salazar drove away. R.493. Young thought a truck was following them. R.493. Young was concerned that someone was trying to get the property back. R.493-94. He told the Salazars that there might be somebody in the truck trying to

reclaim items that Young had stolen. R.493-94. He said, "I think these guys are going to come beat me up because I got my stuff out of the house." R.494,497. He said it with some urgency to let Salazar know that he was worried and Salazar should not stop. R.494-95. The truck disappeared and Salazar pulled into the parking lot of a convenience store. R.495. Young never got out of the car. R.496. Salazar went into the store. R.496. Young believed that Mrs. Salazar stayed in the car except for when Young asked her to throw the bag of pills in the trash. R.496-97,505. After Salazar got back to the car, they drove back the way they had come. R.497. Salazar did not demonstrate any concerns about what had happened at the house or at the gas station. R.498. When Det. Olson signaled for them to pull over, Young thought it was for Young's burglary and theft. R.498-99.

Young did not remember speaking with Det. Olson although he remembered that he talked to an officer. R.504. He didn't remember telling the officer that Mrs. Salazar was throwing small boxes from the car as they drove away from the truck or that he told Det. Olson that he asked Mrs. Salazar to discard the pills at the 7-Eleven. R.505. He testified that he told Det. Olson that Salazar had nothing to do with Young's burglary. R.507.

Defense counsel also re-called Det. Olson. R.508. According to Det. Olson, Young initially told Det. Olson that Salazar and Mrs. Salazar had picked up Young at a different 7-Eleven. R.509. Young initially lied to the detective. R.457,463-64. Det. Olson told Young that Salazar and Mrs. Salazar had told him the truth, that they had driven him up to a home. R.509. At that point, Young told Det. Olson

that he had gone to Homeowner's home, knocked down the back door, and stolen items. R.509.

Procedural History

The State charged Salazar with one count of Burglary, a second degree felony, in violation of Utah Code § 76-6-202, and one count of Theft, a class B misdemeanor, in violation of Utah Code § 76-6-404. R.1-2,552.

Mrs. Salazar died before trial. R.427-28. At trial[1], the State proposed to introduce Mrs. Salazar's statements to Det. Olson. R.427. Defense counsel objected, arguing that the evidence was inadmissible hearsay and violated the Confrontation Clause. R.427-46,485. The trial court overruled counsel's objection and ruled that under Rule 804(b)(3) of the Utah Rules of Evidence, Mrs. Salazar's statements were admissible because Mrs. Salazar was unavailable and the statements were against her interest. R.445-47 (a transcript of parties' arguments and the trial court ruling is attached as Addendum A). The trial court also ruled that admitting the statements did not violate the Confrontation Clause because Salazar could confront Mrs. Salazar's hearsay statements by calling Young as a witness or by choosing to testify himself. R.445-46. Det. Olson testified about Mrs. Salazar's statements. R.449-62.

At the close of the State's case, defense counsel moved for a directed verdict, arguing the evidence was insufficient to prove that Salazar had the mens

[1] On April 27, 2017, Salazar waived his right to have a preliminary hearing. Docket, Case No. 171901573.

rea to commit Burglary or theft as a party because all the evidence showed was that Salazar gave Young a ride to the location of the crimes. R.477. The trial court denied the motion for directed verdict because the jury needed only to find that Salazar had the mental state required to commit the offense and that he "solicited, requested, commanded, encouraged, or intentionally aided another to commit the offense. . . ." R.480. The trial court found that Witness seeing Young run to Salazar's car and Salazar driving quickly away and identifying Salazar, plus the video evidence and Mrs. Salazar's statement could support a reasonable jury concluding that Salazar intentionally aided Young in committing the offenses. R.480-83.

The jury convicted Salazar as charged. R.552. The trial court sentenced Salazar to serve one to fifteen years in the Utah State Prison for Burglary, but suspended the prison commitment. R.220, Sentence, Judgment, Commitment, attached as Addendum B. The trial court sentenced Salazar to serve one hundred eighty days in jail for the Theft, granting credit for seven days served. R.221,603-05. Salazar timely appeals. R.227.

SUMMARY OF THE ARGUMENT

This Court should reverse the trial court's ruling on the admissibility of Mrs. Salazar's out-of-court statement and remand the case for a new trial. First, the trial court should have excluded Mrs. Salazar's statements because they violated the Confrontation Clause. Mrs. Salazar's statements to Det. Olson were testimonial; therefore Salazar had the constitutional right to confront and cross

examine Mrs. Salazar concerning the statement. Where Salazar had no opportunity to confront or cross examine Mrs. Salazar, the trial court violated his constitutional right of confrontation. Moreover, the error was not harmless beyond a reasonable doubt.

Second, the trial court should have excluded Mrs. Salazar's statements because they were inadmissible. The trial court erred by admitting the statement under Rule 804(b)(3) of the Utah Rules of Evidence because the statements were hearsay and she did not make the statements against her own interest. This error was also harmful.

ARGUMENT

I. The trial court erred by admitting Mrs. Salazar's out-of-court statement, in violation of Salazar's constitutional right to confront his accusers.

The trial court violated Salazar's right to confront and cross-examine a witness when it allowed Mrs. Salazar's hearsay statements to substitute for in-court testimony. "The Sixth Amendment's Confrontation Clause provides that, 'in all criminal prosecutions, the accused shall enjoy the right to be confronted with witnesses against him.' [The Supreme Court has] held that this bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (alterations omitted) (Sixth Amendment attached as Addendum C). The Confrontation Clause "bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-

examination." *Davis v. Washington*, 547 U.S. 813, 821 (2006) (internal quotation marks omitted).

This Court should reverse because Mrs. Salazar's statements were testimonial and could not be used against Salazar at trial. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822. "They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* "Statements taken by police officers in the course of interrogations are also testimonial. . . ." *Crawford*, 541 U.S. at 52.

In *Davis*, the U.S. Supreme Court further explained that in *Crawford*, the U.S. Supreme Court considered testimonial all statements that were the product of "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826 (explaining *Crawford*, 541 U.S. at 53). *Davis* held to be testimonial statements that "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed" "some time after the events described were over." *Id.* at 830. For example, the testimonial statements in *Davis* were from a woman to police officers investigating domestic battery that had occurred earlier that day. *Id.* at 817-20. "Such statements under official

interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Id.* at 830.

By contrast, in *Salt Lake City v. George*, this Court determined that certificates concerning breath test calibrations were not testimonial statements. 2008 UT App 257, ¶¶ 1-2,10-14,189 P.3d 1284. The certificates were "uncharacteristic of the typical kind of testimonial evidence at which the Confrontation Clause was aimed, i.e., ex parte examination of witnesses intended to be used against a particular defendant." *Id.* ¶ 11. The certificates were prepared, as mandated by the Utah Administrative Code, to ensure the continued proper functioning of the intoxilyzer machines. *Id.* ¶ 12. They were not prepared in preparation to "prosecut[e] . . . a specific defendant." *Id.* Thus, they were deemed non-testimonial. *Id.* ¶¶ 12-14.

While "exceptions to the hearsay rule" do not generally violate the Confrontation Clause, "the right of a defendant to confront an accuser may bar evidence that might otherwise be admissible under an exception to the hearsay rule." *State v. Villareal*, 889 P.2d 419, 424 (Utah 1995). In *Villareal*, a case of aggravated kidnapping, rape of a child, and sodomy on a child, officers testified as to the content of in-custody statements made by a co-perpetrator. *Id.* at 423. Prior to the officers' testimony, the prosecutor had presented the co-perpetrator as a witness, ascertained that the co-perpetrator refused to testify, and then "propounded a long series of factual propositions in the form of leading

questions" based on the co-perpetrator's confession. *Id.* at 422-23. "[T]o avoid violation of [the defendant's] right to confront his accuser, [the co-perpetrator's] statements must have been subject to cross-examination." *Id.* at 425.

Here, the trial court erred because admitting Mrs. Salazar's statement violated the Confrontation Clause. First, Mrs. Salazar's statements were testimonial. Second, Salazar had no opportunity to cross examine Mrs. Salazar concerning her testimonial statements. Finally, the error was prejudicial.

First, the trial court violated the Confrontation Clause by admitting Mrs. Salazar's testimonial statement. As held in *Crawford*, *Davis*, and *George*, statements made to police officers interrogating for evidence of a crime, rather than responding to an ongoing emergency, are testimonial. *See Crawford*, 541 U.S. at 52-53; *Davis*, 547 U.S. at 821-22,826,830; *George*, 2008 UT App 257, ¶ 11. As in *Crawford*, Mrs. Salazar's statements were made while she was a potential suspect of a reported crime. *See Crawford*, 541 U.S at 38-39,52,65; R.417,420-21,452. Also as in *Crawford*, Det. Olson's purpose in interrogating Mrs. Salazar was to investigate the reported crime. *See id.*; R.417,420-21,449-52. Det. Olson's reading *Miranda* warnings would have caused Mrs. Salazar to "reasonably expect" that her statements would "be used prosecutorially," and that they would be "available for use at a later trial." *See id.* at 52; R.421,449,455-56. Unlike in *Davis*, Det. Olson's questions were not "to enable police assistance to meet an ongoing emergency" because Det. Olson did not witness any crimes and only stopped the Salazars' car to investigate the reported burglary. R.415-16; *see*

Davis, 547 U.S. at 828; R.462. Thus, Mrs. Salazar's statements to Det. Olson were testimonial.

Second, because Mrs. Salazar's statements were testimonial, Salazar had the right to confront and cross examine Mrs. Salazar. *See Crawford*, 541 U.S. at 59; *Davis*, 547 U.S. at 821; *Villareal*, 889 P.2d at 425. Because Salazar had no opportunity to cross examine Mrs. Salazar, admission of her statement violated the Confrontation Clause. *See Crawford*, 541 U.S. at 68; *Davis*, 547 U.S. at 821; *Villareal*, 889 P.2d at 425; R.427-28.

Finally, admission of Mrs. Salazar's statement in violation of the Confrontation Clause was prejudicial. "For an error to be reversible, it must be harmful." *Villareal*, 889 P.2d at 425. "Where 'the error in question amounts to a violation of a defendant's right of confrontation guaranteed by the Sixth Amendment to the United States Constitution, its harmlessness is to be judged by a higher standard, i.e., reversal is required unless the error is harmless beyond a reasonable doubt." *Id.* In *Villareal*, our supreme court considered "the importance of the witness' testimony in the prosecutor's case, whether the testimony was cumulative, the presence or absence of evidence collaborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.* at 425-26 (quoting *State v. Hackford*, 737 P.2d 200, 205 (Utah 1987)). In *Villareal*, the error was harmless beyond a reasonable doubt because the co-perpetrator simply confirmed another witness and confirmed the

defendant's confession. *Id.* at 426. "[T]he case against [the defendant] was so overwhelming that the violations of his right to confront his accuser were harmless beyond a reasonable doubt." *Id.*

Unlike in *Villareal*, the trial court's error in this case was not harmless beyond a reasonable doubt. Consideration of factors set forth in *Villareal* indicates the trial court's error was harmful. *See Villareal*, 889 P.2d at 425-426. Mrs. Salazar's statement was important to the State's case for two reasons. *See id.* at 425-26. First, Mrs. Salazar's calling Young their friend suggested an affiliation between Young and the Salazars that was found nowhere else in the record. R.449-51,488,502-03. Second, as Young's friend and Salazar's wife, Mrs. Salazar's statement that she discarded Homeowner's wife's pills invited the jury to base inferences of Salazar's knowledge on Mrs. Salazar's actions. R.427-28,449-51. As such, the "importance of the [out-of-court statement] in the prosecutor's case" was high and was not cumulative. *See id.*

Further, other *Villareal* factors indicate the error was not harmless. *See id.* There was no "cross-examination otherwise permitted" because Mrs. Salazar was deceased. *See id.*; R.427-28. Moreover, the State's "overall" case was not overwhelming. *See id.* The evidence was undisputed that Salazar never entered Homeowner's home. R.461. Young testified that not only was Salazar unaware that Young had burgled the home but Young provided Salazar a reasonable explanation for Witness following them. R.489,493-95,497,507. He reiterated to Salazar that he had only taken his own possessions. R.493-95. He testified that he

informed law enforcement that Salazar had no involvement in the crimes. R.507. Moreover, Det. Olson did not observe Salazar committing any crime, including speeding or reckless driving. R.462.

Finally, in addition to not being harmless beyond a reasonable doubt, the State's reliance on Mrs. Salazar's statement in its closing arguments indicates that the error was not harmless. This Court will reverse a verdict for evidentiary error "if the admission of the evidence . . . reasonably" affected "the likelihood of a different verdict." *State v. Davis*, 2013 UT App 228, ¶ 80, 311 P.3d 538 (abrogated on other grounds, *State v. Ringstad*, 2018 UT App 66, ---P.3d.---). In *Davis*, which involved object rape and forcible sodomy, the defendant successfully argued that some admitted evidence was irrelevant. *Id*. ¶¶ 1,64-65,77-79. However, this Court determined that "any facts the jury could reasonably have inferred from the [erroneously admitted evidence] were presented to the jury in [] other testimony." *Id*. Moreover, the State did not refer to the irrelevant evidence in closing. *Id*. ¶ 83. Admission was therefore harmless. *Id*. ¶¶ 80-84.

But here, unlike in *Davis*, the State emphasized Mrs. Salazar's hearsay statement in closing arguments. *See id*. ¶ 83. The State said that Mrs. Salazar said that Young "handed her the prescription medication which she discarded," linking it to the video evidence from the 7-Eleven store. R.536-38, State's Exh. 1A. The State again supported its theory that all three individuals, Salazar, Mrs. Salazar, and Young, shared the same mens rea when the State argued on rebuttal

that the three tried to discard items at the 7-Eleven. R.547. The trial court's reference to Mrs. Salazar's statement in denying Salazar's motion for directed verdict indicated that the trial court considered her statement as incriminating Salazar. R.481. The State's and the trial court's repeated references to the statement demonstrate the importance of the statement to the State's case. Thus, the error was not harmless and, *a fortiori*, was not harmless beyond a reasonable doubt.

II. The trial court erred by admitting hearsay evidence in violation of Utah Rule of Evidence 804(b)(3).

The trial court violated Rule 804(b)(3) of the Utah Rules of Evidence when it admitted statements from the deceased Mrs. Salazar to Det. Olson. (Rule 804(b)(3) is attached as Addendum D.) The trial court erred because Mrs. Salazar's statements were hearsay and she did not make the statements against her own interest. Moreover, the error was harmful because absent the hearsay evidence, the jury was reasonably likely to have reached a different result.

Hearsay is a “statement that [] the declarant does not make while testifying at the current trial or hearing; and [] a party offers in evidence to prove the truth of the matter asserted in the statement.” Utah R. Evid. 801(c). "Hearsay is not admissible except as provided by law or by" the Utah Rules of Evidence. Utah R. Evid. 802.

One exception to the prohibition on hearsay is statements that are made by an unavailable declarant that are not in the declarant's interest. Utah R. Evid. 804(b)(3). A statement against interest is one that "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 to expose the declarant to civil or criminal liability . . . ." Utah R. Evid. 804(b)(3)(A). The statement must also be "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." Utah R. Evid. 804(b)(3)(B).

Appellate courts "'look to the circumstances under which the statement was given'" to determine whether the statement "'is one made against penal interest.'" *State v. Clopten*, 2015 UT 82, ¶ 19, 362 P.3d 1216 (quoting *State v. Drawn*, 791 P.2d 890, 894 (Utah Ct. App. 1990)); *see also Williamson v. United States*, 512 U.S. 594, 603-04 (1994). "The statement need not be an outright confession to a crime in order to be sufficiently contrary to the declarant's penal interest to be admissible." *Clopten*, 2015 UT 82, ¶ 19.

But Rule 804(b)(3) "cover[s] only those" statements "that are individually self-inculpatory." *Williamson*, 512 U.S. at 599 (holding that Rule 804(b)(3) of the Federal Rules of Evidence did not make admissible an in-custody statement inculpating the declarant and others). "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Id.* "Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility

of the self-exculpatory statements." *Id.* at 600. "The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability." *Id.* "We see no reason why collateral statements, even ones that are neutral as to interest . . . should be treated any differently from other hearsay statements that are generally excluded." *Id.* "[T]he most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-exculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Id.* at 600-01. "Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest." *Id.* at 601 (quoting Advisory Committee's Notes to Rule 804(b)(3)). "On the other hand, the same words spoken under different circumstances, *e.g.*, to an acquaintance, would have no difficulty in qualifying . . . ." *Id.* at 601-02.

For example, in *Williamson*, a case about a cocaine shipment, the arrested driver's statement that he was transporting the cocaine for the defendant did not qualify as sufficiently against the declarant's self-interest for admission. *Id.* at 596-97,604. Although the defendant's admission—that he knew the cocaine was in his trunk—was self-inculpatory, "other parts of his confession, especially the parts that implicated [the defendant], did little to subject [the declarant] himself to criminal liability." *Id.* at 604. "A reasonable person in [the declarant's] position

might even think that implicating someone else would decrease his practical exposure to criminal liability, at least as far as sentencing goes." *Id.*

Similarly, in *Clopten*, a murder case, the proposed witness's testimony, that the declarant was present at the time of the murder and that the defendant was not the murderer, was insufficiently against self-interest to be admissible under Rule 804(b)(3). *See Clopten*, 2015 UT 82, ¶¶ 1-2,16-21. In *Clopten*, someone shot the victim; the declarant, the defendant, and two other men escaped in a vehicle. *Id.* ¶¶ 10,20. The declarant's words to other prisoners, "I was there and I can tell you for a fact it wasn't him," were somewhat against the declarant's interest because he "would have known that the police suspected that one of these four individuals murdered [the victim]." *Id.* ¶¶ 16,20. "Under these circumstances, statements exculpating [the defendant] necessarily indicate that one of the three [other] occupants of the vehicle was the shooter." *Id.* ¶ 20. But the declarant "never said that he committed the murder." *Id.* "Although [the declarant's] statements have at least *some* tendency to expose him to criminal liability, this does not necessarily mean that his statements have a *sufficient* tendency to expose him to punishment[2] that a reasonable person would not utter them if they were not true." *Id.* ¶ 21. Our supreme court found no error in the trial court's determination that the declarant's statements had insufficient "tendency to expose him to criminal punishment that 'a reasonable person in the declarant's

[2] Another motive for the declarant's statement was that the declarant, the defendant's cousin, did not want other prisoners to harm the defendant in prison. *Id.* ¶ 21.

position would have made [the statements] only if the person believed [them] to be true.'" *Id.* (quoting Rule 804(b)(3)).

By contrast, in *United States v. Smalls*, a co-defendant to murder bragged to a confidential informant how the co-defendant, the defendant, and others had murdered a fellow prisoner. 605 F.3d 765, 769-772 (10th Cir. 2010). The co-defendant and confidential informant were in a cell together. *Id.* at 768. The co-defendant "constantly talked about the murder over a two-month period." *Id.* When the confidential informant expressed concern that someone involved in the murder might "flip," the co-defendant explained how there were four men in the cell and three participated in killing the fourth man. *Id.* at 768-72. The co-defendant said he had suggested the killing and held the victim's hands while the defendant held the victim's feet and the other cellmate put a plastic bag over the victim's head, suffocating him. *Id.* at 769,772. Then the co-defendant flushed the plastic bag down the toilet. *Id.* at 771. "But ain't nobody gonna say nothin' I ain't gonna worry about that shit . . . That was a clean one right there," said the co-defendant, explaining how none of the participants could be witnesses without confessing their own participation in the murder. *Id.*

The Tenth Circuit Court of Appeals held that some of the co-defendant's statement was admissible. *Id.* at 783-87. During the conversation, the co-defendant "most certainly was not seeking to curry favor with authorities in recounting the specifics of [the] murder . . . or seeking to shift or spread blame to his alleged co-conspirators so as to engender more favorable treatment from

authorities." *Id.* at 783. The casual conversation "provid[ed] a 'circumstantial guarantee' of reliability not found in statements, arrest, custodial or otherwise, knowingly made to law enforcement officials." *Id.* The co-defendant "rather than seeking to shift blame repeatedly opined that because all three men were involved in [the victim's] murder, none of them could say anything." *Id.* at 785. While some statements were arguably exculpatory, much of the co-defendant's statement "plainly [spoke] to a conspiracy to commit murder, an act of murder, and a motive for murder." "While [the co-defendant] stated he did not personally hold the bag over [the victim's] head or hold down [the victim's] legs . . . [the co-defendant], as an alleged co-conspirator, was certainly legally responsible for those acts." *Id.* "These comments as to how precisely [the victim's] murder occurred are undoubtedly against [the co-defendant's] penal interest and, coupled with the circumstances of their making, trustworthy to the extent required by Rule 804(b)(3)." *Id.* "[T]hat makes them *sufficiently* against [the co-defendant's] penal interest, rendering them admissible under Rule 804(b)(3)." *Id.* at 785-86 (italics in original).

Mindful of *Williamson*, the Tenth Circuit remanded *Smalls*, directing the district court to determine what parts of the co-defendant's statements were admissible. *Id.* at 786-87. First, the district court was to determine what parts of the co-defendant's confession were "sufficiently against [the co-defendant's] penal interest" to be admissible. *Id.* "The [district court] should then subject

those selected statements not only to [Federal Rules of Evidence] 401 and 402's relevancy requirements, but also to Rule 403's balancing test." *Id.*

Although this Court reached a different conclusion in *Drawn*, *Drawn* relied on United States Supreme Court case law which has since been overruled. *See Drawn*, 791 P.2d at 894. In *Drawn*, a robbery case, the unavailable witnesses were women who drove the getaway vehicle. *Id.* at 891. While under arrest they "admitted that they waited in the car while defendant robbed the shoe store." *Id.* They told police "that after the robbery, they momentarily evaded police, let defendant out, and threw the money bag and gun out the window." *Id.* In determining whether the women's statements were admissible, this Court said "[h]earsay statements of a witness are admissible at trial provided the State can show the witness's unavailability and prove that the statement bears adequate indicia of reliability." *Id.* at 893 (relying on *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (abrogated by *Crawford v. Washington*, 541 U.S. 36 (2004)). "Indeed, in the usual case, the State 'must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against defendant.'" *Id.* (quoting *Roberts*, 448 U.S. at 65). Because the women's statements were made while in custody, were "substantially similar," other witnesses had observed the car, and the statements subjected the women as well as the defendant to prosecution, this Court concluded there was no error in admitting the statements. *Id.* at 894.

This Court's holding in *Drawn* is not useful here because the *Roberts* holding, which this Court relied on in *Drawn*, is no longer good law. *Roberts*, like *Drawn*, conditioned admissibility of hearsay evidence on whether the evidence was within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *See Roberts*, 448 U.S. at 66; *Drawn*, 791 P.2d at 893. The *Crawford* court[3] overruled this specific *Roberts* holding. *Crawford*, 541 U.S. at 60-62. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62. Moreover, unlike this Court in *Drawn*, the United States Supreme Court did not view the unavailable witness's in-custody status as necessarily enhancing either reliability or the against-interest quality of the statement. *See Drawn*, 791 P.2d at 894; *compare with Williamson*, 512 U.S. at 600-01.

Here, Mrs. Salazar's statement was insufficiently self-inculpatory to be admissible under Rule 804(b)(3). As in *Clopten*, *Williamson*, and *Smalls*, the trial court had a duty to exclude those statements which were not fully self-inculpatory. *See Clopten*, 2015 UT 82, ¶¶ 20-21; *Williamson*, 512 U.S. at 599; *Smalls*, 605 F.3d at 783-87. The trial court erred in admitting Mrs. Salazar's conversation with Det. Olson. *Cf. Clopten*, 2015 UT 82, ¶¶ 20-21; *Williamson*, 512 U.S. at 599; *Smalls*, 605 F.3d at 783-87. Moreover, the error was prejudicial.

[3] Additionally, the Tenth Circuit regarded *Davis* as "render[ing] *Roberts* academic." *Smalls*, 605 F.2d at 774 (relying on *Davis*, 547 U.S. at 823-24).

As in *Clopten*, Mrs. Salazar's statement was not a confession. *See Clopten*, 2015 UT 82, ¶¶ 20-21. Mrs. Salazar never said that she knew that Young had stolen from Homeowner's house. *See id.*; R.449-51,461-62. Nor did she say she knew the pills were stolen. *See id.*; R.449-51,461-62. She did not say that she knew why Young wanted a ride to Homeowner's address. *See id.*, R.449-51,461-62. Saying that she and Salazar drove Young, their friend, to an address was even less of an admission than in *Clopten* because, unlike in *Clopten,* she said she did not know exactly where they drove Young. *Cf. id.* ¶¶ 16,20-21; R.449. Also, unlike in *Clopten*, she did not say that she knew what Young did. *Cf. id.* ¶¶ 16,20-21; R.449-51,461-62. As in *Clopten*, Mrs. Salazar admitted to being in the car when someone else committed a crime. *See id.*; R.449-51,461-62.

In fact, as in *Williamson*, many of Mrs. Salazar's statements were self-exculpatory. *See Williamson*, 512 U.S. at 600-01. She denied knowing the address where she and Salazar dropped off Young. R.449. Moreover, her admission to discarding the pills was self-exculpatory. Trial counsel, relying on the State's proffer that Det. Olson would testify that Mrs. Salazar knew the pills belonged to Homeowner's wife, allowed that Mrs. Salazar's statement about discarding the pills could incriminate Mrs. Salazar as obstruction of justice. R.433,438-39. But absent evidence[4] that Mrs. Salazar knew who owned the pills, her statement that

[4] Trial counsel for the State proffered that Det. Olson would testify that Mrs. Salazar said she thought that the pills she discarded belonged to the Homeowner's wife. R.429. But, Det. Olson's actual testimony was that Mrs. Salazar said she did not know whose pills they were. R.451.

she discarded the pills was self-exculpatory. Mrs. Salazar, nervous because she was on felony probation, likely had a self-exculpatory purpose in telling Det. Olson how she discarded the pills because Utah law prohibits possessing controlled substances. *See id.*; *see also* Utah Code § 58-37-8(2)(a); *but see State v. Miller*, 2008 UT 61, ¶ 24, 193 P.3d 92 (holding that possession of controlled substance "excludes temporary possession of a controlled substance for the purpose of returning it to its rightful owner"); R.449-51. Her claim not to have known who the pills belonged to was similarly self-exculpatory. *See id.*; R.451.

Although in *Smalls*, the Tenth Circuit remanded for the trial court to determine if any of the statement at issue was admissible, this Court should not similarly remand for that purpose because none of Mrs. Salazar's statements were admissible. *See Smalls*, 605 F.3d at 786-87. None of Mrs. Salazar's statements have a sufficient tendency to expose Mrs. Salazar to punishment. *See Clopten*, 2015 UT 82, ¶ 21; *cf. Smalls*, 605 F.3d at 786-87. As in *Clopten*, admitting to being present in the same car as someone who commits a crime is not self-inculpatory. 2015 UT 82, ¶¶ 16,21; R.449-51. Similarly, Mrs. Salazar's statement that Young got out of the car and came back, and that they left for the 7-Eleven store is not an admission that she knew of or intended to participate in Young's crime. *See id.*; R.449-51,460-61. As argued above, that Mrs. Salazar said she accepted and discarded the pills is more consistent with self-exculpation than self-inculpation. *See Williamson*, 512 U.S. at 600-01; R.449-51. Moreover,

although Det. Olson arrested[5] Mrs. Salazar, nothing in the record indicates she was prosecuted as a result of her statements. There is nothing in Mrs. Salazar's statement that is sufficiently self-inculpatory to make any part admissible under Rule 804(b)(3). But if this Court deems otherwise, this Court should remand for the trial court to first determine whether any part of Mrs. Salazar's statements should have been excluded as non-self-exculpatory and, if so, to hold a new trial. *See Smalls*, 605 F.3d at 786-87.

The error was prejudicial. "[A]n erroneous decision to admit or exclude evidence does not[, however] result in reversible error unless the error is harmful." *State v. Webster*, 2001 UT App 238, ¶ 38, 32 P.3d 976. In, *Webster*, which involved allegations of wrongful appropriation of a car, this Court considered whether the prior bad acts evidence and the defendant's wife's hearsay admissions to a detective were prejudicial. *Id.* ¶¶ 1,38-39. Although the remaining evidence was sufficient to have convicted the defendant, this Court was "not confident that the jury would still have found the defendant guilty." *Id.* ¶ 39. Similarly, in *State v. Ellis*, our supreme court having held that hearsay was inadmissible because the declarant was not unavailable, said that "[p]rejudice analysis is counterfactual." 2018 UT 2, ¶¶ 24-25,42, 417 P.3d 86. That means considering "an alternative universe in which the trial went off without the error."

[5] It is common for courts to require those on felony probation to avoid the company of persons who are committing crimes or using illegal drugs. Young testified that his actions were because of his drug addiction. R.491-92,501-02. Det. Olson may have believed that Mrs. Salazar had sufficiently violated her probation to merit arrest by being in Young's company.

Id. Or, it may mean an alternative hypothetical universe in which the absent witness testified in person and was subject to cross examination. *Id.* n. 2.

Here, admitting the hearsay was prejudicial. "Without" Mrs. Salazar's statement, "the State's case amounted to the following:" Homeowner's house was burgled on July 6, 2015. *See Webster*, 2001 UT App 238, ¶ 39; R.401-06,410-11. Witness saw Salazar driving his white Honda slowly, against the curb, going around the area twice, with his wife in the car. R.420,465-69,472-73. Young trotted from between houses, got into the car, and they drove away quickly both from the house and from Witness's truck when Witness tried to follow. R.470-71,473-74. Det. Olson pulled over Salazar's car. R.416-20,449,452-53,463. Post-*Miranda*, Salazar said that he had given Young a ride, that Young had gotten out of the car, was gone for a few minutes, and returned to the vehicle, carrying some items. R.423-24,456,463. They drove away from Witness because Witness appeared to be following them. R.425. They stopped for gas at 7-Eleven, where Salazar pumped gas and Mrs. Salazar interacted with Young, and then Mrs. Salazar walked away from the car, away from the direction where Salazar was pumping gas. R.425,459-60; State's Exh. 1A. Upon getting stopped, Salazar assumed that Young must have stolen something. R.427. As argued in Point I, in the "alternative universe in which the trial went off without the error," the jury, "in these circumstances is reasonably likely to have reached a different verdict." *See Ellis*, 2018 UT 2, ¶ 42.

Counterfactually, had Mrs. Salazar been able to testify, the record supports that there is a reasonable likelihood that she might have explained her statement to deny her own and Salazar's involvement in Young's crime. *See id.*, n. 2. Mrs. Salazar might reasonably have been expected to have explained that if she had referred to Young as a friend, she meant that he was the brother of her friend. *See id.*; R.449-51,488,502-03. There is a reasonable likelihood that she would have clarified that she did not know what Young did outside of the car because he told the Salazars that he was retrieving his own possessions and they could not see him in the back of the house. *See id.*; R.409-10,461-62,489,491,503. There is a reasonable likelihood that she would have clarified that she did not know who owned the pills she discarded because there was no evidence that she ever read the labels but simply discarded Young's trash because he was still in the car. *See id.*; R.449-51; State's Exh. 1A. That Mrs. Salazar's statements were admitted without Salazar receiving the opportunity to ask Mrs. Salazar for clarification, either on cross examination or direct examination, was prejudicial to Salazar's case.

Without Mrs. Salazar's hearsay statements, there is a reasonable likelihood that Salazar's trial counsel might have preferred not to present testimony from Young. "[O]nce a court has ruled counsel must make the best of the situation." *State v. Cruz*, 2016 UT App 234, ¶ 44, 387 P.3d 618. The trial court suggested that Salazar address the hearsay by cross-examining Witness and presenting Young as a witness. R.445. Thus, Salazar presented Young's testimony, which was

that he had gotten a ride from the Salazars without previously knowing them. R.488,502-04. He told them that he needed to recover his belongings from a house he was renting. R.498,503. He told Salazar where to drive, and then told him to stop and wait while Young got his stuff. R.489. Out of view of the road, Young then kicked in the back door of Homeowner's house, stole items including medications, and ran back to the car, telling Salazar to hurry away. R.490-92,505. He explained that Witness was following, intending to hurt Young because Young recovered items belonging to Young. R.493-95,497. At the 7-Eleven, Young asked Mrs. Salazar to discard the baggie of pills. *See id.*; R.496-97,505.

But for Mrs. Salazar's hearsay statements, there is a reasonable likelihood that the jury would not have convicted. *See Webster*, 2001 UT App 238, ¶ 39. "[H]ad the jury not been given the additional evidence indicating that" Salazar's deceased wife described Young as a friend or that she had agreed to discard pills in prescription bottles with Homeowner's wife's name on them, this Court should not be "confident that the jury would still have found [Salazar] guilty beyond a reasonable doubt" of being involved in Young's burglary and theft. *See id.*; R.403,449-51; State's Exh. 11. That is because no witness would have described Young as a "friend" of the Salazars. R.488,502-03. Moreover, absent the trial court's erroneous ruling, there is a reasonable likelihood that Salazar's counsel would not have presented testimony from Young which included Young saying that he asked Mrs. Salazar to discard the pills. *See Cruz*, 2016 UT App 234, ¶ 44;

R.439-40,496-97,505. This is especially true where the trial court suggested presenting Young as a defense witness to confront the unavailable Mrs. Salazar. *See id.*; R.445. Absent the hearsay evidence in which Young was described as a "friend" of the Salazars and in which Mrs. Salazar agreed to discard Homeowner's wife's pills, there is a reasonable likelihood of a better outcome for Salazar.

Moreover, as argued in Point I, *infra*, the State's reliance on the hearsay evidence in closing demonstrated further harm. *See Davis*, 2013 UT App 228, ¶¶ 83-84. Mrs. Salazar's hearsay statement allowed the State to argue that Salazar, Mrs. Salazar, and Young all shared the same mens rea. R.536-38,547; State's Exh. 1A. For example, the State argued that Mrs. Salazar "basically indicated, yeah, at some point [Young] also handed her some prescription medication which she discarded." R.536. The State also discussed the video. R.537. The State argued that in the video, where Mrs. Salazar is seen getting out of the car, "she kind of walks around and you can't see what's happen[ing] because the gas pump is blocking it, but safe to assume there's probably a trash can over there and she does something . . . and then at some point then [Salazar and Mrs. Salazar] walk in [to the 7-Eleven]." R.537-38. The State argued, from Mrs. Salazar's statements matching what was visible in the video, plus photographs from the trash can, "[a]nd so did [Salazar] know what was going on? Yes. Did [Mrs. Salazar] know what was going on? Yes." R.538. Although the State had the videos and photographs, it was Mrs. Salazar's statements that enabled the State to imply an

affinity and common plan between Young and the Salazars that the exhibits did not otherwise portray. Thus, the trial court's error was prejudicial.

CONCLUSION

Salazar respectfully asks this Court to reverse the trial court's ruling on Mrs. Salazar's out-of-court statement and remand this case for a new trial.

SUBMITTED this 20th day of September 2018.

ANDREA J. GARLAND
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 8,257 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.

ANDREA J. GARLAND

CERTIFICATE OF DELIVERY

I, ANDREA J. GARLAND, 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 two 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 20th day of September 2018.

Andrea Garland
ANDREA J. GARLAND

DELIVERED this _____ day of September 2018.

_____

ADDENDUM A

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. EDDIE A. SALAZAR, Defendant.	Case No. 171901573 TRANSCRIPT OF: JURY TRIAL

BEFORE THE HONORABLE KEITH A. KELLY

MATHESON COURTHOUSE
450 STATE STREET
SALT LAKE CITY, UTAH 84111

October 30, 2017

Q. And what did he say?

A. He didn't provide much information regarding it, says he was kind of unsure but assumed that he had stolen something.

Q. You had a chance to talk to Nikki Salazar as well?

A. I did.

Q. And who's Nikki Salazar?

A. Nikki Salazar is Eddie Salazar's wife.

Q. And what did Nikki Salazar tell you?

MR. BAUTISTA: Objection 802.

MR. TAN: Your Honor, I believe it's --

THE COURT: Can you approach?

(Bench conference.)

THE COURT: How -- you have a hearsay objection.

MR. TAN: And I believe --

THE COURT: What -- what is your offer of proof?

MR. TAN: As far as it's a hearsay exception, under --

THE COURT: Well, is it hearsay, is the first question?

MR. TAN: And I don't believe it is under 801.

THE COURT: What -- what are you suggesting that he's going to say?

MR. TAN: That Nikki Salazar was aware in regards to what the three of them were doing that day, and that Steve Young, one of the coconspirators asked that they actually

throw some of the evidence away at the 7-Eleven.

THE COURT: Okay. And I understand she's dead, right now?

MR. TAN: Yes, that's correct.

THE COURT: Why don't we take a brief break and let the -- let the jury go we'll talk more about this.

MR. TAN: Okay.

(End of bench conference.)

THE COURT: This is a good time for a break. We will take probably about a ten-minute break. I want to remind members of the jury to -- to not discuss the case or any issues related to the case at this time, and certainly to not form any opinions until you've heard all of the evidence.

THE BAILIFF: All rise for the jury.

(Jury exits the courtroom.)

THE COURT: Please be seated. You can go ahead and step down. I'm going to still have a bench conference as to the offer of proof.

(Bench conference.)

THE COURT: So, you're saying that -- well, first of all, Nikki Salazar is dead, correct?

MR. TAN: As far as we know.

MR. BAUTISTA: Yes.

THE COURT: At least we had an obituary?

MR. BAUTISTA: Yes, she's passed.

THE COURT: So Nikki, you're saying that she's going to say what?

MR. TAN: So that they were just driving around, that Steve exited and returned a few minutes later, they stopped at 7-Eleven and Steve handed her a plastic bag containing some prescription pills which she discarded, which I believe is one of the State's exhibits that's been admitted. And that she also -- and -- and the -- the last thing is, she thinks that the pills belonged to the homeowner.

THE COURT: Okay. So there hearsay objection. So let's go through each of these items. That they were driving around. I assume that's put in for the truth of the matter asserted?

MR. TAN: Correct.

THE COURT: That Steve exited for a few minutes and -- to the home, and later came back. I assume that's for the truth of the matter asserted.

MR. TAN: Right.

THE COURT: And Steve Young asked her to dispose of the pills. I assume that's for the truth of the matter asserted?

MR. TAN: Yes.

THE COURT: And finally, she thinks the pills belong to the homeowner. It's probably a real 701 opinion, but it's for the truth of the matter asserted; is that correct?

MR. TAN: That's correct.

THE COURT: Okay. What is the hearsay exception then?

MR. TAN: Your Honor, I believe under 801, Subsection d, No. 2, subsection E, statements that are not hearsay. A statement that meets the following conditions is not hearsay, an opposing party's statement. The statement is offered again to the opposing party and was made by the party's coconspirators during and in furtherance of the conspiracy.

THE COURT: Okay.

MR. BAUTISTA: The problem is multi -- no. 1. I think they have --

THE COURT: I'm sorry. At this point we've -- we've got the offer of proof, I think we can go ahead and argue it on the record. I just didn't want to taint the witness's testimony.

MR. BAUTISTA: Oh, okay.

(End of bench conference.)

THE COURT: Okay. So the issue the State is arguing that the statements and the offer of proof were under 801(d)2 subpart E. Go ahead, Mr. Tan. So you're arguing that Nikki Salazar was a coconspirator with the defendant, and it was made during and in furtherance of the conspiracy?

MR. TAN: That's correct.

THE COURT: The question I have is: If it's an

admission to a police officer, is it during the conspiracy or is it in furtherance of the conspiracy? In other words, it's -- it appears to be a kind of a confession. Which is that during a conspiracy and is it in furtherance of a conspiracy?

MR. TAN: I believe the content of her statements itself is during the conspiracy, and also in furtherance, because the -- and -- and I don't if we need to approach the bench again, to --

THE COURT: If you want to approach, let's do it.

(Bench conference.)

MR. TAN: The part she tells the officer that Mr. Young told her to discard some of the evidence, I think that's in furtherance of the conspiracy as well. So if I can--

THE COURT: I guess the question I have is: Normally 801(d)2E is a party -- a coconspirator says something and you have a witness who hears it. It's like a party opponent admission, during the conspiracy being carried out. For example, example here might be, if somebody heard her say, "Get in the car we need to get out of here," while this alleged incident was taking place when -- once -- once the police stopped them, the question I have is: Then are those statements during a conspiracy and are they in furtherance of conspiracy?

MR. TAN: And I think that, as I understand it, I think it's still part of the -- the furtherance of the

conspiracy because at this point, she's still part of an incident where she's still involved in helping out as a coconspirator. I -- I don't think that actual crime itself has -- when in fact, what we have is one coconspirator telling another coconspirator to discard some of the evidence, and the video, I believe, in my argument would be does show that it's kind of what she did.

THE COURT: Okay. Defense argument?

MR. BAUTISTA: I don't believe that it actually meets the -- that exception. And in addition, it would be in violation of the confrontation clause. The problem is: I believe the Court is correct that it's in furtherance of the conspiracy would be a situation where someone was in a bank robbery and Bank Robber A tells Bank Robber B, "Don't forget the cash," and a witness overhears that, but only Bank Robber B's at trial.

Bank robber A's statement comes in because it was in the conspiracy, it was in the furtherance, or alternatively, when we have an FBI wiretap or FBI undercover agent, for example, on a mob sting, I don't believe that it satisfies that. Further, if it is a conspiracy, they have -- I think the State has to show independent evidence to support that conspiracy prior to the statement being introduced.

It's the State's theory of the case that there was a party offense by all people in the car, but absent of these

statements, they have no -- they have to have independent witness -- other evidence to corroborate these statements that in fact there was a conspiracy. The statements themselves cannot be used as evidence of the conspiracy. They -- they are not self-authenticating.

Finally, the statement of "Get rid of this property," doesn't necessarily showing that she's a conspirator, she's helping him get rid of evidence, but she did not maintain it or -- or take possession of it with intent to deprive the owner of it for herself. She wasn't stealing it. She might be guilty of obstructing justice. But that would be it. And so I don't believe these statements should be allowed.

THE COURT: Reply?

MR. TAN: No. I think what -- as Mr. Bautista indicated, potentially we're looking at additional charges because of what she did. In essence, I'm making an in furtherance argument because the State potentially can charge her with obstruction of justice, evidence tampering, based on that statement.

The other issue though, that I also run into is, for obvious reasons, the declarant, namely being Nikki Salazar is no longer available, she's --

THE COURT: So that gets into a new exception. If -- why don't we deal with this exception and then if there are other exceptions, we can decide where that leads us. Is

that -- do you have anything else on that?

MR. TAN: Nothing else.

THE COURT: Well, the issue is: These four statements, and I've just stated on the record that they were all for the truth of the matter asserted, so it's a -- and Nikki Salazar was in the car, the evidence that we have now, is she's in the car with the defendant and Steve Young, who's alleged to have gone into the house and broken in and taken stuff.

And she's making statements about the facts of the case for the truth of the matter asserted. And the exception is an opposing parties statement, a statement offered against an opposing party and subpart D2E of Rule 801 was made by parties coconspirator during in furtherance of the conspiracy.

The key words are "during and in furtherance of." These statements are made to the police after they were caught or stopped, and there were separate statements. And that the -- they're not during the conspiracy because at that point they've been stopped. Is it in furtherance of the conspiracy? No, because in a sense it's -- it's an admission of facts that may be used against her personally. It's not further in the conspiracy. In a sense it's -- it's creating evidence to prosecute the conspiracy.

After the -- it has been stopped. Subpart on -- the comment under D2E is statements by co-conspiracy -- conspirator

of a party made during the course and in furtherance of the conspiracy, admitted as non-hearsay under subdivision D2E have traditionally been admitted as exceptions to the hearsay rule.

So, and -- and the -- and then the further comment about the old rule of evidence was broader than this rule, in that it provided for the admission of statements made while the party and declarant were participating in a plan to commit a crime or civil wrong if the statement was relevant to the plan or its subject matter, and was made while the plan was in existence, but -- and before it's complete execution or other termination.

I mean, I don't know that that directly applies other than to highlight the fact that it's statements made while the crime is taking place, the conspiracy is. So it does not satisfy the exception under 801(d)2E. Any other hearsay exceptions?

MR. TAN: We thought the other one would be the declarant, one of the declarants, that being Nikki Salazar is no longer available, because she's deceased.

THE COURT: Okay. That goes to 804, what would the -- the subpart be? So I'm assuming based upon the -- I think she's unavailable.

MR. TAN: That's correct.

THE COURT: So what is the -- what is the exception? Under 804. Do you want to grab your rules?

MR. TAN: Yes.

THE COURT: And why don't we --

(End of bench conference.)

THE COURT: I think we can go -- at this point we can go on to the overall record. So I -- the -- there's an argument under Rule 804 that the witness is unavailable and we have the obituary of Nikki Salazar. And I think both sides, nobody's contending that Nikki Deal Salazar still alive, are they?

MR. BAUTISTA: No, Your Honor.

THE COURT: Both sides agree that they're unavailable? Does the State?

MR. TAN: Yes, Your Honor.

THE COURT: And the defense agree that Nikki D. Salazar is unavailable, Mr. Bautista?

MR. BAUTISTA: Yes. Because of her death. That is one of the criteria for being unavailable.

THE COURT: Okay. Which is under 084(a)4?

MR. BAUTISTA: Four.

MR. TAN: Trying to pull it up, but for whatever reason the wifi on the internet on my computer is a little bit slow.

MR. BAUTISTA: Do you want to come see?

(Conversation between counsel.)

THE COURT: Mr. Tan.

MR. TAN: Yes, I believe we have been able to pull it up, it is -- I believe it fits under 804 Sub 3, statement against interest.

THE COURT: Okay. Argument on that, Mr. Tan?

MR. TAN: Yes, Your Honor. So under Sub A, a reasonable person in the declarant's position would have made only if the person believed it be true because when made it was so contrary to the declarant's proprietary [inaudible] interests, 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. Again, for the same facts that we discussed at the bench and I don't want -- unless --

THE COURT: We can -- we can -- you can approach and we can talk about them if you want.

MR. TAN: Okay. And again I just don't want --

(Bench conference.)

THE COURT: That's fine. You're welcome to put it up here if that would be helpful to you. I just think you'll more likely to be recorded if it's closer.

MR. TAN: So first thing that she indicated is that they were just driving around as opposed to anything else in regards to, like, trying to commit a crime, she basically states they were just driving around. She also says that Mr. Young returned a few minutes later. Again, about really

indicating that he's commit any type of crimes.

At the same time, though, knowing that most likely he did commit some type of break-in. And then finally, I think the most incriminating part is where she says that when they were at the 7-Eleven, Steve Young handed her a plastic bag containing some prescription pills, which she discarded, which I think basically in regards to Sub A, so contrary to declarant's proprietary and [inaudible] interests. And I think also Sub B is supported by corroborating circumstance that [inaudible] trustworthiness.

I think we have evidence to show that the prescription pills were found in one of the trash cans at the 7-Eleven, which Detective Olson is about to testify, but has not testified to yet, so I think it also goes to show his trustworthiness in that respect.

THE COURT: Mr. Bautista?

MR. BAUTISTA: I don't believe that we are just driving around as a statement against interest, there's nothing incriminatory with that. I don't believe saying that Steve exited the vehicle and returned a few minutes later is -- is a statement against interest either, and I don't believe those need any exception. Their observations or they're -- they're not of subjecting someone to criminal penalty in and of themselves.

Stopped at 7-Eleven, and Steve handed her a plastic

bag containing some orange pills which she discarded. Coupled with that she told officers she believed the pills were the homeowners', might suggest some incriminating statement there.

The question is: That's incriminating for her obstructing, and it's incriminating for Steve, but is that admissible against Mr. Salazar?

THE COURT: Okay. Anything else?

MR. BAUTISTA: No.

THE COURT: You know, she is clearly unavailable, I think both sides have agreed. I do find it meets the exception under Rule 804(b)3. Because I could see her -- if she were still alive, she's likely going to be prosecuted based on those statements. Driving around with a person who went into the car -- who went into the house, he goes into a house, exits, later comes back, and the other evidence that corroborates that is there are things from this particular owner's house in their car, including pills with -- that Mr. Combs' wife's name on them that -- that Steve Young later asked her to dispose of the pills, she does dispose of the pills, and it's corroborated by her walking over to a garbage can, at least a video of what appears to be her walking to a garbage can, and she thought the pills belonged to the homeowner.

Well, she apparently had possession of them. And the pills themselves that were retrieved, I assume the evidence is they were retrieved -- retrieved from the trash can, show her

name on them, and so I see that as being a statement that a reasonable person in the declarant's position would have made only if they believed them to be true, because when made, it was so contrary to their interest as to expose them to criminal liability, and they supported by corroborating circumstances that clearly indicated it's trustworthiness, and it is offered in criminal case as one that tends to expose the declarant to criminal liability.

All of those facts would be put into a case with the same type of charges in this case, plus a charge of obstruction of justice for throwing away the pills. Plus, it's -- it's corroborated by both the video of the surveillance camera and by the statements that the officer said the defendant made in this case about Steve Young going into a house and coming out. So I find it meets that exception under 804(b)3A.

Anything else for the State? Defense?

MR. TAN: No.

MR. BAUTISTA: All of it.

THE COURT: Yeah, I see all of it, because I --

MR. BAUTISTA: Because driving around is not incriminatory.

THE COURT: No. Well, I think it is, when -- when put with the other facts of the case that they were together in the car driving around.

MR. BAUTISTA: How do we overcome confrontation

clause because he's not -- the State's now using this evidence by another person against him, without him having a right to cross-examine that person. And also I think we have Bruton issues where we're now having a codefendant's statements without that individual being subject to cross-examination. I think Bruton does not allow this.

THE COURT: What's your response to that?

MR. TAN: I think your argument would be if she was here, she -- we would be with a subpoena and she would be able to testify, whether consistently with these statements or inconsistently, but the fact is: She's -- she's no longer here, she's -- she's dead, which I think we all agreed upon, but it's -- and so I agree.

THE COURT: Well, I don't we have any evidence of why she's passed away. Do we?

MR. TAN: And my understanding, this is, I think from what her --

MR. BAUTISTA: We --

MR. TAN: -- AP&P agent --

MR. BAUTISTA: I don't think we have evidence; we just know that she passed away.

THE COURT: I -- I kind of assume, given her history, that it was some kind of drug overdose. That's what I assume, but I don't know.

MR. BAUTISTA: I think it's a safe assumption, but

unfortunately --

THE COURT: We -- we don't have --

MR. BAUTISTA: -- the long history of that, could have been a heart attack.

THE COURT: Right. Which could have been one of the side effects using drugs. Anything -- so what -- what do you believe the standard is for the confrontation clause issue?

MR. TAN: Well, I think if the individual was available, and either side can have a -- have him or her come into court and one side or the other doesn't do it, I think we have a confrontation clause issue. But when it's clearly the fact that the person is deceased, it's sort of like similar to a -- a homicide case kind of, where the victim's dead. You obviously, you can't confront someone who's -- you really can't confront someone who's already dead in the homicide, because that leads to somewhat argument in regards to this situation where I think that there isn't any dispute, she's not available because she's hiding, she refuses to cooperate. Unfortunately and sadly she's not available because she's passed away.

THE COURT: Response, Mr. Bautista?

MR. BAUTISTA: I think that confrontation clause, both for the Utah state and the federal confrontation clause, trump any rules of evidence. He has a right to cross-examine witnesses to test their veracity. Some of these statements are corroborated such as the pills being discarded in the trash,

but the just driving around, and, right now, Steve exited the vehicle and returned a few minutes later, I mean, I guess that's corroborated by the defendant's statement, but the just driving around could be alluded as some kind of criminal wrongdoing. We didn't have an opportunity to cross-examine her and point out, What do you mean by just driving?" It's -- it's a vague enough statement that it could be prejudicial to the defense, and I think without having her to cross-examine, it's unfortunate that she's passed, but we have the confron -- we have those clauses for a purpose, so that we can test people and -- and with her not being here, he's being denied that, and I do think that without her being here to testify that it's a Bruton issue as well.

MR. TAN: And I --

THE COURT: And what -- talk to me about what you believe the Bruton standard is --

MR. TAN: Well, I guess --

THE COURT: -- and how it applies or doesn't apply in this case.

MR. TAN: I don't think it applies, and the other thing I want to add is: In regards to the confrontation clause, I think part of that can remedied by the fact that, as I understand it, the defense intends on calling Steve Young. The other -- the third conspirator, and he can either validate or invalidate some of the statements that is referenced from

what Nikki Salazar said. So it's not like she's completely unavailable.

And the fact is, again, I would emphasis that she's unavailable because she's -- she's -- she's dead. I -- I think that some of these issues that Mr. Bautista's concerned about in regards to the confrontation clause, I think some of that can come in through either the direct or cross-examination of Steve Young, as far as him handing her the bag of prescription pills and telling her to discard it. So I think we -- we're doing our best to -- to not violate Mr. Salazar's con -- constitution -- or the confrontation clause, when we can't bring Nikki Salazar back to life and have her testify, but we do have Steve Young, which the defense has subpoenaed. Which, I don't know what their strategy might be, but it might be to -- to anticipate that this might be an issue, and he can testify as to whether or not he told Nikki Salazar to discard the drugs at the scene.

THE COURT: Reply?

MR. BAUTISTA: I don't know if we're allowed to corroborate the State's theory by the defense witness, that sounds burden shifting-ish. But it's -- I don't think the fact that she's unavailable trumps the confrontation clause. And lastly, her statements are incriminating herself and they're incriminating Mr. Young, but they're -- how are they incriminating the defendant. And if they're not incriminating

the defendant are they relevant.

THE COURT: But they're -- he's being charged as a party to the offense.

MR. BAUTISTA: They have to show the actual evidence not just circumstance evidence.

THE COURT: Okay. Anything else?

MR. BAUTISTA: No.

MR. TAN: Not from the State.

THE COURT: Well, the witness is clearly dead, we've stipulated to that. As to each of the items that she's testifying to, we have -- we have evidence from at least based upon your opening, you've proffered that he saw the car driving around. Mr. Bautista will have a chance to cross-examine that witness, and that witness is --

MR. TAN: Musgrove.

THE COURT: -- Mr. Musgrove. If the defendant chose to testify he could get up and confront that statement and we also have Steve Young being subpoenaed by the defense. And really as to the Steve Young exiting the car and coming back, the -- in the home, coming back a few minutes later, Steve -- the defendant or Steve Young could respond and respond to that statement.

As to Steve Young heard -- asked her to impose of the pills, the defendant if he had -- if he chose to testify could seek to rebut that statement to say he didn't hear it, or Steve

Young could say, "No, I didn't ever ask her to dispose of the pills." As of her disposing of the pills, we have, that appears to be on the video and that she thinks the pills belong to the homeowner, they have the homeowner's name on them, and not Steve Young's name on them.

And so I see in the confrontation issue, we can't bring the witness back from the dead, but the defense does have the ability to call the other two witnesses, if it chooses to confront those statements.

And so based upon satisfying Rule 804(b)3, and based on the fact that there are other witnesses who could be confronted about those particular facts, I'm going to overrule that objection and admit that evidence.

Why don't we just take about a five-minute recess and then we'll continue. Do you want to see if Mr. Musgrove is here --

MR. TAN: Yes, I'm going to check right now.

THE COURT: And I assume we will start with him and inform the jury of that. And is there any objection to taking Mr. Musgrove out of turn? I apologize. Once you start walking away, I don't think you were recorded, but I made my ruling that under 804(b)3A and B, there's an exception to the hearsay rule to allow those statements to come in, and I'm ruling that the confrontation clause issues raised by the defense, I'm overruling those for the reasons I just stated on the record.

And both sides have stipulated to take Mr. Musgrove out of order, in fact, in the middle of the detective's direct examination; is that correct?

MR. TAN: And, Your Honor, either way is fine, I -- I might defer to Mr. Bautista. I can talk to Mr. Musgrove. I think he just wants to be in and out as soon as possible, however --

THE COURT: How long do you think the direct will take of the detective?

MR. TAN: I think we're just going to ask the detective about Nikki's statements and then I would turn the time over to Mr. Bautista for cross-examination, and I think we're okay then putting Mr. Musgrove on after the detective's--

THE COURT: That's my preference. Why don't you go talk to him, take five minutes and reconvene.

MR. TAN: Okay.

(Break taken.)

THE COURT: So are we ready to proceed? Is Mr. Musgrove good with finishing this witness before he is called?

MR. TAN: Yes, Your Honor, I had a chance to talk to Mr. Musgrove, I indicated to him that I am almost done with my direct examination of Detective Olson. I indicated that the preference would be to allow defense counsel get a chance to

THE COURT: Mr. Tan, do you stipulate to those changes -- those instructions?

MR. TAN: Yes, Your Honor, I do.

THE COURT: Okay. So we've essentially finalized the post-evidence instructions. So I'll print them out during the break and court will be in recess.

MR. BAUTISTA: And may I have the benefit of the record in regard --

THE COURT: Oh, of course.

MR. BAUTISTA: Your Honor, during our bench conference and whether -- and the discussions of whether to introduce Nikki Salazar's hearsay statements.

THE COURT: Uh-huh.

MR. BAUTISTA: We --

THE COURT: I want to make clear, we were recorded, this recorded it during that break.

MR. BAUTISTA: Right. I made reference to Crawford and Bruton, and I sa -- I said summarily, but I believe the Court was aware that I was making reference to Crawford versus Washington, which was a case that came out to reemphasize the emphasis of the confrontation clause and also Bruton versus United States, which had to deal with codefendant's hearsay statements being used without the benefit of cross-examination.

THE COURT: Right.

MR. BAUTISTA: That's all.

ADDENDUM B

The Order of the Court is stated below:
Dated: November 08, 2017 01:38:02 PM
At the direction of:
/s/ KEITH KELLY
District Court Judge
by
/s/ NAKIA NUUSILA
District Court Clerk

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

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 171901573 FS
EDDIE A SALAZAR,	:	Judge: KEITH KELLY
Defendant.	:	Date: November 8, 2017
Custody: Salt Lake County Jail		

PRESENT
Clerk: nakian
Prosecutor: TAN, PATRICK S
Defendant Present
The defendant is in the custody of the Salt Lake County Jail
Defendant's Attorney(s): BAUTISTA, RUDY J

DEFENDANT INFORMATION
Date of birth: November 8, 1974
Sheriff Office#: 191501
Audio
Tape Number: S35 Tape Count: 113-24

CHARGES
1. BURGLARY - 2nd Degree Felony
Plea: Guilty - Disposition: 10/30/2017 Guilty
2. THEFT - Class B Misdemeanor
Plea: Guilty - Disposition: 10/30/2017 Guilty

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

SENTENCE JAIL

Based on the defendant's conviction of THEFT a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s)
Credit is granted for time served.
Credit is granted for 7 day(s) previously served.

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE
To run concurrent.

SENTENCE FINE
Charge # 1 Fine: $10000.00
Suspended: $10000.00

Charge # 2 Fine: $1000.00
Suspended: $1000.00

Total Fine: $11000.00
Total Suspended: $11000.00
Total Surcharge: $0
Total Principal Due: $0
Plus Interest

ORDER OF PROBATION
The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation and Parole.
Defendant to serve 180 day(s) jail.

Usual and ordinary conditions required by Adult Probation and Parole.
Violate no laws.
Enter into and successfully complete the CATS Program.
Enter into and successfully complete the CATS Aftercare Program.
Obtain a substance abuse evaluation and successfully complete any recommended treatment.
Defendant to enter into a DORA assessment and enter into and successfully complete any recommended treatment.

Defendant is to be screened by AP&P's Treatment and Resource Center (TRC) and complete any recommended programming/treatment as directed.
Comply with all standard drug and alcohol conditions imposed by probation agency.
Do not use, consume, or possess alcohol or illegal drugs; nor associate with any persons using, possessing or consuming alcohol or illegal drugs.
Do not frequent any place where drugs are used, sold or otherwise distributed illegally.
Submit to drug testing.
Submit to breath and/or urine testing for drugs or alcohol upon the request of any law enforcement officer.
No spice, ivory wave or items of the nature.
Submit to random UA's and/or ETG testing.
Refrain from the use of alcoholic beverages.
Not to possess alcohol nor frequent places where alcohol is the chief item of sale.

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

Case No: 171901573 Date: Nov 08, 2017

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 171901573 by the method and on the date specified.

EMAIL: ADC ADC-court1@slco.org
EMAIL: APP UDC-CTServices-Reg3@utah.gov

Date: 11/08/2017 /s/ NAKIA NUUSILA

Deputy Court Clerk

ADDENDUM C

U.S. Const. amend VI

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

ADDENDUM D

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.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE

Subdivision (a) is comparable to Rule 63(7), Utah Rules of Evidence (1971). Rule 62(7)[(e)], Utah Rules of Evidence (1971), seems to be encompassed in Rule 804(a)(5). Subdivision (a)(5) is a modification of the federal rule which permits judicial discretion to be applied in determining unavailability of a witness.

Subdivision (b)(1) is comparable to Rule 63(3), Utah Rules of Evidence (1971), but the former rule is broader to the extent that it did not limit the admission of the testimony to a situation where the party to the action had the interest and opportunity to develop the testimony. Condas v. Condas, 618 P.2d 491 (Utah 1980); State v. Brooks, 638 P.2d 537 (Utah 1981).

Subdivision (b)(2) is comparable to Rule 63(5), Utah Rules of Evidence (1971), but the former rule was not limited to declarations concerning the cause or circumstances of the impending death nor did it limit dying declarations in criminal prosecutions to homicide cases. The rule has been modified by making it applicable to any civil or criminal proceeding, subject to the qualification that the judge finds the statement to have been made in good faith.

Subdivision (b)(3) is comparable to Rule 63(10), Utah Rules of Evidence (1971), though it does not extend merely to social interests.

Subdivision (b)(4) is similar to Rule 63(24), Utah Rules of Evidence (1971).

Subdivision (b)(5) had no counterpart in Utah Rules of Evidence (1971).