

Case No. 20171019-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

EDDIE A. SALAZAR,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for burglary, a second-degree felony,
and theft, a class B misdemeanor, in the Third Judicial District,
Salt Lake County, the Honorable Keith Kelly presiding

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INTRODUCTION

Salazar and his wife Nikki drove Steve to Cottonwood Heights where Steve jumped a fence, kicked in a basement door, and stole prescription pills, money, jewelry and other items from a home. A witness (Witness), saw Steve run from the home to Salazar's car, jump in, and then watched as the car sped away. Witness called police and followed the car. When Salazar saw Witness behind him, he sped up and drove recklessly until Witness gave up his pursuit. Eventually, a detective (Detective), responding to the burglary, stopped Salazar's car. A jury convicted Salazar of burglary and theft.

The issue on appeal is the admissibility of Nikki's post-stop statements to Detective. By the time of Salazar's trial, Nikki had died. But the trial court

allowed Detective to testify what Nikki had told him: that Nikki and Salazar had given their friend, Steve, a ride to Cottonwood Heights, Steve got out of the car, came back to the car, and they then went to a 7-Eleven where Steve asked Nikki to throw away some prescription pills, which she did.

Salazar complains that Nikki's statements were inadmissible under the Confrontation Clause. The State agrees: Nikki's statements were testimonial in nature – taken by police officers in the course of interrogations; Nikki did not appear at trial; and Salazar had no prior opportunity to cross examine her.

But reversal is not warranted here because Nikki's statements were not important to the State's case and were cumulative of, and corroborated by, the other, admissible evidence, namely: Witness's testimony (about Salazar's suspicious and reckless driving), Steve's testimony (including his confession that he told Salazar that he had "stole[n] stuff" from the home), Salazar's statements (including his admission that he "assumed that [Steve] had stolen something"), surveillance video (showing Nikki, in eyesight of Salazar, throwing away the bag of pills at 7-Eleven), and the bag of pills recovered from the 7-Eleven. This admissible evidence overwhelmingly supported Salazar's convictions and rendered any error harmless beyond a reasonable doubt.

STATEMENT OF THE ISSUE

Was the admission of Nikki's post-stop statements harmless beyond a reasonable doubt?

Standard of Review. "Whether testimony was admitted in violation of defendant's right to confrontation is a question of law, which [this Court] reviews for correctness." *State v. Calliham*, 2002 UT 86, ¶42, 55 P.3d 573. "Notwithstanding [an] error by the trial court, [this Court] will not reverse a conviction if [it] finds that the error was harmless." *Id.* ¶45 (citation omitted).

STATEMENT OF THE CASE

A. Summary of relevant facts.¹

Salazar waits while Steve steals

One July afternoon, Salazar and his wife, Nikki, drove Steve to a home in Cottonwood Heights. R423-24, 427, 487-89. There, Salazar stopped his white, 90s Honda Accord and Steve jumped out of the back seat, went to the front door, knocked, and, when no one answered, hopped a fence to the backyard. R417-18, 452, 465-66, 449, 490, 509; SE1-2 (showing the home).

¹ Because this is an appeal from a jury verdict, the State presents the facts in the light most favorable to the jury's verdict, addressing conflicting evidence only to the extent necessary to understand the issues on appeal. *See State v. Bond*, 2015 UT 88, ¶3 n.2, 361 P.3d 104.

Steve found a basement door, kicked it in (triggering the alarm system), went inside, and rifled through the homeowners' belongings, throwing and scattering clothes and furniture. R490-91; SE3-6 (showing items scattered throughout house); SE7-8 (showing broken back door).² He grabbed a bag of pills (hoping they were prescription pain medications), Ray Ban sunglasses, a money clip with cash, a microcassette recorder, and women's rings and necklaces. R403-04, 492; SE3-6, 9-10 (showing inside of home and some of items stolen). After three or four minutes, Steve rushed back to Salazar's Honda with the loot in his arms, jumped in the back seat, and told Salazar, "[H]urry up." R492-93.

Salazar drives suspiciously

Outside, a witness (Witness), who had been waiting in his truck for his wife, saw a white, early-90s Honda, with a black leather bra that caught his attention. R465-66. It drove slowly, ten miles an hour or so, up-and-down the street and not in its normal traffic lane; instead, it drove up "against the curb," but never parked. R466-68, 472. The driver appeared Hispanic and his head was shaved, identical to Salazar, and his seat was tilted way back. R469. The female passenger had darker hair, like Nikki's. *Id.*

² It is not clear from the record if this was a silent alarm or made some type of noise.

After the car twice moseyed along the same street, each time hugging the curb, Witness saw a white man race from between the houses; the Honda rapidly accelerated to meet him. R468, 470. The man jumped in the back seat and the Honda sped off. R470, 493.

Salazar drives recklessly

To Witness, something felt wrong. R470. So he followed the Honda, called the police, and described the vehicle and its occupants. *Id.*

Salazar saw Witness's truck following them. R425, 471, 493. Steve told Salazar that he had "stole[n]" some things from the home and that the truck "might be somebody trying to get their stuff back." R493-94.³ Abruptly, the Honda accelerated and drove "erratic" and "reckless." R416, 471. Witness decided his pursuit was no longer safe and stopped. R471.

After losing Witness's truck, Salazar stopped at a 7-Eleven for some gas. R495-97. There, Steve handed Nikki the prescription pills that he had just stolen and asked her to throw them away, which she did, and then the trio left. R496-97; SE1a.

³ Steve first testified that he told Salazar that he "stole some stuff" when he saw Witness's truck. R494. He repeated this claim three times. *Id.* He then changed his story to say that he told Salazar about stealing items at some point after they saw Witness's truck. *Id.* Then he changed his story again, this time saying he never told Salazar that he stole items. R496-97. The details of Steve's ever-changing testimony are provided in subsection I.D.

Detective stops Salazar

A detective (Detective), in an unmarked police car, heard the reports of the burglary, including a description of the suspects and their car. R414-16. As he made his way to the crime scene, he spotted a car with three occupants that matched the description given by dispatch. R415-17. He followed the car and then stopped it. R417-18, 452.

Witness, who was still in the area, joined Detective and confirmed that the Honda and its three occupants were the ones he saw fleeing Cottonwood Heights. R420.

Detective interviews Salazar, Nikki, and Steve

Although no one was under arrest at that point, Detective interviewed Salazar, Steve, and Nikki and each waived their *Miranda* rights. R421.

Salazar told Detective that he gave Steve a ride to the home, that Steve got out of the car for a "few minutes," and came back "carrying some items." R423-24. When asked what Steve was doing at the home, Salazar responded that he "assumed that [Steve] had stolen something." R427, 462. He also admitted that as they left, they saw a truck following them and that he "dr[ove] a little faster in an attempt to lose the tailing vehicle." R425.

Nikki largely confirmed Salazar's account, but added some additional detail regarding their activities after Steve left the house and got back in the

car. *See* R449–51. Nikki later died – before having the opportunity to testify in the case. *See* R92, 445.

Steve told Detective a different story. He said that Salazar and Nikki had just picked him up at a 7-Eleven. R509. But when confronted with Salazar’s and Nikki’s stories, Steve confessed that he went to the home, broke in, and stole several items. *Id.*

Surveillance Video and Recovery of Victim’s Prescription Pills

Officers secured the 7-Eleven surveillance video from when Salazar, Nikki, and Steve were at the store. It showed that while Salazar pumped gas on the driver’s side, Nikki exited the passenger side and walked to an adjacent garbage can. SE1a. Before getting to the garbage can, she stopped, turned around and returned to the car. *Id.* When she got back to the car, Salazar was leaning his head into the car through the open door as a passenger (Steve) reached out and handed Nikki something. *Id.* Nikki then resumed walking to the garbage can and threw something away. *Id.* When Nikki returned, Salazar was still leaning his head into the car. *Id.* After staying in the car for a few seconds, Nikki got out and walked to the same garbage can a second time, again throwing something away. *Id.*

Later that same day, the police recovered prescription pills with the homeowner's name on them from the same 7-Eleven garbage seen in the surveillance video. R450-51, SE11.

The State charged Salazar with burglary and theft. R1-3.

Steve provides new details at trial

At trial, Steve provided details that he had not given to Detective. Steve said that he was living with his sister the day of the burglary because he had been "kicked out of the place [he] was staying." R487-88. That morning, his sister's friend Nikki stopped by along with her husband, Salazar. R488. Steve said that he had known Nikki for a short time but had only met Salazar that morning. R488, 502. He said that he asked Nikki for a ride "to a house that [he] was renting and [that he] needed to get [his] stuff from there." R489.

Salazar and Nikki gave Steve a ride, and he broke into the home and stole items. R489-91. When they left the home, Steve said he saw Witness's truck following them and told Salazar that it might be some "guys [coming] to beat [him] up because [he] got [his] stuff out of the house." R494. That's when Salazar sped up and lost the truck. R494-95.

When they stopped at 7-Eleven, Steve admitted that he asked Nikki to throw away a bag of prescription pills he had stolen from the home, which she did. R496. He said that Salazar was inside the store when he asked her to

do so, but the surveillance video showed Salazar was leaning inside the car when Steve handed Nikki the pills. *Compar* R496 *with* SE1a. Steve testified that Salazar knew nothing about his burglary plans. R506.

B. Summary of proceedings and disposition of the court.

Before the trial, Nikki died. R92, 445. At trial, over Salazar's objections on Confrontation Clause and hearsay grounds, the State introduced Nikki's hearsay statements to Detective. R427-46, 485. The trial court denied Salazar's objection. It concluded that admitting the statements did not violate the Confrontation Clause because Salazar could confront these statements by testifying himself or calling Steve to testify. R445-46. It also concluded that because Nikki was unavailable, and the statements were against her interest, her hearsay statements were admissible under evidence rule 804(b)(3). R445-47.

The jury convicted Salazar of burglary and theft. R552. For burglary, the court sentenced Salazar to one-to-fifteen years in prison, which it then suspended, and then placed on Salazar on probation which included an order that he serve 180 days in jail. R220-21. For theft, the Court sentenced Salazar to 180 days in jail, which was to run concurrently with his burglary sentence. R221. He was then placed on 36 months of AP&P-supervised probation. *Id.* Salazar timely appeals. R227.

SUMMARY OF ARGUMENT

Salazar is correct: Nikki's statements were inadmissible under the Confrontation Clause because they were testimonial, and he did not have a prior opportunity to cross examine her.

But reversal is not warranted here because Nikki's statements were not important to the State's case and were cumulative of, and corroborated by, the other, admissible evidence, namely: Witness's testimony (about Salazar's suspicious and reckless driving), Steve's testimony (including his confession that he told Salazar that he had "stole[n] stuff" from the home), Salazar's statements (including his admission that he "assumed that [Steve] had stolen something"), surveillance video (showing Nikki, in eyesight of Salazar, throwing away the bag of pills at 7-Eleven), and the bag of pills recovered from the 7-Eleven. This admissible evidence overwhelmingly supported Salazar's convictions and rendered any error harmless beyond a reasonable doubt.

ARGUMENT

Nikki's statements were harmless beyond a reasonable doubt.

The State concedes that admission of Nikki's statements to Detective violated Salazar's Sixth Amendment right to confront Nikki because her statements were testimonial in nature – "taken by police officers in the course of interrogations"; Nikki "did not appear at trial"; and Salazar had no "prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004). But reversal is not warranted because Nikki's statements were harmless beyond a reasonable doubt.⁴

Where an error deprives defendants of their Sixth Amendment right of confrontation, reversal is not required when the error is harmless beyond a

⁴ Salazar claims that the trial court also erred in admitting Nikki's statements as statements against penal interest by an unavailable witness under rule 804(b)(3). Aplt.Br.18-33. But because the State concedes that Nikki's statements were erroneously admitted in violation of the Confrontation Clause, there is no need to address this alternative claim. As the State explains, any constitutional error in admitting the statements was harmless beyond a reasonable doubt. And that showing more than satisfies that any error was harmless. As Salazar admits, "An erroneous decision to admit or exclude evidence . . . does not result in reversible error unless the error is harmful." Aplt.Br.28 (quoting *State v. Webster*, 2001 UT App 238, ¶38, 32 P.3d 976 (cleaned up)). And such errors are harmful only where there is a reasonable likelihood of a different outcome. *Id.* This is a lower standard than the harmless-beyond-a-reasonable-doubt standard that applies to Salazar's Confrontation Clause claim. *State v. Villareal*, 889 P.2d 419, 425 (Utah 1995). And because Nikki's statements are harmless beyond a reasonable doubt (see subsections I.A-D), they are necessarily harmless under this lesser standard.

reasonable doubt. *Delaware v. Van Ardsall*, 475 U.S. 673, 680–81, 684 (1986); *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Villareal*, 889 P.2d 419, 425 (Utah 1995); *State v. Hackford*, 737 P.2d 200, 204 (Utah 1987). It is the State’s burden to prove harmlessness. *State v. Farnworth*, 2018 UT App 23, ¶24, 414 P.3d 1053. Whether an error is harmless beyond a reasonable doubt in any given case depends on a host of factors, including: (1) whether the testimony was cumulative; (2) whether the testimony is corroborated or contradicted by the other evidence; (3) the testimony’s importance; and (4) the overall strength of the State’s case. *Van Ardsall*, 475 U.S. at 684; *Villareal*, 889 P.2d at 425–26.⁵ All these factors support a finding that the error in admitting Nikki’s statements to Detective was harmless beyond a reasonable doubt.

A. Nikki’s statements are cumulative of other evidence.

“Where [the] evidence admitted in violation of defendant’s right to confrontation is merely cumulative, it may be deemed harmless beyond a reasonable doubt.” *Calliham*, 2002 UT 86, ¶46 (citing *Harrington v. California*, 395 U.S. 250, 253–54 (1969)); *Farnworth*, 2018 UT App 23, ¶31 (holding

⁵ The Supreme Court in *Van Ardsall* held that “the extent of cross-examination otherwise permitted” may also factor in a finding that a statement’s erroneous admission is harmless beyond a reasonable doubt. 475 U.S. at 684. This factor is of no help in showing harmlessness here because Nikki did not testify at all and thus was not subject to any cross-examination that may have supported a finding of harmlessness.

confrontation error harmless where admitted evidence was cumulative of other record evidence). Such is the case here.

Nikki's statements were cumulative of other evidence. For example, Nikki said that she and Salazar drove Steve to "an address on the east side" (R449); Salazar and Steve said the same thing. R423, 488-89. Nikki said that Steve "exited the car, came back to the car, and they left" (R449); Salazar, Steve, and Witness said the same thing. R423-25, 470, 489-90. Nikki said they stopped at a 7-Eleven (R449-50); Salazar and Steve said the same thing. R425, R495. Nikki said that Steve gave "her a bag of prescription pills and directed her to discard the pills in the garbage can at the 7-Eleven store"; and she told Detective the specific garbage can she used. R450-51. Steve confirmed that he asked Nikki to throw away "[a] bag of pills" at 7-Eleven. R496.

Salazar alleges just one of Nikki's statements to Detective as non-cumulative: that Nikki "just stated that they were driving around [in the neighborhood] with *their friend*." R450-51 (emphasis added). Salazar contends on appeal that "nowhere else in the record" is there a "suggested . . . affiliation between [Steve] and the Salazars." Aplt.Brff.16. But that's not true. Steve testified on direct that Nikki knew his sister. R488. On cross-examination he acknowledged that he knew Nikki as his sister's "good friend[]." R502-03. Steve also explained that he knew Salazar "[t]hat day,"

and Nikki “[n]ot very long, just through [his] sister.” R502. R502-03. The point is—contrary to Salazar’s claim—there was evidence, apart from Nikki’s statements to Detective, that Steve had some affiliation with Nikki through his sister.

In short, Nikki’s statements to Detective added nothing to the evidence in this case. Her statements were “merely cumulative since others also testified to essentially the same facts.” *State v. Oniskor*, 510 P.2d 929, 931 (Utah 1973); see *State v. Chapman*, 655 P.2d 1119, 1125 (Utah 1982) (holding that because testimony was “merely cumulative” of the testimony of others, it was “clearly harmless beyond a reasonable doubt”). This alone proves that Nikki’s statements were harmless beyond a reasonable doubt.

B. Nikki’s statements are corroborated.

The above, cumulative testimony also corroborates Nikki’s statements. But there was more corroborating evidence of what she told Detective. The State introduced 7-Eleven surveillance video capturing Nikki throwing items away in the garbage can that she described to Detective. SE1a. And on top of that, inside that same garbage can, the police recovered a bag of prescription pills with the name of the homeowner whose house the trio had burglarized. R450-51, SE11. In short, Nikki’s account to Detective was “supported by

independent evidence that is both credible and admissible.” *Corroborated*, Black's Law Dictionary (10th ed. 2014).

C. Nikki’s statements are unimportant.

Nor was Nikki’s passing and vague reference to Steve as a friend important. Detective testified that Nikki “just stated that they were driving around [in the neighborhood] with their friend.” R450–51. Salazar contends that Nikki’s “friend” statement was important because it invited the jury to infer that Salazar knew about Steve’s burglary plans. *Aplt.Brif.16*. But the “friend” statement was one word in a full-day, four-witness jury trial. And the prosecution never suggested to the jury that Salazar would know of Steve’s burglary plans because he was a friend. In fact, the prosecutor never referred to Steve as the Salazars’ friend—not in opening, closing, or in defending Salazar’s motion to dismiss.⁶

That’s because it didn’t matter. It was not an element of the crime. *See Farnworth*, 2018 UT App 23, ¶26. The State argued that Salazar was guilty based on his actions both before and after the burglary, his admission that he “assumed that [Steve] had stolen something” from the home, Steve’s

⁶ Salazar’s counsel, on the other hand, referred to Steve and Nikki as “friends” three times. R397 (referring to Steve in opening as “Nikki’s friend”); R398 (referring to Steve in opening as a “friend of [Nikki’s].”); R541 (referring to Steve in closing as “friends with [Nikki’s] sister).

admission that he told Salazar that he had stolen “some stuff” from the home, and the pills that were thrown away at the 7-Eleven. *See* subsection I.D *infra*. That’s why the jury convicted him; not because of any friendship (or lack thereof) with Steve. And Salazar’s story – that he took Steve to get some of his belongings – did not become less believable because Steve was a friend or an acquaintance. Just because Nikki called Steve their “friend,” did not mean that they were close friends or longtime friends. It could be that they did meet only that morning and became fast friends.

Nor was admission at trial of Nikki’s statement important to proving that Steve asked Nikki to dispose of the stolen prescription pills. That’s because Steve confessed that he gave Nikki “[a] bag of pills” and asked her to throw them away at the 7-Eleven. R496. And, as discussed, the 7-Eleven surveillance video showed Nikki taking items from the car and throwing them in the garbage can while Salazar stood nearby. SE1a. And, later that day, in that same garbage can, the police recovered a bag of prescription pills with the homeowner’s name on them. R450–51, SE11.

D. The State’s overall case was overwhelming.

Finally, where the properly admitted evidence is “so overwhelming that there is no likelihood whatsoever of a different result,” as is the case here, the error is harmless beyond a reasonable doubt. *Hackford*, 737 P.2d at

205, n.3 (Utah 1987) (quoting *State v. Scandrett*, 468 P.2d 639, 643 (1970)); see *Villareal*, 889 P.2d at 426 (finding violation of confrontation right harmless where the evidence was overwhelming); *United States v. Marquez*, 898 F.3d 1036, 1048 (10th Cir. 2018) (“A Confrontation Clause violation is harmless if it’s clear beyond a reasonable doubt that the properly admitted evidence is so overwhelming that the prejudicial effect of the improperly admitted evidence is insignificant by comparison.” (cleaned up)).

Here, Steve committed both burglary and theft. The only question was whether Salazar was also liable as a party to the offense. As a party to the offense, Salazar needed to act “with both the intent that the [burglary and theft] be committed and the intent to aid [Steve] in [their commission].” *State v. Briggs*, 2008 UT 75, ¶13, 197 P.3d 628. Here, Salazar’s intent may be inferred from his conduct both before and after the burglary, his admission that he assumed that Steve had stolen something, and Steve’s confession that he told Salazar that he burglarized the home. *Id.*; see *State v. Steed*, 2014 UT 16, ¶21, 325 P.3d 87.

Salazar’s actions both before and after the burglary prove his intent. Salazar drove Steve to the home, watched as Steve got out, knocked on the front door, and, when no one answered, jumped over the fence. R423, 489–90, 509. Instead of parking in the driveway, or in front of the home, and

waiting for Steve, as would be expected if he truly believed that Steve was there to legally get his own belongings, he drove slowly, up-and-down the street, hugging the curb, never parking, and watching for Steve's return. R467-68, 472-73.

He then saw Steve running from the home with several items in his arms – prescription pills, a money clip with cash in it, Ray Ban sunglasses, a microcassette recorder, and women's rings and necklaces. R403, 406, 424, 470, 473, 492.⁷ Instead of keeping his slow, deliberate pace, Salazar suddenly accelerated to meet Steve, Steve quickly hopped in and said, "hurry up," and Salazar raced off. R470, 492. While driving away, Salazar noticed Witness's truck following them, so he drove faster, erratically, and recklessly to ditch it. R416, 425, 471. When he had successfully done so, he pulled into a 7-Eleven where his wife, Nikki, within Salazar's eyesight, threw away a bag full of prescription pills with the homeowner's name on them. R496, SE1a.

Salazar also admitted to Detective that he "assumed that [Steve] had stolen something" from the home. R427.

⁷ Salazar admitted that he saw Steve carrying "some items" in his arms, but there is no testimony about what exactly he saw. R424. However, these items are the ones that were stolen from the home and are the items that Steve must have been carrying. R403-06.

On top of this is Steve's confession that he told Salazar, when they saw Witness's truck following them, that he had stolen property from the home:

Q: Did you say anything to [Salazar] or Nikki when you saw [Witness's] truck?

A: No, sir. I said that they might — *they might be somebody trying to get their stuff back.*

Q: Stuff back?

A: Yeah, like, *something I stole from them.*

Q: Okay. So you told Nikki and/or [Salazar], that people in the truck may be trying to get you because they might be trying to get the stuff back that you stole from them?

A: *Yes, sir.*

Q: Okay. So you told [Salazar] and Nikki right then and there and then that they stole stuff?

A: *That I stole some stuff, yes.*

R494 (emphasis added). In sum, Steve confirmed — three times — that he told Salazar that he “stole some stuff.” *Id.*

True, right after repeatedly admitting that he told Salazar about the stolen items, Steve changed his story:

A: No, I didn't tell them *at that exact moment* that I stole something.

Q: Okay. I'm talking about that exact moment.

A: No, I didn't tell them I stole something.

Id. (emphasis added). But by saying not "at that exact moment," Steve clearly implied that at some point he did tell Salazar. *Id.* Even Salazar's counsel believed as much; that's why he asked at what point Steve told Salazar about the burglary. Yet again, Steve changed his story, this time claiming that he *never* told Salazar about the burglary:

Q: Okay. Earlier you said that – that you did admit to [Salazar] and Nikki that in fact, you did steal something from that house. Had you told them [when you were stopped by police] or did you tell them later?

A: *I didn't tell them at all.* I didn't tell them I stole nothing. . . .

R497 (emphasis added).

So depending on which of Steve's three different versions you believe, he told Salazar about the burglary (1) before Salazar drove recklessly to ditch Witness, (2) sometime later, or (3) never told him.

Salazar, of course, claims that the third version is the most believable. Aplt.Brff.16-17. According to him, when they saw Witness's truck following them, Steve gave a "reasonable explanation": it might be some guys looking to beat him up "because [he] got [his] stuff out of the house." R494, 497. But that makes no sense. First, there was no testimony that Witness was driving

aggressive or reckless as he followed Salazar—as you would expect if someone was following you to “beat [you] up.” R494. In fact, the opposite is true: as soon as Salazar sped up, Witness stopped his pursuit. Second, if Salazar was truly concerned, about getting beaten up, he could have called the police or at least asked some questions of Steve about why these guys would want to beat him up for getting his own stuff back, but he did neither. Third, and perhaps most important, why would a bunch of guys be looking to beat Steve up for taking his *own* belongings? There is nothing in the record to show that it was reasonable to believe that someone would be looking to beat Steve up for taking his own stuff.

For these, or other reasons, the jury clearly did not believe Steve’s third version. In fact, it clearly did not believe any of Steve’s testimony, which is what Salazar’s defense and appeal hinge on. *See* Aplt.Brf.16–18 (pointing to Steve’s testimony to argue the State’s evidence was not overwhelming).

Salazar’s suspicious driving while waiting for Steve, his reckless driving to ditch Witness, his admission that he “assumed” Steve had stolen items from the home, Steve’s initial admission that he told Salazar that he “stole some stuff” from the home, surveillance video showing Nikki throwing away the prescription pills within Salazar’s eyesight, and the prescription pills recovered from the garbage can, overwhelmingly support

Salazar's conviction and make any error in the admission of Nikki's statements – which did not strongly inculcate Salazar – harmless beyond a reasonable doubt.

CONCLUSION

In sum, any error in admitting Nikki's hearsay statement to Detective was harmless beyond a reasonable doubt and thus, this Court should affirm.

Respectfully submitted on January 18, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 22 pages, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

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/s/ Nathan D. Anderson

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CERTIFICATE OF SERVICE

I certify that on January 18, 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):

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/s/ Melanie Kendrick

Addenda

Addenda

Addendum A

UNITED STATES CONSTITUTION

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 defense.

Addendum B

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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

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

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

4 **MR. TAN:** Yes, that's correct.

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

7 **MR. TAN:** Okay.

8 (End of bench conference.)

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

14 **THE BAILIFF:** All rise for the jury.

15 (Jury exits the courtroom.)

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

19 (Bench conference.)

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

22 **MR. TAN:** As far as we know.

23 **MR. BAUTISTA:** Yes.

24 **THE COURT:** At least we had an obituary?

25 **MR. BAUTISTA:** Yes, she's passed.

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

3 **MR. TAN:** So that they were just driving around, that
4 Steve exited and returned a few minutes later, they stopped at
5 7-Eleven and Steve handed her a plastic bag containing some
6 prescription pills which she discarded, which I believe is one
7 of the State's exhibits that's been admitted. And that she
8 also -- and -- and the -- the last thing is, she thinks that
9 the pills belonged to the homeowner.

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

14 **MR. TAN:** Correct.

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

18 **MR. TAN:** Right.

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

22 **MR. TAN:** Yes.

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

1 **MR. TAN:** That's correct.

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

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

10 **THE COURT:** Okay.

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

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

17 **MR. BAUTISTA:** Oh, okay.

18 (End of bench conference.)

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

24 **MR. TAN:** That's correct.

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

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

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

9 **THE COURT:** If you want to approach, let's do it.
10 (Bench conference.)

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

14 **THE COURT:** I guess the question I have is: Normally
15 801(d)2E is a party -- a coconspirator says something and you
16 have a witness who hears it. It's like a party opponent
17 admission, during the conspiracy being carried out. For
18 example, example here might be, if somebody heard her say, "Get
19 in the car we need to get out of here," while this alleged
20 incident was taking place when -- once -- once the police
21 stopped them, the question I have is: Then are those
22 statements during a conspiracy and are they in furtherance of
23 conspiracy?

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

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

8 **THE COURT:** Okay. Defense argument?

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

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

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

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

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

13 **THE COURT:** Reply?

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

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

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

1 that -- do you have anything else on that?

2 **MR. TAN:** Nothing else.

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

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

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

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

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

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

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

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

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

23 **MR. TAN:** That's correct.

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

1 **MR. TAN:** Yes.

2 **THE COURT:** And why don't we --

3 (End of bench conference.)

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

10 **MR. BAUTISTA:** No, Your Honor.

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

13 **MR. TAN:** Yes, Your Honor.

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

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

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

19 **MR. BAUTISTA:** Four.

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

23 **MR. BAUTISTA:** Do you want to come see?

24 (Conversation between counsel.)

25 **THE COURT:** Mr. Tan.

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

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

5 **MR. TAN:** Yes, Your Honor. So under Sub A, a
6 reasonable person in the declarant's position would have made
7 only if the person believed it be true because when made it was
8 so contrary to the declarant's proprietary [inaudible]
9 interests, or had so great a tendency to invalidate the
10 declarant's claim against someone else or to expose the
11 declarant to civil or criminal liability. Again, for the same
12 facts that we discussed at the bench and I don't want -- unless
13 --

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

16 **MR. TAN:** Okay. And again I just don't want --
17 (Bench conference.)

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

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

1 indicating that he's commit any type of crimes.

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

11 I think we have evidence to show that the
12 prescription pills were found in one of the trash cans at the
13 7-Eleven, which Detective Olson is about to testify, but has
14 not testified to yet, so I think it also goes to show his
15 trustworthiness in that respect.

16 **THE COURT:** Mr. Bautista?

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

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

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

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

7 **THE COURT:** Okay. Anything else?

8 **MR. BAUTISTA:** No.

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

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

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

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

16 Anything else for the State? Defense?

17 **MR. TAN:** No.

18 **MR. BAUTISTA:** All of it.

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

20 **MR. BAUTISTA:** Because driving around is not
21 incriminatory.

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

25 **MR. BAUTISTA:** How do we overcome confrontation

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

7 **THE COURT:** What's your response to that?

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

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

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

18 **MR. BAUTISTA:** We --

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

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

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

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

1 unfortunately --

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

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

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

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

20 **THE COURT:** Response, Mr. Bautista?

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

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

14 **MR. TAN:** And I --

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

17 **MR. TAN:** Well, I guess --

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

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

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

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

18 **THE COURT:** Reply?

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

1 the defendant are they relevant.

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

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

6 **THE COURT:** Okay. Anything else?

7 **MR. BAUTISTA:** No.

8 **MR. TAN:** Not from the State.

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

15 **MR. TAN:** Musgrove.

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

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

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

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

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

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

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

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

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

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

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

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

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

17 **MR. TAN:** Okay.

18 (Break taken.)

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

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

1 cross Detective Olson before Mr. Musgrove takes the stand, and
2 he's fine with that.

3 **THE COURT:** Okay. Any objection to that,
4 Mr. Bautista?

5 **MR. BAUTISTA:** No, Your Honor.

6 **THE COURT:** Okay. Let's call the jury in.

7 Counsel, before the jury comes in, I actually -- if
8 you want to approach. I actually fixed those elements, the
9 burglary, the elements, and I added a -- there was
10 one -- there are one each, for each of you, I added a
11 definition of intentionally or knowingly. Why don't you take a
12 look at that and we'll talk about that in a few minutes.

13 I just -- I had that definition in my last trial that
14 I just finished last week. So take a look at. When we're done
15 with the witnesses that may resolve the issue of adding that
16 definition. We ready to go?

17 **MR. BAUTISTA:** Yes.

18 **MR. TAN:** Yes, Your Honor.

19 **THE BAILIFF:** All rise for the jury.

20 (Jury enters courtroom.)

21 **THE BAILIFF:** Be seated.

22 **THE COURT:** We're back on the record in the matter
23 State versus Salazar, Case 171901573. The jury has returned.
24 We appreciate your patience.

25 Detective, you understand you're still under oath?