No. 20180016-CA

**IN THE UTAH COURT OF APPEALS**

THE STATE OF UTAH,
*Plaintiff/Appellee*,

v.

MATTHEW GORDON EYRE
*Defendant/Appellant*.

Appellant is incarcerated.

# BRIEF OF APPELLANT

Appeal from a judgment of conviction for aggravated robbery, in violation of Utah Code § 76-6-302, a first-degree felony, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Royal I. Hansen presiding.


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# REPLY BRIEF OF APPELLANT

## INTRODUCTION

Eyre was charged as an accomplice to aggravated robbery after Jesse Rakes—the principal actor—attempted to take the vehicle of the alleged victim. In initiating contact with the alleged victim, Rakes relied on the false claim that he needed assistance in jump starting his car. One of the State's primary theories of accomplice liability was that Eyre aided the aggravated robbery by searching for jumper cables. Yet, evidence showed that Eyre thought the robbery was a "bad [] idea" and did not want to participate. Despite this evidence, trial counsel did not object to the accomplice elements instruction, which understated accomplice liability's mens rea requirement. This instruction was flawed because it did not explain to the jury that Eyre needed to act with the intent that aggravated robbery be committed. Eyre argues that trial counsel's failure to object to the incorrect

instruction constituted ineffective assistance of counsel. Thus, this Court should reverse and remand for a new trial.

A new trial is warranted for another reason: the jury was allowed to replay Eyre's videotaped police interview during deliberations. The trial court correctly recognized that the jury's viewing of the interview was improper. But the trial court erred in determining that the error was harmless and that a mistrial was not warranted. Finally, Eyre argues that the cumulative effect of the errors undermines confidence that he had a fair trial.

## ISSUES, STANDARDS OF REVIEW, PRESERVATION

Issue I: Whether trial counsel rendered ineffective assistance of counsel by failing to object to an instruction that understated accomplice liability's mens rea requirement.

*Standard of Review/Preservation*: This Court reviews challenges to jury instructions for correctness. *Cheves v. Williams*, 1999 UT 86, ¶20, 993 P.2d 191. The issue is not preserved. But it can be reached under the doctrine of ineffective assistance of counsel, which is an exception to the preservation rule and is reviewed as a matter of law. *See, e.g.*, *State v. Kozlov*, 2012 UT App 114, ¶28, 276 P.3d 1207.

Issue II: Whether the trial court should have granted Eyre's mistrial motion where the jury was allowed to replay Eyre's videotaped police interview during deliberations.

*Standard of Review/Preservation*: A trial court's ruling on a motion for

mistrial is reviewed for an abuse of discretion. *State v. Cardall*, 1999 UT 51, ¶19, 982 P.2d 79. This issue is preserved. R.240-45 (memorandum in support of mistrial); 248-54 (State's memorandum in opposition); 257-62 (ruling); 872-82 (discussion, argument, and motion for mistrial); 912-15 (additional argument and ruling). Moreover, the issue may be reviewed for ineffective assistance.

Issue 3: Whether cumulative error requires reversal.

*Standard of Review/Preservation*: A claim of cumulative error "requires [this Court] to apply the standard of review applicable to each underlying claim of error." *Radman v. Flanders Corp.*, 2007 UT App 351, ¶4, 172 P.3d 668. Preservation is inapplicable.

## STATEMENT OF THE CASE AND FACTS

### a. Background

On the morning of August 28, 2016, Boyfriend and Girlfriend[1] went to "the shelter" area and parked their Dodge Challenger on 300 South between 500 and 600 West. R.549-52, 632. Girlfriend was a heroin addict and was looking to purchase drugs in the area. R.632, 650.

A PT Cruiser occupied by Eyre, Michael Polk, and Jesse Rakes was parked nearby. *See* R.553-54, 583, 758. At some point, Rakes approached Girlfriend and Boyfriend. R.553-54, 591. Rakes asked Boyfriend if Boyfriend would "help jump their vehicle because it wouldn't start." R.553. Boyfriend offered to help. R.554-55, 635.

[1] Eyre refers to the alleged victims as "Boyfriend" and "Girlfriend" throughout this brief.

Boyfriend, the driver of the Challenger, then pulled his vehicle to the east of the PT Cruiser, parking it "[n]ose to nose" with the other vehicle in a "'V' shape." R.555-56, 600, 636; *see* State's Ex. 1. Girlfriend remained in the Challenger as Boyfriend got out, popped the hood, and stood in between the vehicles next to the Challenger's front passenger side. R.554-56, 635-36.

At this point, Polk and Eyre had also exited the vehicle and were in the back of PT Cruiser "rummaging around" in the trunk; Girlfriend and Boyfriend thought they were looking for jumper cables. R.556, 626, 637-38, 652. Rakes joined Boyfriend in between the cars and the two engaged small talk. R.556, 598, 638-39, 650-51.

According to Girlfriend and Boyfriend, Rakes then lifted up his shirt and flashed a pistol that was tucked into his waistband. R.557-58, 591-92, 639. Girlfriend and Boyfriend provided conflicting testimony regarding whether Eyre flashed a pistol as well. *Compare* R.652-59, 663, *with* R.558-61.

Rakes then announced, "[y]ou know what this is." R.560, 600, 639-40. Next, he said something to the effect of "I'm" or "we're" taking your car and your belongings, though the testimony was inconsistent regarding precisely what was said. R.560, 593-96, 600-01, 639-40, 814-15. He then threatened, "[g]et your bitch out of the car. I'm going to pistol whip her." R.560, 600, 639-40.

Boyfriend had a gun in the Challenger, and without anyone noticing, Girlfriend passed the gun to Boyfriend through the passenger side window. R.560-61, 601-02, 641-42. Shortly after doing so, a gunshot was fired; Boyfriend

had shot Rakes. R.562-63, 583-84, 641-42, 657.

Boyfriend testified that he shot Rakes in self-defense. R.562-63, 609. According to Boyfriend, Rakes drew a gun in Boyfriend's direction at which point Boyfriend fired. R.562-63. Rakes staggered and fell to the ground. *Id.* The shot left Rakes fatally wounded, and Rakes died that day from the wounds inflicted by the shot. R.583-84. Soon after the shooting, Eyre left the scene. R.768-69, 787-88, 804-05.

Girlfriend and Boyfriend started to drive away. R.563-65, 642-45. As they were doing so, the PT Cruiser—driven by Eyre's co-defendant, Michael Polk—hit the Challenger's rear end. R.564-65, 605, 644-45, 787; State's Ex. 10 (facing west at 7:25:40-7:26:05). The impact caused the PT Cruiser to flip, but Polk was able to exit. *Id.*; State's Exs. 5, 10 (facing west at 7:26:05-7:27:00). Girlfriend and Boyfriend drove away. R.645.

Back at the crime scene, "a bunch of people" had rushed towards Rakes and the flipped PT Cruiser. R.645-46; State's Ex. 10 (facing west at 7:27:00). According to police, these people robbed Rakes and took items from the PT Cruiser. R.645-46, 733.

Girlfriend and Boyfriend parked nearby and prepared for the arrival of the police. R.565, 645. Boyfriend and Girlfriend were restricted persons, so Girlfriend got rid of Boyfriend's gun before police got there. R.566-69, 585, 660, 606-07, 645-47. To alter his appearance, Boyfriend also changed his shirt. R.567.

Police arrived and arrested Boyfriend. R.584. Although Girlfriend

successfully disposed of Boyfriend's gun and ammunition, a search of Boyfriend's Challenger revealed an ounce of marijuana, a gun cleaning kit, a scale for measuring drugs, and 37 bags of suspected spice (which ultimately tested negative for a controlled substance). R.586, 737-38. Officers also found a magazine to a pistol in the PT Cruiser. R.733-35. But other than that, police found "very little physical evidence" at the scene of the crime, which was "compromised" by the various individuals who rushed to the scene. R.732. Police never recovered a gun from Rakes's person. R.790.

Police spoke to a witness who observed a man in a dark hoody run from the crime scene. R.670-74, 711-15, 804-07. This information led an officer to stop Eyre near 800 West 800 South. R.714-15. The officer initially let Eyre go after he denied involvement, but the officer later learned that detectives wanted to speak with Eyre. R.716-19. Eyre was arrested near 425 West 1300 South and was subsequently interviewed. R.719-20. No gun was found on his person. R.725-26.

Based on this incident, the State charged Eyre with aggravated robbery, a first degree felony, under a theory of accomplice liability. R.1-7, 66-68. The State also alleged that Eyre committed this crime in concert with two or more people and sought enhancement under Utah Code § 76-3-203.1. After a preliminary hearing, Eyre was bound over on this charge. R.62-65, 294-446.

**b. Trial**

A two-day jury trial was held on October 17-18, 2017. R.196-201. Through its witnesses—among them, Girlfriend and Boyfriend—the State presented the

evidence outlined above. *See supra* section a. The testimony of Girlfriend and Boyfriend, however, differed regarding the extent of Eyre's involvement. *Compare* R.652-59, 663, *with* R.558-61. To try to prove its case, the State also introduced Eyre's interview with the police. R.751-72; State's Ex. 11. After the presentation of evidence, the trial court instructed the jury regarding accomplice liability. R.222, 226-28. And ultimately, the jury found Eyre guilty as charged. R.230-31, 884.

*Boyfriend and Girlfriend offer different accounts regarding Eyre's involvement*: Girlfriend testified that she first observed Eyre at the back of the PT Cruiser digging through the trunk. R.652. To Girlfriend's knowledge, that is where he stayed. *Id*. Eyre did not say anything or do anything that Girlfriend viewed as threatening. R.655-59. While Girlfriend observed Rakes flash his weapon, she did not observe Eyre flash a gun or leave the trunk area. R.655-57. Girlfriend testified that she believed Eyre did nothing to further the crime. R.663.

Meanwhile, Boyfriend testified Eyre left the trunk area and joined Rakes in between the cars. R.558-60. Eyre stood side by side with Rakes and "flashed a pistol" that was under his shirt. R.558-61, 579, 601. Boyfriend considered Eyre a threat, and after shooting Rakes, attempted to shoot Eyre as well. R.563, 578-80. The gun, however, misfired. *Id*. Boyfriend then became focused on leaving the scene and lost sight of Eyre. R.564, 603.

Through cross-examination, the defense highlighted various inconsistencies between Boyfriend's trial testimony and preliminary hearing

testimony. *E.g.* R.551, 581-83 (inconsistency regarding whether Boyfriend was in the area with a purpose to buy drugs); R.590-91 (inconsistency regarding whether Rakes asked if Boyfriend would jump start "his" car or "our" car). The defense also put on witnesses and elicited testimony seeking to demonstrate that Boyfriend's story changed over time. *E.g.* R.816-17 (officer testifying that Boyfriend never mentioned anything about a second man who flashed a gun). Moreover, the defense emphasized that based on the incident Boyfriend faced charges for second degree felony possession of a firearm by a restricted person. R.608-14; *see also* 568-70. But the State offered Boyfriend a class A misdemeanor in exchange for testifying "truth[fully]" at Eyre's trial. *Id.* Finally, the defense sought to undermine Boyfriend's testimony that Eyre was armed by presenting evidence that a man resembling Eyre appeared to be shielding himself as he fled from the scene. R.805-06; *see also* R.856. Additionally, no weapon was recovered from Eyre. R.725-26.

*Eyre's interview*. Eyre did not testify, but his videotaped police interview was admitted into evidence as Exhibit 11 and was played for the jury. *See* R.751-72, 872-73. In his interview, Eyre initially told police that he did not witness or know anything about the incident. R.752. Subsequently, Eyre admitted to being present and looking for cables to jump start the PT Cruiser's "d[ea]d" battery, but did not mention that Rakes "tried to take [Boyfriend's] car." R.758-61, 763-65. When police told Eyre that Rakes had died, Eyre became emotional and gave the following account. R.761; State's Ex. 11.

Rakes, Polk, and Eyre had been sitting in the parked PT Cruiser for about 2-3 minutes when Rakes looked over and saw the Challenger. R.765-767, 769, 773. Rakes announced that he wanted to take it. *See* R.765, 767. Eyre wanted no part in driving around in a stolen car and warned Rakes that "[i]t [was] a bad ass idea." R.765; State's Ex. 11 (9:07-9:25).

Before exiting the PT Cruiser, Rakes "said he was going to ask for a jump start." R.767, 773; State's Ex. 11 (11:25-11:40). "As soon as [Rakes] got out of the car, he started spinning"—or telling a "bullshit" story about—the "jump thing." R.772-73; State's Ex. 11 (14:00-14:30); State's Ex. 11 (9:45-9:50).[2] At some point, Rakes told Eyre to look for jumper cables and told Polk to pop the hood. R.767, 773; State's Ex. 11 (11:35-11:45). Eyre proceeded to look for jumper cables in the back. R.773. According to Eyre, Rakes was "running the [] show." R.766. In an earlier version of the story, Eyre said he eventually stated that they did not have cables. R.760, 773.

When asked about the "plan," Eyre told police, "We didn't have a plan .... Didn't plan shit." R.766; *see also* R.770; State's Ex. 11 (15:43-16:05) (officer asking Eyre in the interview what Polk thought about the idea, and Eyre responding, "It wasn't really talked about. It wasn't discussed").

Just prior to the shooting, Rakes said something to Boyfriend. R.760, 773,

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[2] At trial, the detective testified that Eyre said in the interview that "*as soon as they got in the area*, Jesse started spinning this whole fuckin' jump start thing." R.772 (emphasis added). But in Exhibit 11, Eyre can be heard saying: "*As soon as [Rakes] got out of the car*, he started spinning this whole fuckin' jump thing." State's Ex. 11 (14:00-14:30).

775. But Eyre joined them at the front of the car toward the end of their conversation, so he could not hear what was said. R.760, 773-75. Eyre then observed Boyfriend run in front of the Challenger and Rakes run after him. R.768, 774-75. Rakes was then shot, and he told Eyre, "run." R.760, 768, 788. After that, Eyre left the scene. R.768-69, 788; State's Ex. 11 (13:12-13:35). Moreover, Eyre told police that he did not flash or possess a gun that day; he did not know if Rakes had a gun; and he did not know what Rakes was doing when Rakes was shot. R.760, 768; State's Ex. 11 (11:55-12:35).

Exhibit 11 was 23 minutes and 27 seconds long. *See* State's Ex. 11. But only about the first 17 minutes and 45 seconds was played for the jury in open court. *See* R.751-72; State's Ex. 11. In the remaining portion, the detective expresses his opinion that Eyre "w[ould] probably go to jail for robbery." *See* State's Ex. 11 (17:50-20:15). The recording also shows police handcuffing and taking mugshots of Eyre. *See* State's Ex. 11 (17:50-23:15). The recording ends with footage of police taking Eyre into custody. *See* State's Ex. 11 (23:05-23:27).

*Jury Instructions*. The State proceeded on a theory of accomplice liability and the jury was instructed accordingly. *See* R.847-48, 222, 226-28; *see also* Addendum A (relevant jury instructions). Instruction 40, which set forth the elements of party liability, told the jury that a defendant is guilty as an accomplice if: "(1) the defendant intentionally, (2) solicited, requested, commanded, encouraged, or intentionally aided another to commit the offense, **AND** (3) the offense was committed." R.227 (bolding in original). Defense

counsel stipulated to the inclusion of this instruction. R.706.

**c. Eyre's motion for mistrial**.

On the second day of trial, Exhibit 11—Eyre's videotaped police interview—was offered and admitted into evidence by the State. R.751, 872-73. According to defense counsel, there was an agreement between the parties that the interview could be played for the jury. R.872. While the prosecutor had a different understanding of the agreement, R.872-73, defense counsel was under the impression that Exhibit 11 would not go into the jury room during deliberations. R.872, 875. Based on defense counsel's understanding, the defense stipulated to the "blanket admission" of all exhibits, including Exhibit 11. R.799, 875. All of the exhibits went back into the jury room. R.870-71.

During deliberations, the jury requested a computer with which to view the video exhibits.R.248-49, 873. Defense counsel believed that the jury sought to review different video exhibits—not Exhibit 11. R.873. Accordingly, a computer was provided. R.249, 873. When it occurred to defense counsel that Exhibit 11 might have gone into the jury room, defense counsel immediately notified a court employee, and the computer was retrieved. R.873-74. The bailiff confirmed that the jury watched Exhibit 11 in the jury room. R.874. The jury had the ability to access Exhibit 11 for 20 minutes. R.259, 873-74. When the recording was stopped, it appeared that seven minutes remained on the recording. R.880.

Defense counsel brought the issue to the court's attention and moved for a mistrial on the grounds that Exhibit 11 may have improperly influenced the jury.

R.874. The trial court ultimately ruled that the issue was timely raised and took the mistrial motion under advisement pending the jury verdict. R.877-79, 886-87. While the court reserved its ruling, it thought "on [the] face of" things that there was no prejudice, pointing to its belief that "[t]he jury ha[d] not been exposed to anything ... new or different." R.879-80. Defense counsel clarified that Exhibit 11 contained footage that had not been played for the jury at trial. R.880-81. After the verdict, the court ordered briefing on the mistrial motion. R.886-87.

In his brief, Eyre argued that replaying the police interview permitted the jury to place undue emphasis on the recording—"the State's most persuasive evidence against Eyre." R.243; *see also* Addendum B (defendant's memorandum in support of mistrial). Thus, Eyre argued, a mistrial should be declared. *Id.* Meanwhile, the State argued that Eyre waived any objection because Eyre stipulated to the admission of Exhibit 11. R.249-53; *see also* Addendum B (State's opposition memorandum). Alternatively, it argued that a mistrial was not warranted on the merits. *Id.*

The trial court memorialized its decision in a written order. R.257-60; Addendum C (ruling). There, the court evidently rejected the State's waiver argument and ruled on the issue. *Id.* The court determined that the "jury's viewing of Exhibit 11 in the jury room during deliberations was improper." R.259. But it determined that the error was harmless and denied Eyre's mistrial motion. R.259-60.

At sentencing, the trial court entertained further argument on the mistrial motion. R.912-15. Defense counsel added that the jury was "deliberating for some time" before they requested Eyre's interview, indicating "confusion or discussion about what [Eyre] may have said to the police." R.913-14. But upon reviewing Eyre's interview, they came back with a verdict "shortly thereafter." *Id*. Based on this, counsel argued, the error was not harmless. *Id*. The trial court once again denied the motion for lack of prejudice. R.915.[3]

Eyre was sentenced to an indeterminate prison term of 10 years-to-life (in concert enhanced). R.266-268; *see also* Addendum D (Sentence, Judgment, Commitment). Eyre timely appealed. R.269-70. This appeal was transferred from the Utah Supreme Court to this Court. R.284-87.

## SUMMARY OF ARGUMENT

*Issue I*. Trial counsel rendered ineffective assistance of counsel by failing to object to an instruction that understated accomplice liability's mens rea. To be guilty as an accomplice to aggravated robbery, Eyre needed to act "intentionally," i.e., he needed to act with the intent or desire to cause aggravated robbery. The elements instruction on accomplice liability omitted this critical requirement. Instead, the instruction suggested that the intentional mental state attached only to the actions of "solicited, requested, commanded, or encouraged, or intentionally aided." The instructions as a whole did not cure this deficiency.

Moreover, the instructional error improperly allowed jurors to convict if

[3] The transcripts relevant to Eyre's mistral motion are attached at Addendum G.

they found that Eyre acted with an objective other than the desire to cause aggravated robbery. In effect, the error reduced the State's burden of proof. Thus, trial counsel performed deficiently by failing to object to an instruction that made it easier for the jury to convict.

Lastly, counsel's failure to object to the instruction undermines confidence in the verdict. There was record evidence that Eyre did not intend for his conduct to cause aggravated robbery. Indeed, the jury heard that Eyre did not want Rakes to commit the crime and did not want to take part in its commission. Moreover, the jury had reason to doubt Boyfriend's claim that Eyre participated in the robbery by flashing a gun. Thus, Eyre was prejudiced by counsel's failure to ensure that the jury was correctly instructed.

*Issue II*. This Court should grant Eyre a new trial because the jury improperly viewed Eyre's videotaped police interview during deliberations. The trial court correctly recognized that this was error. The trial court nevertheless denied Eyre a mistrial based on the erroneous determination that this error was harmless. Contrary to the trial court's suggestion, the replaying of the video detrimentally emphasized Eyre's interview. Moreover, the record suggests that the improper emphasis likely influenced the verdict. The trial court also relied on an incorrect understanding of prejudice law in reaching its determination. A mistrial was required because it is reasonably likely that but for the jury's viewing of the interview, Eyre would have enjoyed a more favorable outcome. This issue is preserved, but if not, the issue may be reviewed for ineffective assistance.

*Issue III*: Cumulative error requires reversal.

## ARGUMENT

### I. Trial counsel rendered ineffective assistance of counsel by failing to object to an instruction that incorrectly stated the elements of accomplice liability.

The Sixth Amendment right to effective assistance of counsel protects criminal defendants against attorney errors that undermine confidence in the verdicts. *See Strickland v. Washington*, 466 U.S. 668, 684-94 (1984). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate both "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Id.* at 687.

When evaluating "whether trial counsel performed deficiently in failing to object to [] jury instructions, [this Court] must first consider whether those instructions were legally correct." *State v. Liti*, 2015 UT App 186, ¶12. This Court then asks "whether trial counsel performed deficiently by not objecting to the erroneous instructions." *Id.* ¶18. Finally, this Court asks whether the defense was prejudiced by the failure to object. *State v. Grunwald*, 2018 UT App 46, ¶23.

In this case, trial counsel erred in the most fundamental of ways by failing to ensure that the jury understood the elements of the alleged crime. The problem lied in the elements instruction on accomplice liability, which understated the mens rea necessary to be guilty as an accomplice. Specifically, it failed to explain to the jury that Eyre needed to possess a culpable mental state with respect to the commission of the principal crime, i.e., he needed to act with

the intent that aggravated robbery be committed. *See infra* Part I.A. This critical omission reduced the State's burden of proving Eyre guilty of the statutorily required elements. *See infra* Part I.A-B. Accordingly, counsel performed deficiently by failing ensure that the jury was correctly instructed on the elements. *See infra* Part I.B. Moreover, this failure prejudiced Eyre. *See infra* Part I.C.

A. The elements instruction on accomplice liability was incorrect.

The mens rea element "ought to be explicitly explained to a jury." *State v. Bird*, 2015 UT 7, ¶19 (citing *State v. Jeffs*, 2010 UT 49, ¶43). The elements instruction on accomplice liability did not do that in this case.

Eyre was charged "as a party" to aggravated robbery. R.66-68. Party liability, more commonly known as accomplice liability, is set forth in Utah Code § 76-2-202, which states: "[e]very person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." Utah Code § 76-2-202; Addendum E (relevant statutes).

"Accomplice liability requires that the defendant act 'with the mental state required for the commission of [the principal] offense.'" *Grunwald*, 2018 UT App 46, ¶33 (alteration in original) (quoting Utah Code § 76-2-202). In other words, "an accomplice cannot be convicted based on a lesser mental state than that required to commit the underlying offense." *Id.*

Here, the underlying offense of aggravated robbery requires intentional conduct. *See* Utah Code § 76-6-301, 302; *see also* Addendum E (relevant statutes). Accordingly, an accomplice to aggravated robbery acts "with the mental state required for the commission of [the principal] offense" when he acts intentionally. Utah Code §§ 76-6-301, 76-2-202.

But intentionally "in regard to what?" *Jeffs*, 2010 UT 49, ¶44. The Utah Supreme Court answered that question in *Jeffs*, which held that the defendant must act with the intent that the underlying crime be committed. *Id*. ¶¶42-44; *see also* Addendum F. In *Jeffs*, the defendant was charged as an accomplice to rape. *Id*. ¶17. At trial, the defense was denied an instruction that would have required the State to prove that the defendant "intended that the result of his conduct would be that [the principal] rape [the victim]." *Id*. ¶40.

The Utah Supreme Court held that the elements instruction on accomplice liability was deficient, and thus, the defendant was entitled to the requested instruction. *Id*. ¶¶42-52. The main problem with the elements instruction was that it failed to connect the required mental state to the underlying crime. *Id*. ¶42. That is, the instructions "only indicated that the reckless, knowing, or intentional mental state attached to the actions of 'solicited, requested, commanded, or encouraged,' not to the underlying criminal conduct of rape." *Id*. The court held that this was error. *Id*. [4]

[4] The accomplice elements instruction in *Jeffs* stated as follows:

To convict Warren Jeffs as an accomplice to the crime of rape, you

In reaching its conclusion, the *Jeffs* court considered the accomplice statute's requirement that a defendant act "with the mental state required for the commission of an offense." *Id.* ¶44; Utah Code § 76-2-202. Because the underlying crime of rape required intentional, knowing, or reckless conduct, accomplice liability required that the defendant act "intentionally, knowingly, or recklessly." *Jeffs*, 2010 UT 49, ¶44. "But," the *Jeffs* court asked, "intentionally, knowingly, or recklessly in regard to what?" *Id.*

In answering this question, the court rejected an argument that the defendant could "act intentionally, knowingly, or recklessly in the abstract." *Id.* ¶46. Instead, the court held that the defendant "must act intentionally, knowingly, or recklessly as to the results of his conduct. And in order for criminal liability to attach, the results of his conduct must be a criminal offense." *Id.* ¶44. For instance, in prosecuting a defendant as an accomplice to an intentional underlying offense—such as aggravated robbery—the State would need to prove

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must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime:

1. That the defendant, Warren Jeffs:
   a. intentionally, knowingly, or recklessly solicited, requested, commanded, or encouraged another—
      I. to have sexual intercourse
      ii. with Elissa Wall without consent; or
   b. intentionally aided another—
      I. to have sexual intercourse
      ii. with Elissa Wall without consent; and
2. Allen Steed had sexual intercourse with Elissa Wall without consent.

*Jeffs*, 2010 UT 49, ¶41.

that the defendant acted with the "desire[] to cause [the underlying offense]." *Id.* ¶45. In short, the accomplice instruction in *Jeffs* was erroneous because it failed to connect the intentional/knowing/reckless mental state to the underlying criminal conduct of rape. *Id.* ¶¶42-52.

Similarly here, the accomplice elements instruction (Instruction 40) was erroneous because it omitted any requirement that Eyre act intentionally with respect to the principle crime, aggravated robbery. Instruction 40 stated:

> A person can commit a crime as a "party." In other words, a person can commit a criminal offense even though that person did not personally do all of the acts that make up the offense. If you find beyond a reasonable doubt that:
>
> 1. the defendant intentionally
> 2. solicited, requested, commanded, encouraged, or intentionally aided another to commit the offense, **AND**
> 3. the offense was committed,
>
> then you can find the defendant guilty of that offense.

R.227 (bolding in original).

Instruction 40 correctly identified the mental state "intentionally" as the mens rea required to commit aggravated robbery. *Id.* But the instruction failed to connect this mens rea to the underlying offense of aggravated robbery. *Id.* In other words, nothing told the jury that Eyre needed to "intend[] ... that [his] conduct would result in the commission" of aggravated robbery. *Grunwald*, 2018 UT App 46, ¶36. Instead, as in *Jeffs*, the instruction erroneously suggested that the intentional mental state applied only to the "actions of 'solicited, requested, commanded, [] encouraged,'" or intentionally aided. *Jeffs*, 2010 UT 49, ¶42.

Moreover, absent an "intent to cause aggravated robbery" requirement, Instruction 40—read together with the abstract definition of "intentionally"—allowed the jury to convict based on a noncriminal intent. The jury was instructed that "[a] person acts 'intentionally' when his conscious objective is to cause a certain result." R.223. But the definition does not even contemplate that the "certain result" be prohibited or criminal. *See id*. For instance, the jury could have found that Eyre acted "intentionally" if—in looking for jumper cables—Eyre's only intention was to appease Rakes or to avoid a confrontation with him. *See id*. That and a whole range of mental states could meet the abstract definition of "intentional[]." *Id*.

In *Jeffs*, however, the Utah Supreme Court rejected an argument that accomplice liability could attach to a defendant who encouraged/aided a crime while acting intentionally "in the abstract." 2010 UT 49, ¶46. For a defendant to be guilty as an accomplice, only one intent matters: the intent that the underlying crime be committed. *See id*. ¶¶42-46. The instructions did not state this fundamental principle, which resulted in an understated mens rea requirement that allowed the jury to convict based on abstract notions of intent.

This serious error was not cured by the instructions as a whole. Instruction 41 included the statutory definition of accomplice liability and told the jury that a defendant's "mere presence" at the scene or knowledge of the crime's commission is not enough to convict. R.228. But this statement of law only told the jury what accomplice liability *was not*; it did not explain that accomplice liability requires

the desire to cause aggravated robbery. *See id.*; *see also Jeffs*, 2010 UT 49, ¶45.

Additionally, the statutory definition of accomplice liability, which was repeated in Instructions 39 and 41, was likewise insufficient to remedy the erroneous accomplice elements instruction. R.226; *see also* R.228 (also reciting the statutory definition of accomplice liability). Instruction 39, for instance, explained that an accomplice must "act[] with the mental state required for the commission of an offense." *Id.* It is a stretch to say that a lay jury would glean from this instruction that Eyre needed to act with the intent to cause aggravated robbery. Indeed, even legal professionals have differed regarding the interpretation of the phrase, "acting with the mental state required for the commission of an offense." *Compare Jeffs*, 2010 UT 49, ¶46 (State interpreting this phrase to require the defendant to "act intentionally ... in the abstract and incur criminal liability if his actions resulted in ... encouraging, or intentionally aiding" a crime), *with id.* ¶¶42-44 (supreme court interpreting the phrase to require that a defendant act intentionally with respect to the underlying offense).

Nevertheless, even if the jury understood Instruction 39, the jury was not given a way to reconcile Instruction 39 with Instruction 40, which—like the erroneous instruction in *Jeffs*—failed to connect a mens rea requirement to the underlying crime. *See* 2010 UT 49, ¶42. Indeed, on the one hand, the unspecific statutory definition suggested that a mental state applied to the principle crime, while on the other hand, the purported elements instruction did not. *See Francis v. Franklin*, 471 U.S. 307, 322 (1985) ("[l]anguage that merely contradicts and

does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"); *State v. Campos*, 2013 UT App 213, ¶43 (finding error in a verdict form that "directly contradicted" a correct instruction on imperfect self-defense).

Moreover, there is a strong likelihood that the jury relied on Instruction 40 rather than the statutory definition. In fact, the prosecutor identified Instruction 40 as the source of law for accomplice liability. *See* R.848 (prosecutor stating: "let's talk about this party liability.... That instruction is Instruction No. 40").

In some cases, instructions read as a whole may provide meaning to an instruction that is otherwise inadequate standing alone. For instance, in *State v. Clark*, this Court held that the instructions as a whole adequately instructed the jury on accomplice liability.[5] 2014 UT App 56. In that case, it appears that only one instruction detailed the principle of accomplice liability. *See id.* ¶¶52-55. That instruction was "copied nearly verbatim from Utah's accomplice liability statute." *Id.* ¶52. Then, for each of the counts, the trial court also provided an instruction "detailing the elements of each crime, including the required mental state." *Id.* ¶55. Put plainly, the accomplice instruction was correct, as far as it went, because it accurately repeated the unspecific accomplice statute. *See id*. Then the specific mental state requirements for each charge were discussed in other instructions. *See id.* Thus, viewed as a whole, the elements for each accomplice charge could be determined by putting together the underlying elements instructions and the

[5] The evidence in *Clark* pointed to the defendant acting as a principle actor, rather than an accomplice. 2014 UT App 56, ¶55.

accomplice instruction. *See id.*

By contrast, the instructions in this case, as a whole, did not cure the erroneous accomplice elements instruction. Unlike *Clark*, this case does not involve an unspecific instruction that was clarified by other instructions. *See id.* Rather, as explained, Instruction 40 conflicts with and expounds upon the statutory definition in a way that is incorrect. *See supra* pp. 21-22.

In short, the accomplice elements instruction incorrectly omitted a requirement that Eyre act intentionally with regard to the underlying crime of aggravated robbery. And the remaining instructions did not cure this error.

B. Trial counsel's failure to object to the erroneous instruction on accomplice liability constituted deficient performance.

The next question in the ineffective assistance analysis is did defense counsel perform deficiently for failing to object to the incorrect instruction. *Liti*, 2015 UT App 186, ¶18. The answer to this question is yes. "[N]o reasonable lawyer would have found advantage in understating the" elements required to prove accomplice liability. *State v. Barela*, 2015 UT 22, ¶27.

Counsel performs deficiently when his "conduct f[alls] below an objective standard of reasonableness under prevailing professional norms." *State v. Ring*, 2018 UT 19, ¶35 (quotation marks omitted). For instance, in *Barela*—a rape case—the Utah Supreme Court held that counsel was deficient for failing to object to an instruction that "implied that the mens rea requirement ('intentionally or knowingly') applied *only* to the act of sexual intercourse, and not to [the alleged victim]'s nonconsent." 2015 UT 22, ¶¶26-27 (emphasis in original). The *Barela*

court explained that "no reasonable lawyer would have found an advantage in understating the mens rea requirement as applied to the victim's nonconsent." *Id.* ¶27. As the court pointed out, "[t]here is only upside in a complete statement of the requirement of mens rea." *Id.*

Likewise, in *Grunwald*, this Court held that counsel performed deficiently by failing to object to erroneous instructions on accomplice liability. 2018 UT App 46, ¶42. There, this Court identified three flaws in the accomplice liability instructions. *See id.* ¶¶32-42. These errors effectively "reduc[ed] the State's burden of proof" and allowed the jury to convict under "impermissible scenarios"—among them, "if [the defendant] directed her actions to some purpose other than the commission of the principal crime." *Id.* ¶42. Thus, counsel performed deficiently because "no reasonable trial strategy would justify trial counsel's failure to object to instructions misstating the elements of accomplice liability in a way that reduced the State's burden of proof." *Id; see also State v. Apodaca*, 2018 UT App 131, ¶36.

Similarly here, counsel performed deficiently by failing to object to the incorrect accomplice instructions. The instructions "understat[ed]" accomplice liability's mens rea by omitting any requirement that a mental state apply to the underlying offense of aggravated robbery. *Barela*, 2015 UT 22, ¶27. Consequently, the instructions allowed the jury to convict under an "impermissible scenario[]." *Grunwald*, 2018 UT App 46, ¶42. That is, the jury could convict if they found that Eyre acted with an objective other than "desire[]

to cause" aggravated robbery. *Jeffs*, 2010 UT 49, ¶45. As in *Grunwald*, this "error[] had the effect of reducing the State's burden of proof at trial." 2018 UT App 46, ¶42. And no reasonable trial strategy would justify allowing an incorrect instruction that made it easier for the jury to convict, *see id.*—particularly where defense counsel disputed that Eyre possessed a culpable mind. R.858 (stating that Eyre and Polk "could have been thinking, God, (inaudible) knock this off. Hoping that their friend would see the light and not do a stupid thing"); *see also* R.852-53.

The reasonableness of counsel's actions are further undermined by the similarities Instruction 40 shared with the erroneous instruction in *Jeffs*—a case that was established precedent at the time of trial. 2010 UT 49, ¶41. Moreover, the instruction departed from the Model Utah Jury Instruction's sample instructions on accomplice liability. *See* Model Utah Jury Instructions 2d (MUJI) CR309A and CR309B.

Finally, the presence of Instruction 39, which provided the statutory definition of accomplice liability, did not relieve counsel of his duty to object. The Utah Supreme Court has held that counsel has a duty remove ambiguity and conflict in instructions that could mislead the jury. *See State v. Hutchings*, 2012 UT 50, ¶23. And here, Instruction 40 was incorrect and misleading; it understated accomplice liability's mens rea; and it did not comport to the statutory definition of accomplice liability. Thus, counsel was deficient for failing to object to it.

C. Counsel's errors prejudiced Eyre.

The last step in the ineffective assistance analysis is to decide whether counsel's deficient performance was prejudicial. *Grunwald*, 2018 UT App 46, ¶43. Deficient performance requires reversal when "'a reasonable probability exists that, but for counsel's error, the result would have been different.'" *Id.* (quoting *State v. Millard*, 2010 UT App 355, ¶18). Moreover, when "attempting to determine whether the omission of an element from a jury instruction" is prejudicial, this Court "'asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.'" *State v. Ochoa*, 2014 UT App 296, ¶5.

In this case, there was a reasonable likelihood of a different result but for counsel's failure to ensure that the jury was correctly instructed. According to the State's evidence, Eyre allegedly aided in the aggravated robbery of Boyfriend in two ways: (1) Eyre flashed a pistol after Rakes threatened to take Boyfriend's property ("the pistol-flashing theory"); or (2) Eyre looked for jumper cables in the back of the PT cruiser, which—according to the State—helped Rakes isolate Boyfriend ("the jumper cable theory"). *See* R.849-51. While the erroneous instructions were prejudicial under any theory, the instructions were particularly problematic if the jury convicted upon the jumper cable theory.

The jury heard compelling evidence upon which they could have doubted that Eyre "intended ... that [his] conduct"—i.e., looking for jumper cables—"would result in the commission" of aggravated robbery. *Grunwald*, 2018 UT

App 46, ¶36. Evidence showed that Eyre did not want Rakes to commit the crime and did not want to take part in its commission. R.765. Eyre even warned Rakes that it was "[i]t [was] a bad ass idea." *Id.* He also indicated that he wanted no part in driving around in a stolen car. *Id.*; State's Ex. 11 (9:07-9:25). And in closing, defense counsel stressed that Eyre thought stealing the car was "stupid." R.852-53. Defense counsel also suggested that Eyre lacked a culpable mind. *See* R.858 (stating that Eyre and Polk "could have been thinking, God, (inaudible) knock this off. Hoping that their friend would see the light and not do a stupid thing").

Moreover, evidence demonstrates that there was no mutually agreed upon plan to rob Boyfriend. True, Eyre acknowledged that he knew the PT Cruiser did not require a jump start, and thus, "[the] jump thing" was something that Rakes was "spinning." *See* R.766, 772-73; State's Ex. 11 (14:00-14:30). But "spinning" toward what objective? A jury could find that from Eyre's perspective, the answer was not clear.

The idea of using a "jump start" as a ruse to isolate Boyfriend was not something that was discussed by the parties. *See* R.766-67. Rakes did not overtly connect the "jump start" idea to the robbery of Boyfriend. *See id.* Nor did Rakes explain to Eyre how Eyre's search for jumper cables would advance the plan. *See id*. Rather, evidence shows that Rakes simply said, "he was going to ask for a jump start," and then Rakes ordered Eyre to look for jumper cables. R.767, 773; State's Ex. 11 (11:25-11:40). And importantly, the jury heard evidence that they "didn't have a plan .... Didn't plan shit." R.766. Moreover, Rakes's idea "wasn't

really talked about. It wasn't [] discussed." State's Ex. 11 (15:43-16:16); *see also* R.770. From this, a jury could find that in Eyre's mind, it was unclear whether looking for jumper cables furthered Rakes's aggravated robbery plans.

On this record, a jury could perhaps conclude that Eyre acted recklessly with regard to the crime's commission. But to be guilty as an accomplice to aggravated robbery, Eyre needed to act with the highest mental state of all: intent. And with little evidence of a mutually-understood plan of action—taken together with the evidence that Eyre did not want to participate in the crime—the jury had reason to doubt that Eyre's intent in looking for the cables was to cause an aggravated robbery.

Moreover, it is reasonably likely that at least some jurors convicted based upon the jumper cable theory and rejected the pistol-flashing theory. Boyfriend, who provided the only evidence that Eyre flashed a weapon, had serious credibility problems. Through cross-examination, the defense highlighted various inconsistencies between Boyfriend's trial testimony and preliminary hearing testimony. *E.g.* R.551, 581-83 (inconsistency regarding whether Boyfriend was in the area with a purpose to buy drugs); R.590-91 (inconsistency regarding whether Rakes asked if Boyfriend would jump start "his" car or "our" car). The defense also put on witnesses and elicited testimony seeking to demonstrate that Boyfriend's story changed over time. *E.g.* R.816-17 (officer testifying that Boyfriend never mentioned anything about a second man who flashed a gun). Additionally, the jury heard evidence that Boyfriend was a felon who illegally

possessed drugs and weapons. R.568-70, 586, 737-38.

Furthermore, the jury heard evidence that Boyfriend had a motive to slant his testimony in favor of the State given the beneficial plea deal he worked out with the prosecutor. R.569-70. Boyfriend also had a motive to lie about Eyre (and Rakes) having a gun. Indeed, Boyfriend indisputably shot Rakes. R.562-63, 583-84, 641-42, 657. Accordingly, Boyfriend had a motive to exaggerate the nature of the threat—including lying about Eyre having a gun—in order to support his claim that the shooting was justified.

The jury also heard compelling evidence that undermined Boyfriend's claim that Eyre flashed a weapon. Notably, Girlfriend did not observe Eyre flash a gun or leave the trunk area of the PT Cruiser. R.655-57. In fact, Girlfriend testified that she believed Eyre did nothing to further the crime. R.663. In addition to Girlfriend's testimony, the jury heard evidence suggesting that Eyre shielded himself as he fled from the scene, which undercut Boyfriend's claim that Eyre was armed. R.805-06. Also, no weapon was recovered from Eyre. R.725-26.

Finally, the prosecutor encouraged the jury to convict based upon the jumper cable theory and Eyre's interview alone. *See* R.868 (prosecutor telling jury that they did not "have to decide th[e] case on [the testimony of] [Boyfriend] or [Girlfriend], [they] c[ould] decide this case simply on the defendant's own words"). Under these circumstances, there is a reasonable likelihood that the jury rejected the pistol-flashing theory and convicted based upon the jumper cable theory—the theory that was most susceptible to the instructional error.

In short, counsel's deficient performance undermines confidence in the verdict, and this Court should reverse.

## II. The jury's improper viewing of Eyre's videotaped interview during deliberations warrants a new trial.

The trial court improperly denied Eyre a mistrial after the jury was allowed to replay his videotaped police interview during deliberations. While the trial court correctly recognized that it was improper for the jury to view the interview, *see infra* Part II.A, it erred in determining that this error was harmless. *See infra* Part II.B. Moreover, this issue is preserved, but if not, the issue may be reviewed for ineffective assistance. *See infra* Part II.C. No matter how the issue is reviewed, the error warrants a new trial.

### A. It was improper to allow the jury to view Eyre's videotaped police interview during deliberations.

Rule 17 of the Utah Rules of Criminal Procedure provides that during deliberations, "the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury . . . ." Utah R. Crim. P. 17(k). Although the rule "permits the jury to take most exhibits into the deliberations," *State v. Cruz*, 2016 UT App 234, ¶35, the trial court in this case correctly determined that the "jury's viewing of Exhibit 11 in the jury room during deliberations was improper." R.259.

The trial court's position is well-supported by Utah law. Utah appellate courts have stated that "'exhibits which are testimonial in nature should not be

given to the jury during its deliberations.'" *Id*. The rationale for this rule is that testimonial writings and recordings are "simply a different form of testimony that 'should not be unduly emphasized over oral testimony.'" *Id*. ¶36 (quoting 2 *McCormick on Evidence* § 220 (7th ed. 2016)).

This Court recently reaffirmed these principals in *Cruz*, which held that it was error to allow the viewing of a child victim's videotaped police interview during deliberations. *Id*. ¶¶36-41. In reaching its conclusion, this Court reasoned that the "video recording [of the child's interview] pose[d] the same danger of undue emphasis as would the transcript of the witness's live trial testimony." *Id*. ¶39. Indeed, the "'replay of a video recording is tantamount to having the witness testify a second time.'" *Id*. This Court therefore concluded that the child's interview, which "was taken by police for the purpose of prosecuting crime," "f[ell] within the category of 'exhibits which are testimonial in nature'" and thus "should not be given to the jury during its deliberations." *Id*. ¶38.

Likewise here, Eyre's videotaped interview (Exhibit 11) was testimonial, and it was improper to allow it to go into the jury room. As in *Cruz*, Exhibit 11 was a recording of an "interview" with the police. *Id*. ¶¶37-41; *see also People v. Jefferson*, 411 P.3d 823, 826 (Colo. App. 2014) ("a trial court must 'oversee with caution' the jury's use of exhibits of a testimonial character, including video recorded interviews of witnesses"). The interview was also "taken by police for the purpose of prosecuting crime." *Id*. ¶38. Additionally, Eyre's interview was "video record[ed]," posing a danger of undue emphasis upon it. *Id*. ¶38. For these

reasons, Exhibit 11 constituted a testimonial exhibit that should not have been available in the jury room. Therefore, the trial court correctly determined that it was improper to allow the jury to view Exhibit 11 during deliberations. *See* R.259.

B. The jury's viewing of Exhibit 11 in the jury room was prejudicial.

The trial court nevertheless erred in determining that the error was harmless, and thus, a mistrial was not warranted. *See* R.259. "'[A]n incident rises to the level requiring a mistrial' if the trial court determines that the 'incident may have or probably influenced the jury, to the prejudice of [the defendant].'" *State v. Craft*, 2017 UT App 87, ¶24 (alterations in original). An error is prejudicial when there is a "'reasonable likelihood that the error affected the outcome of the proceedings.'" *Cruz*, 2016 UT App 234, ¶42.

In this case, it is reasonably likely that the jury's improper review of Exhibit 11 affected the outcome of Eyre's trial. Because of the error, the jury had the opportunity to replay the recording during deliberations, creating the "danger of undue emphasis" on Eyre's testimony. *Id.* ¶39.

The trial court disagreed, concluding that the error was harmless. R.257-60. In support, the court explained that Eyre would have benefited from any undue weight placed on the recording; that the jury's opportunity to review the video was "limited;" and that the State's evidence was otherwise "sufficient" for the jury to convict. R.259-60. The trial court was incorrect because the jury's viewing of Exhibit 11 was prejudicial.

First, it is reasonably likely that the replaying of Exhibit 11 emphasized

Eyre's statements to his detriment. Although Eyre's interview contained statements that benefited the defense, it also showed Eyre giving three different versions of the incident. *See* State's Ex. 11. This could have caused the jury to question Eyre's credibility. And credibility was important in this case. On the one hand, Boyfriend testified that Eyre aided the robbery by flashing a pistol, R.558-61, and on the other hand, Eyre stated that he did no such thing. R.760, 768; State's Ex. 11 (11:55-12:35). In deciding who to believe, there is a reasonable likelihood that the unduly emphasized inconsistencies in Eyre's interview tipped the jury in favor of Boyfriend. Meanwhile, Boyfriend's credibility problems (of which there were plenty, *see supra* pp. 28-29) were allowed to "fade[] from the memory of the jurors.'" *Cruz*, 2016 UT App 234, ¶36.

Also, the various witnesses' "inconsistencies" and "different stories" was something capitalized on by both the prosecution and the defense. R.854, 864-65. In closing, the defense pointed to Boyfriend's "massive inconsistencies." R.854, 861. And the prosecutor made a point of emphasizing Eyre's "three different stories." R.864-65. Replaying Eyre's interview allowed the jury to double-check and confirm what the prosecutor was saying. But to confirm the defense's arguments, the jury had to rely on their imperfect memories. Thus, replaying the video gave the State an advantage.

Additionally it appears that Eyre's entire 23 minute and 27 second police interview—which included material that was not played in court—went back into

the jury room during deliberations. *See* State's Ex. 11, R.870-71, 880-81.[6] The footage that had not been played for the jury appeared in the last 5 minutes and 42 seconds of Exhibit 11 (approximately). *See* R.751-72; State's Ex. 11. This footage contained prejudicial content.

Among the prejudicial material, was a video recording of police handcuffing Eyre. *See* State's Ex. 11 (22:17-23:17). The presence of physical restraints not only undermines the presumption of innocence, but tends "to prejudice the jury against the accused." *Lucas v. State,* 791 S.W.2d 35, 55-56 (Tex. Crim. App. 1989); *Illinois v. Allen*, 397 U.S. 337, 344 (1970). Moreover, the sight of Eyre in handcuffs suggested to the jury that Eyre was a dangerous person who was not be trusted. *See id.* Also among the prejudicial content was footage of the detective expressing his opinion that Eyre "w[ould] probably go to jail for robbery." State's Ex. 11 (18:03-10). Like the handcuffing footage, this portion of the video suggested that Eyre's guilt had already been decided. *See id.* Indeed, the detective's opinion, much like the opinion of a prosecutor, "carrie[d] with it the imprimatur of the Government and may [have] induce[d] the jury to trust the Government's judgment rather than its own view of the evidence." *United States*

[6] At one point, the prosecutor notes that "[d]efense counsel helped [him] make it so the jury could not access anything that was extraneous." R.914-15. In making this statement, it appears that the prosecutor was referring to the parties' efforts to ensure that there was nothing on the computer (with which the jury viewed Exhibit 11) "that could contaminate the deliberation process, such as data, documents or other items from [Eyre's] case or any other." R.249. In other words, it does not appear that Exhibit 11 was edited to exclude the content that was not played for the jury in open court.

*v. Young*, 470 U.S. 1, 18 (1985).

Furthermore, it is reasonably likely that the jury viewed the 5 minutes and 42 second of additional content. The jury had the ability to access Exhibit 11 for 20 minutes, and when the video was stopped, it appeared that the jury had seven more minutes to watch. R.259, 873-74, 880. Twenty minutes was more than enough time for the jury to review the recording, particularly if it skipped around or fast-forwarded portions of the video. In short, the accessibility of Exhibit 11 during deliberations likely exposed the jury to prejudicial content and resulted in detrimental emphasis on Eyre's interview. Thus, the trial court was wrong to suggest that the jury's access to Exhibit 11 was beneficial to Eyre. R.259.

Second, contrary to the trial court's suggestion, prejudice resulted even if the jury only had access to the video for twenty minutes. R.259-60. As noted, twenty minutes was plenty of time for the jury to view and perhaps replay segments of Exhibit 11. *See* State's Ex. 11. And even if the jury only viewed the video once, that is one more time than all the other testimonial evidence was reviewed. In other words, even a single replay was "'tantamount to having [Eyre] testify a second time.'" *Cruz*, 2016 UT App 234, ¶35. Moreover, the mid-deliberation viewing of Exhibit 11 left Eyre's interview freshest in the minds of the jurors, causing it to stand out. *See* R.874. Under these circumstances, it is likely that the jury afforded undue weight to Eyre's testimony.

Third, the trial court incorrectly determined there was no prejudice because "[the State] presented sufficient evidence at trial to support the jury's

verdict without needing to rely on the testimony contained in Exhibit 11." R.259. But a correct prejudice analysis does not focus on whether that State's evidence was "sufficient" or look at the evidence in a light most favorable the verdict. *See Barela*, 2015 UT 22, ¶¶30-31. Instead, the analysis looks at errors "in light of the 'totality of the evidence,' ... not just the evidence supporting the verdict." *Id*. ¶31. This is because "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. Thus, to the extent that the trial court denied Eyre's mistrial motion because the State presented "sufficient evidence," that was a mistake of law to which this Court owes little deference. *See Carbaugh v. Asbestos Corp. Ltd.*, 2007 UT 65, ¶7, 167 P.3d 1063.

In any event, as discussed above, evidence of Eyre's guilt was far from overwhelming. *See supra* pp. 26-29. For instance, Girlfriend did not observe Eyre flash a gun and testified that Eyre did nothing to further the crime. *See* 652-59, 663. Moreover, no gun was recovered from Eyre's person. R.725-26.

Finally, the record suggests that the jury's viewing of Exhibit 11 influenced the verdict. The jury found Exhibit 11 important enough to request and review. R.873-74. And as trial counsel noted, the jury had been "deliberating for some time" prior to viewing the video, indicating "confusion or discussion about what [Eyre] may have said." R.913-14; *see also* R.223. It was after reviewing Eyre's interview that the jury came back with a verdict a "short[]" time later. *Id*. Thus, replaying Exhibit 11 appeared to resolve the jury's questions in favor of guilt.

For these reasons, there is a reasonable likelihood that but for the jury's viewing of Exhibit 11, Eyre would have enjoyed a more favorable outcome. Accordingly, the trial court erred in determining that the error was harmless and that a mistrial was not warranted.

C. Preservation.

This issue was preserved because the trial court had the opportunity to rule—and did in fact rule—on the issue. *See Fort Pierce Indus. Park v. Shakespeare*, 2016 UT 28, ¶13, 379 P.3d 1218 (determining that an issue was preserved where the "court not only had an opportunity to rule on the issue ... but in fact did rule on it"); *Patterson v. Patterson*, 2011 UT 68, ¶12, 266 P.3d 828 ("An issue is preserved for appeal when it has been 'presented to the district court in such a way that the court has an opportunity to rule on [it].'"); *see also* R.240-45 (Eyre's memorandum in support of mistrial); 248-54 (State's memorandum in opposition); 257-62 (ruling); 872-82 (discussion, argument, and motion for mistrial); 912-15 (additional argument and ruling).

Nevertheless, Eyre argues in an abundance of caution that the issue may also be reviewed for ineffective assistance of counsel. As explained above, a claim of ineffective assistance requires "a defendant [to] show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'" *State v. Montoya*, 2004 UT 5, ¶23, 84 P.3d 1183; *Strickland*, 466 U.S. at 687.

First, if this Court believes that trial counsel did anything to limit the Court's consideration of the issue—including failing to take the necessary steps to ensure that Exhibit 11 stayed out of the jury room—counsel's failure constituted deficient performance. Under the facts of this case, counsel's omissions were not reasonable or strategic. *See State v. Larrabee*, 2013 UT 70, ¶28 (holding that "under the facts of th[e] case," counsel's "strategy d[id] not qualify as 'reasonable' or 'sound'"). It is evident from the record that counsel did not want the jury to view Exhibit 11 during deliberations. *See* R.872-75; *see also* R.240-45, 913-14. Indeed, upon learning that the jury had access to Exhibit 11 in the jury room, trial counsel immediately notified court staff and moved for a mistrial. R.873-74. Where counsel's objective was to keep Exhibit 11 out of the jury room, it was not reasonable to render performance that undermined this very goal. Moreover, trial counsel himself suggested that misunderstanding and oversight were the only reasons he allowed Exhibit 11 to go back into the jury room. *See* R.872-74. On this record, there is no "'conceivable tactical basis'" for allowing the jury to consider Exhibit 11 during deliberations. *State v. Lewis*, 2014 UT App 241, ¶10, 337 P.3d 1053. Thus, counsel's performance "'failed to meet an objective standard of reasonableness.'" *Montoya*, 2004 UT 5, ¶24.

Second, as set for in Part II.B, *supra*, it is reasonably likely that Eyre would have enjoyed a more favorable outcome but for the jury's viewing of Exhibit 11. For instance, replaying Exhibit 11 unduly emphasized Eyre's police interview, including its inconsistencies. *See supra* pp. 32-33. The emphasis was particularly

prejudicial in a case where credibility was important, and the oral testimony of the State's witnesses suffered from serious credibility problems—problems that were allowed to "fade[] from the memory of the jurors.'" *Cruz*, 2016 UT App 234, ¶36; *see also supra* pp. 28-29, 32-33. In short, reversal is warranted because counsel's deficient performance prejudiced Eyre.

## III. Cumulative Error Requires Reversal.

The cumulative error doctrine requires reversal when multiple errors considered collectively "undermine confidence in the fairness of a trial." *State v. Perea*, 2013 UT 68, ¶97, 322 P.3d 624. Even if none of the errors discussed in Parts I and II are prejudicial on their own, taken together, they undermine confidence in the fairness of Eyre's trial.

As explained above, there was a basis in the evidence to acquit on a theory that Eyre—in looking for the jumper cables—did not intend to cause aggravated robbery. Both errors increased the likelihood that the jury rejected this theory.

The incorrect jury instructions allowed the jury to ignore this theory of acquittal even if they believed that Eyre acted with a purpose other than the intent to cause aggravated robbery. *See supra* Part I. Meanwhile, the replaying of Eyre's interview in the jury room overemphasized Eyre's testimony and any inconsistencies with it. *See supra* Part II. As a result, there was an increased likelihood that the jury did not credit Eyre's statements—including the statements that supported Eyre's lack of intent. *See supra* pp. 32-33; *see also, e.g.*, R.765. (Eyre stating in his interview that he warned Rakes that the crime

was "a bad ass idea"). Together, the errors worked to close the door on otherwise viable theory of acquittal. Thus, the cumulative effect of the errors undermines confidence that Eyre had a fair trial.

## CONCLUSION

Based on the foregoing reasons, Eyre asks this Court to reverse his aggravated robbery conviction and remand for a new trial.

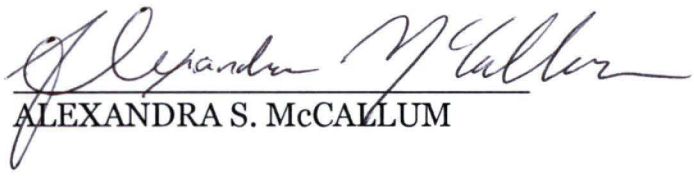
SUBMITTED this 17th day of July 2018.

ALEXANDRA S. McCALLUM
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 10,039 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.



ALEXANDRA S. McCALLUM

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. McCALLUM, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 17th day of July 2017.

ALEXANDRA S. McCALLUM

DELIVERED this _____ day of July 2018.

_____

ADDENDUM A

INSTRUCTION NO. 35

The defendant, Matthew Gordon Eyre, is charged with the offense of Aggravated Robbery which is alleged to have occurred on August 28, 2016 in Salt Lake County. You cannot convict him of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. That the defendant, Matthew Gordon Eyre,

2. As a party to the offense did

(a) unlawfully and intentionally take or attempted to take,

(b) personal property in the possession of another,

(c) from his person or immediate presence,

(d) against his will by means of force or fear,

(e) with a purpose or intent to deprive the person permanently or temporarily of the personal property; and

3. And that in the course of committing these acts a party:

(a) used or threatened to use a dangerous weapon; or

(b) took or attempted to take an operable motor vehicle.

After you carefully consider of all of the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY of Aggravated Robbery. On the other hand, if you are not convinced that all of the elements have been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of Aggravated Robbery.

INSTRUCTION NO. 36

A person acts "intentionally" when his conscious objective is to cause a certain result.

The term "unlawful" or "unlawfully" means contrary to law or without legal justification.

INSTRUCTION NO. 39

Every person, acting with the mental state required for the commission of the offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

INSTRUCTION NO. 40

A person can commit a crime as a "party." In other words, a person can commit a criminal offense even though that person did not personally do all of the acts that make up the offense. If you find beyond a reasonable doubt that:

(1) the defendant intentionally,

(2) solicited, requested, commanded, encouraged, or intentionally aided another to commit the offense, **AND**

(3) the offense was committed,

then you can find the defendant guilty of that offense.

INSTRUCTION NO. 41

Prior knowledge that a crime is about to be committed or is being committed does not make a person an accomplice, and thereby does not subject them to criminal prosecution unless that person has the mental state required to commit the crime and he solicits, requests, commands, encourages, or intentionally aids in the perpetration of the crime.

Further, his mere presence at the crime scene does not in itself subject him to criminal prosecution for any crime, unless you find beyond a reasonable doubt he possessed the mental state required to commit the crime and he acted in such a manner that he solicited, requested, commanded, encouraged, or intentionally aided in the perpetration of the crime.

If, on the other hand, you have a reasonable doubt as to whether the defendant possessed the mental state required to commit the crime or whether he solicited, requested, commanded, encouraged, or intentionally aided in the perpetration of the crime(s), you must find him not guilty of the charge.

ADDENDUM B

Rudy J. Bautista (8636)
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Telephone: (801) 364-6666
Facsimile: (801) 618-3835
Email: rudy@bbpdefense.com

*Attorneys for Defendant*

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT

SALT LAKE COUNTY, STATE OF UTAH

| | |
|---|---|
| STATE OF UTAH,<br><br>Plaintiff,<br><br>vs.<br><br>MATTHEW GORDON EYRE,<br><br>Defendant. | **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR MISTRIAL**<br><br>Case No. 161909443<br><br>Judge Royal Hansen |

Matthew Eyre, by and through counsel Rudy J. Bautista, respectfully submits this Memorandum in support of his Motion for Mistrial

STATEMENT OF FACTS

Mr. Eyre was charged with Count 1 – Aggravated Robbery, a first-degree felony. See Information, dated September 9, 2016. A jury trial was held on October 17 and 18, 2017. On the second date of trial, October 18, State's Exhibit 11 was offered and accepted into evidence, and published to the jury. State's exhibit 11 was a videotaped police interview of Mr. Eyre.

Sometime during jury deliberations, defense counsel learned that State's Exhibit 11 was viewed by the jury during deliberation in the jury room. Defense counsel made a motion for mistrial and the State, defense counsel, and the Court discussed in chambers whether Exhibit 11

was to be published and viewed by the jury during deliberations. The Court made this minute entry regarding the issue:

> 4:24 Court finds that State's exhibit 11, video interview, was published to the jury on the record and that a decision for mistrial cannot be made at this time. Motion for mistrial is taken under advisement. Court is in recess.

See Minute Entry, dated 10-18-17. Mr. Eyre was later found guilty by the jury of Count 1.

## ARGUMENT

The jury's viewing of Mr. Eyre's videotaped law enforcement interview during deliberations, without the knowledge of this Court, constitutes "legal necessity" to warrant a mistrial.

A defendant can be retried after declaration of a mistrial if "(1) the defendant consents to the discharge of the jury, or (2) 'legal necessity' requires the discharge in the interest of justice." State v. Harris, 2004 UT 103, ¶ 24, 104 P.3d 1250 (additional citations omitted). Utah's "legal necessity" doctrine prohibits a trial court from declaring a mistrial "except in those exceptional circumstances where there is a compelling justification for doing so. Id. at ¶ 26. A trial court "must refrain from prematurely discharging the jury unless it determines, after careful inquiry, that discharging the jury is the only reasonable alternative to insure justice under the circumstances." Id.

This inquiry requires two steps. "First, a trial court must carefully evaluate all of the circumstances and conclude that legal necessity mandates the discharge of the jury. This requires the trial judge to afford the parties adequate opportunity to object to the declaration of a mistrial." Id. at ¶ 28. "It also requires the trial judge to consider possible curative alternatives to terminating the proceeding and to determine that none of the proposed alternatives are reasonable under the circumstances" Id. at ¶ 27. "Second, the record must adequately disclose

both the factual basis for the trial judge's conclusion that a mistrial was necessary and the reasons why the alternatives presented by either party were unreasonable under the circumstances." Id. at ¶ 28.

In the unique circumstances of this case, "legal necessity" exists to justify a mistrial. "Although the video recording of a defendant's statement or a victim's statement is admissible evidence, playbacks of such testimony have the capacity to permit a jury to place undue emphasis on a single item of evidence." State v. A.R., 65 A.3d 818, 820 (N.J. 2013). "An audio recording permits the jury to hear every inflection, every hesitation, and every equivocation in the voice of the witness. A video recording magnifies the effect of a playback of testimony." Id. Indeed, "[v]ideotape testimony is unique. It enables the jury to observe the demeanor and to hear the testimony of the witness. It serves as the functional equivalent of a live witness." United States v. Binder, 769 F2d 595, 600 (9th Cir. 1985) (replay of videotaped witnesses' testimony in jury deliberations was erroneous). In fact, "[r]epeated jury review of a video-recorded statement is tantamount to a second, third, or even fourth appearance of the same witness at trial." A.R., 65 A.3d at 820.

"It is within the sound discretion of the trial court to determine whether to allow a jury to review properly admitted testimony or recordings during deliberations." United States v. Muhlenbruch, 634 F.3d 987 (8th Cir. 2011). Despite giving the trial court the discretion to allow replay of videotaped testimony, some states, such as New Jersey, have gone further and mandated that "a video-recorded statement must be replayed in open court under the direct supervision of the judge. A.R., 65 A.3d at 821 ("Therefore, when confronted with a request to replay audio- or video-recorded statements of witnesses or a defendant marked as a trial exhibit and received in evidence, the trial judge must focus on fairness to the defendant."; see also State

v. Burr, 948 A.2d 627 (N.J. 2008) (victim's pre-trial interview admitted into evidence was properly replayed at the jury's request in open court); State v. Miller, 13 A.3d 873 (N.J. 2011)

Unlike situations where videotaped statements are replayed for the jury on the record in open court, in this case, Mr. Eyre's police interview was published to the jury and the jury viewed the videotaped statements without this Court's knowledge during deliberations. This Court was not able to decide whether to allow the jury to view the police interview in open court on the record, because the jury viewed the videotape in deliberations, without the knowledge of this Court. This accident qualifies as an "exceptional circumstance" for which there is a "compelling justification" for declaring a mistrial. Harris, 2004 UT at ¶ 26.

Because this Court was unaware that the jury watched Mr. Eyre's police interview during deliberations, this Court was unable to issue a limiting or curative instruction regarding the videotaped evidence, or to decide whether fairness required Mr. Eyre's live testimony to be read to the jury. Thus, this Court has no ability to consider possible curative alternatives to mistrial. Id. at ¶ 27. In this case, declaring a mistrial is the only reasonable alternative under the circumstances because re-playing Mr. Eyre's police interview permitted the jury "to place undue emphasis on a single item of evidence" – the State's most persuasive evidence against Mr. Eyre. A.R., 65 A.3d at 820.

## CONCLUSION

Unlike other situations where properly admitted videotape evidence can be replayed to the jury with blessing and knowledge of the trial court, Mr. Eyre's police interview was replayed to the jury during deliberations, without the knowledge of this Court. This unfortunate accident is such an "exceptional circumstance" where there is no other reasonable alternative but to declare a mistrial and order a new trial.

DATED this 29th day of October, 2017.

/s/ Rudy J. Bautista
Rudy J. Bautista
Attorney for Mr. Eyre

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR MISTRIAL** was e-filed, on this 29th day of October, 2017 to the following:

Salt Lake County District Attorney's Office
111 East Broadway, Suite 400
Salt Lake City, Utah 84111

/s/ Rudy Bautista

SIM GILL, Bar No. 6389
District Attorney for Salt Lake County
BYRON F. BURMESTER, Bar No. 6844
Deputy District Attorney
111 E. Broadway Ste. 400
Salt Lake City, Utah 84111
Phone: (385) 468-7600

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT,

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

| | |
|---|---|
| THE STATE OF UTAH,<br><br>Plaintiff,<br><br>vs.<br><br>MATTHEW GORDON EYRE<br>Defendant. | **STATE'S MEMORANDUM IN OPPOSITION TO THE DEFENDANT'S MOTION FOR MISTRIAL**<br><br>Case No. 161909443<br><br>Honorable Judge Hansen |

The State of Utah, by and through its counsel, SIM GILL, Salt Lake County District Attorney, and BYRON F. BURMESTER, Deputy District Attorney, hereby submits the State's Memorandum in Opposition to the Defendant's Motion for Mistrial.

## STATEMENT OF RELEVANT FACTS

After a two day jury trial on October 17 and 18, 2017, the Defendant was found guilty of Aggravated Robbery. Exhibit 11, a video of the Defendant speaking with the police, was offered and accepted into evidence, and published to the jury along with several other videos.[1] The defense stipulated to the admission of all exhibits. During jury deliberations, the jury requested a

[1] The interview video is approximately 20 minutes in duration.

computer with which to view video exhibits. Defense counsel and the State worked together to make sure that there was nothing on the computer desktop that could contaminate the deliberation process, such as data, documents or other items from this case or any other. About 20 minutes after the bailiff took the computer defense counsel asked whether exhibit 11 had gone back to the jury. Moments later the bailiff returned with the computer. Defense counsel then made a motion for a mistrial. The Court took the motion under advisement and has ordered briefing on motion for mistrial. The defense motion was filed on October 29, 2017. First, the State opposes the defense's motion for mistrial since they waived their objection to the video being viewed by the jury when they stipulated to the video being admitted into evidence. Second, in the alternative, the playing of the video during jury deliberations does not justify a mistrial.

## ARGUMENT

### I. THE DEFENDANT WAIVED ANY OBJECTION TO THE EVIDENCE BEING VIEWED BY THE JURY WHEN HE STIPULATED TO THE ADMISSION OF THE EVIDENCE AT TRIAL.

Under Rule 103, a party can claim an error in admitting evidence if the error affects a substantial right and the party timely objects while stating a specific ground for the objection. Utah R. Evid. Rule 103. In other words, to complain about the admission of evidence there must be a clear and definite objection stating the grounds for the objection. *See Stagmeyer v. Leatham* Bros., 20 Utah 2d 421, 439 P.2d 279 (1968). Further, even if the evidence is admitted in error, a verdict should only be set aside is a substantial right of the party is affected. *State v. Speer,* 750 P.2d 186, 189 (Utah Sup.Ct. 1988); see also *State v. Rammel,* 721 P.2d 498, 500 (Utah 1986). To determine this, the court looks at the evidence as a whole and determines if there is a reasonable likelihood that a different result would have been reached. *Id.* Additionally, Under Rule 17, during deliberations " . . .the jury may take with them the instructions of the court and *all*

exhibits which have been received as evidence. . .” Utah R. Crim. P. Rule 17 (emphasis added). Further, “[t]he court shall permit the jury to view exhibits upon request.” *Id.*

In this case, defense counsel waived any objection to the jury's viewing of exhibit 11 when he stipulated to allowing the exhibit into evidence. As noted by Rule 17, the jury can view exhibits that are admitted into evidence. Further, the defense did not object until several minutes after the jury requested to view the exhibit. In addition, even if the defense did not waive their objection to the jury viewing exhibit 11 there is not a reasonable likelihood a different result would have been reached if the jury had not viewed exhibit 11 during their deliberations.

In *State v. Dibello*, the defense did not object to the admission of several gruesome photographs that were viewed by the jury. 780 P.2d 1221, 1230 (Utah Sup.Ct. 1989). One of the photos showed the victim's ". . .body slumped on the sofa and [a] gaping wound where her throat was slashed." *Id.* at 1231. The Court determined that, even though the photo would have been excluded under Rule 403, since the defense failed to object his objection to the admission of the evidence was undermined. *Id.* The Court also held, while the photo was improperly introduced, that there is not a reasonable likelihood that the defendant would have achieved a more favorable result without the admission of the evidence. *Id.*

Similarly, in this case, the defense also failed to timely object to the admission of the evidence. Like in *Dibello*, the failure of the defense to timely object to the admission of the evidence undermines their attempt to obtain a mistrial after the jury had begun their deliberations. Further, if the court in *Dibello* found that the admission of a gruesome photograph of the victim's throat slashed wouldn't have led to a different outcome, the admission of a video of the Defendant speaking with police is not so unfair that it would have changed the outcome in this case. Given the context of the trial, the jury already viewed the video during the State's case

in chief. Allowing the jury to review exhibit 11, for no more than twenty minutes, does not create a reasonable likelihood that this changed the outcome, especially when the other evidence that was presented at trial is considered. Unlike the gruesome photograph in *Dibello* that would have been excluded under Rule 403, there is no evidence that exhibit 11 in this case contained evidence that was so prejudicial that it would have changed the outcome of the trial.

Therefore, by failing to object to the admission of the evidence, the defense waived their objection to the evidence being viewed by the jury during their deliberations.

## II. EVEN IF THE DEFENSE DID NOT WAIVE THEIR OBJECTION TO THE ADMISSION OF THE EVIDENCE, THE JURY'S VIEWING OF THE EXHBIT DURING THEIR DELIBERATIONS DOES NOT WARRANT A MISTRIAL.

The defense claims in their motion that the jury viewing a properly admitted exhibit, an exhibit that was stipulated to being admitted by the defense, constitutes a "legal necessity" that requires this Court to dismiss the jury's guilty verdict and grant a mistrial. To grant a mistrial based on a legal necessity, the trial court must find that there are "exceptional circumstances" and that there is a "compelling justification" for granting a mistrial. *See State v. Harris*, 2004 UT 103, ¶¶ 24-25. The State contends that there are not exceptional circumstances or compelling justifications in this case that would warrant a mistrial.

First, as noted in the defense's motion, the trial court has discretion to determine whether to allow the jury to review admitted testimony or recordings during their deliberations. *See United States v. Muhlenbruch*, 634 F.3d 987 (8th Cir. 2011). However, in support of their claim, the defense cites to a case from New Jersey, where the court determined that the jury playing video testimony during deliberations placed undue emphasis on a single item of evidence. *See State v. A.R.*, 65 A.3d 818, 820 (N.J. 2013). In *A.R.*, the court made sure to note that the replay of a video

recording for the jury is within the discretion of the trial judge. *See id.* at 826. In that case involving child sexual abuse, two video statements -- one was of the child victim and one was of the defendant -- were admitted into evidence. *Id.* at 824. The new Jersey Supreme Court expressed concerns that the nature of the video and the jury' unencumbered access to the video recording may have undermined the fairness of the trial. *See id.* at 826-827. However, the Court ultimately upheld the conviction under the invited error doctrine since the defense did not object to the viewing of the video and, in fact, encouraged the jury to view the video. *Id.* at 831.

Unlike in *A.R.*, this case only involves a video of the defendant, and not the victim, being viewed during deliberations. In *A.R.*, the victim's video recording dealt with a nine year old girl graphically describing how her uncle sexually assaulted by her. *Id.* at 821. In finding error with the jury viewing of the video during deliberations, the Court in A.R. noted that they were concerned due to that nature of the video. *Id.* at 827. In this case, there are no such concerns. Rather than an underage victim graphically describing sexual assault, the video in this case deals with the defendant talking with police about an aggravated robbery. In addition, the concerns regarding undue emphasis on a particular witness's testimony doesn't apply in this case. The witness who testified at trial was the officer who conducted the interview with the Defendant. The Defendant was not even a witness in the case. Therefore, the concerns over hearing a witness testify multiple times are misapplied in this case.

Further, in *State v. Cruz*, the Court recognized the holding in *A.R.* with respect to victim interviews being played during deliberations. 2016 UT App 234 ¶ 39. Like in *A.R.*, the jury viewed a CJC interview of a child sexual abuse victim. *See id.* at ¶¶ 3-6. The video contained a six year old victim describing how she performed oral sex on the defendant. *Id.* at ¶ 6. While emphasizing that not all video recordings cannot be viewed by the jury during deliberations, the

Court held that the video in that case was testimonial and that it had a danger of placing undue influence on the witness's testimony. *Id.* at ¶¶ 39-40. Unlike in *Cruz,* the video in this case does not involve a victim who is acting as a witness. Rather, the video contains the Defendant's own statements that he made to the police. In addition, the video in this case does not contain the same inflammatory evidence as that of a young childr graphically describing sexual abuse.

Lastly, even the Court in *Cruz,* like in *A.R.,* ultimately did not reverse the outcome at trial. In fact, the Court held, despite the error, that Cruz could not show a reasonable likelihood that the error affected the outcome of the trial. *Id.* at ¶ 49. Similarly, in this case, even if the Court finds error in the jury's viewing of exhibit 11 during their deliberations, there is not a reasonable likelihood that this error changed the outcome of the trial. Considering the other evidence at trial and the fact that the jury viewed the video earlier, it is unlikely that, had the jury not viewed the video again, for a maximum of twenty minutes, that they would have changed their verdict. Therefore, a mistrial is not warranted in this case and the jury's guilty verdict should stand.

## CONCLUSION

For the foregoing reasons, the State requests that the Court deny the Defendant's motion for a mistrial.

/s/ Byron F. Burmester

BYRON F. BURMESTER
Deputy District Attorney

**CERTIFICATE OF DELIVERY**

I hereby certify that a true and correct copy of the foregoing State's Memorandum in Opposition to the Defendant's Motion for Mistrial.

to:

Rudy J. Bautista
Attorney for MATTHEW GORDON EYRE
215 South State Street, Suite 950
Salt Lake City, Utah 84111

on this 7th day of November, 2017.

/s/ Byron F. Burmester

ADDENDUM C

IN THE THIRD JUDICIAL DISTRICT, STATE OF UTAH

IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

| | |
|---|---|
| THE STATE OF UTAH,<br>Plaintiff,<br>vs.<br>MATTHEW GORDON EYRE,<br>Defendant. | **RULING & ORDER**<br>Civil No. 161909443<br>Judge Royal I. Hansen |

Pending before the Court is Defendant Matthew Gordon Eyre's ("Defendant") Motion for Mistrial (the "Motion"). Defendant filed the Motion with an accompanying memorandum on or about October 29, 2017. Plaintiff the State of Utah ("Plaintiff") filed a Memorandum in Opposition to the Motion on or about November 7, 2017. Defendant has filed no Reply Memorandum in Support of the Motion and the time to do so has now expired. Neither party has requested oral argument with regard to the Motion. The Motion is therefore fully briefed and ready for decision.

## DISCUSSION

A mistrial is permitted only if "legal necessity requires the discharge [of the jury] in the interest of justice." *State v. Harris*, 2004 UT 103, ¶24, 104 P.3d 1250. The legal necessity doctrine "prohibits a trial court from declaring a mistrial except in those exceptional circumstances where there is a compelling justification for doing so." *Id.* at ¶25. "[L]egal necessity is established only if a mistrial is the only reasonable alternative to insure justice under

the circumstances." *State v. Manatau*, 2014 UT 7, ¶10, 322 P.3d 739. In order to show that a mistrial is the only reasonable alternative, the following two elements must be met:

> [f]irst, the trial judge has a duty to carefully evaluate the circumstances of the particular case and determine that legal necessity requires the discharge of the jury. As part of the inquiry, the judge . . . must consider possible alternatives to terminating the proceeding and determine that none of the proposed alternatives are reasonable. . . . Second, the trial court must establish a record of the factual basis for its conclusion that a mistrial is necessary, as well as the reasons why there is no reasonable alternative under the circumstances.

*Id.* at ¶¶10, 13.

In the Motion, Defendant argues that the jury's viewing of Exhibit 11–a video of Defendant speaking with the police–in the jury room during deliberations requires the declaration of a mistrial in this case. In support of this argument, Defendant relies on *State v. A.R.*, a New Jersey case. In that case, the New Jersey Supreme Court clarified that "unfettered access to the video-recorded statements of the victim and defendant in the jury room during deliberations" was improper. *See State v. A.R.*, 65 A.3d 818, 828 (N.J. 2013). Nevertheless, the Court found "the procedure utilized cannot be said to undermine the trial process." *Id.* Moreover, the Court also found that, because defense counsel had encouraged the jury to view the video-recorded statements, the invited-error doctrine applied to preclude declaration of a mistrial. *See id.* at 830. The Utah Court of Appeals has also addressed the propriety of a jury's access to video-recorded statements during the deliberation process in *State v. Cruz*, 2016 UT App 234, 387 P.3d 618. In that case, the Court reasoned "[a] recording of a[n] interview . . . constitutes . . . testimony–or, at the very least, falls within the category of exhibits which are testimonial in nature and thus should not be given to the jury during its deliberations." *Id.* at ¶38.

Nevertheless, rule 30 of the Utah Rules of Criminal Procedure provides "[a]ny error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded." UTAH R. CRIM. P. 30(a). In examining this provision, courts have clarified "[h]armless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings." *See State v. Devey*, 2006 UT App 219, ¶19, 138 P.3d 90. "Put differently, an error is harmful only if the likelihood of a different outcome is sufficiently high that it undermines [] confidence in the verdict." *State v. Evans*, 2001 UT 22, ¶20, 20 P.3d 888.

As a preliminary matter, the Court notes the jury's viewing of Exhibit 11 in the jury room during deliberations was improper. Nevertheless, the Court finds that any error in providing Exhibit 11 to the jury during deliberations is harmless. Indeed, Plaintiff presented sufficient evidence at trial to support the jury's verdict without needing to rely on the testimony contained in Exhibit 11. Thus, the likelihood of a different verdict is not sufficiently high that it undermines the Court's confidence in the verdict. *See id.*

Moreover, unlike the video-recordings addressed in both *A.R.* and *Cruz*–both of which involved testimony of child victims of sexual abuse–the video-recording in this case involves only Defendant's testimony. Thus, there is no concern that the jury might have given undue weight to the testimony of a child victim in this case. Indeed, it was Defendant who would have benefitted from any undue weight the jury might have placed on such testimony based on repeated viewings.

Finally, the jury was only permitted to access Exhibit 11 in the jury room for 20 minutes during deliberations, after which the Court removed Exhibit 11 from those exhibits contained on the computer in the jury room. The short time the jury had access to Exhibit 11 in the jury room

hardly constitutes the "unfettered access" to a video-recording addressed in both *A.R.* and *Cruz*.[1] Such limited access prevented the jury from repeatedly viewing Defendant's testimony during deliberations. *Cf. Martin v. State*, 747 P.2d 316, 320 (Okla. Crim. App. 1987) (holding that "it was error for the trial court to submit the video tape of [] testimony to the jury for their unrestricted and, very likely, repeated viewing during deliberations"). This inability to repeatedly view Defendant's testimony during deliberations further allays concerns that the jury might have placed undue weight on such testimony.

Thus, the Court finds that allowing the jury to view Exhibit 11 in the jury room during deliberations constitutes harmless error in that it "d[id] not affect the substantial rights of a party." *See* UTAH R. CRIM. P. 30(a). Consequently, the Court must disregard the foregoing error. *See id.* Moreover, as the error was harmless, Defendant has failed to establish a "compelling justification" required for the Court to declare a mistrial in this matter. *See Harris*, 2004 UT 103, at ¶25, 104 P.3d 1250. Defendant is therefore not entitled to the relief requested in the Motion. *See id.*

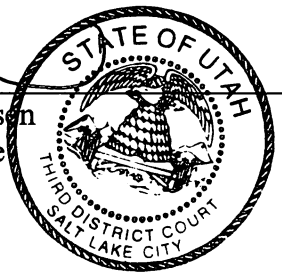
Based on the foregoing, the Court DENIES Defendant's Motion for Mistrial. The matter will therefore proceed to sentencing, at a hearing scheduled for that purpose on December 8, 2017 at 8:30 a.m.

This Ruling and Order is the order of the Court and no further writing is necessary to effectuate this decision.

[1] The Court notes both cases involved the provision of video-recorded testimony to the jury for the entirety of the deliberation process.

So Ordered this 30 day of November, 2017.

Judge Royal I. Hansen
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 161909443 by the method and on the date specified.

EMAIL: RUDY J BAUTISTA rudy@bbpdefense.com
EMAIL: BYRON F BURMESTER fburmester@slco.org
EMAIL: JEREMY D DEUS jdeus@slco.org
EMAIL: SHAMIM MONSHIZADEH shamim@bbpdefense.com

Date: 12/01/2017 /s/ DANIEL FARNSWORTH

Deputy Court Clerk

ADDENDUM D

**The Order of the Court is stated below:**
**Dated:** December 08, 2017 01:25:25 PM
**At the direction of:**
/s/ ROYAL I HANSEN
District Court Judge
**by**
/s/ DANIEL FARNSWORTH
District Court Clerk

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

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| | | |
|---|---|---|
| STATE OF UTAH, | : | MINUTES |
| Plaintiff, | : | SENTENCE, JUDGMENT, COMMITMENT |
| | : | |
| | : | |
| vs. | : | Case No: 161909443 FS |
| MATTHEW GORDON EYRE, | : | Judge: ROYAL I HANSEN |
| Defendant. | : | Date: December 8, 2017 |

Custody: Salt Lake County Jail

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PRESENT
Clerk: danielsf
Prosecutor: BURMESTER, BYRON F
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: June 10, 1981
Sheriff Office#: 307726
Audio
Tape Number: N44 Tape Count: 1119-1142

CHARGES
1. AGGRAVATED ROBBERY - 1st Degree Felony
Plea: Not Guilty - Disposition: 10/18/2017 Guilty

HEARING

Counsel argue the motion for a new trial. Court denies the motion and refers to the written ruling previously issued by the Court.

SENTENCE PRISON
Based on the defendant's conviction of AGGRAVATED ROBBERY a 1st Degree Felony, the

defendant is sentenced to an indeterminate term of not less than ten years and which may be life in the Utah State Prison.

COMMITMENT is to begin immediately.

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

SENTENCE RECOMMENDATION NOTE
Court recommends Drug Treatment Program and credit for time served of 468 days.

ALSO KNOWN AS (AKA) NOTE
PINBALL

Court orders full restitution which is to be left open for the statutory time period.

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

Case No: 161909443 Date: Dec 08, 2017

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 161909443 by the method and on the date specified.

EMAIL: ADC ADC-court1@slco.org
EMAIL: ADC TRANSPORT ADC-Transportation@slco.org
EMAIL: PRISON udc-records@utah.gov

Date: 12/08/2017 /s/ DANIEL FARNSWORTH

Deputy Court Clerk

ADDENDUM E

# Utah Code § 76-2-202

§ 76-2-202. Criminal responsibility for direct commission of offense or for conduct of another

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

## Credits

Laws 1973, c. 196, § 76-2-202.

U.C.A. 1953 § 76-6-301

# § 76-6-301. Robbery

(1) A person commits robbery if:

(a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property; or

(b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.

(2) An act is considered to be "in the course of committing a theft or wrongful appropriation" if it occurs:

(a) in the course of an attempt to commit theft or wrongful appropriation;

(b) in the commission of theft or wrongful appropriation; or

(c) in the immediate flight after the attempt or commission.

(3) Robbery is a felony of the second degree.

**Credits**

Laws 1973, c. 196, § 76-6-301; Laws 1995, c. 222, § 1, eff. May 1, 1995; Laws 2004, c. 112, § 1, eff. May 3, 2004.

# Utah Code § 76-6-302

§ 76-6-302. Aggravated robbery

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

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

(b) causes serious bodily injury upon another; or

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

(2) Aggravated robbery is a first degree felony.

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

## Credits

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

ADDENDUM F

2010 UT 49



IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Appellee,

v.

Warren Steed Jeffs,
Defendant and Appellant.

No. 20080408

F I L E D

July 27, 2010

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Fifth District, St. George
The Honorable James L. Shumate
No. 061500526

Attorneys: Mark L. Shurtleff, Att'y Gen., Laura Dupaix, Craig L. Barlow, Asst. Att'ys Gen., Salt Lake City, Brock R. Belnap, Ryan J. Shaum, St. George, for plaintiff
Walter F. Bugden, Jr., Tara L. Isaacson, Salt Lake City, Richard A. Wright, Las Vegas, NV, for defendant

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PARRISH, Justice:

**INTRODUCTION**

¶1 Defendant Warren Jeffs was convicted of two counts of rape as an accomplice for his role in the compelled marriage of fourteen-year-old Elissa Wall to her nineteen-year-old first cousin, Allen Steed, and the resulting sexual intercourse between them. Jeffs appeals his convictions, arguing a variety of errors in the proceedings before the trial court. While we are unconvinced by the majority of Jeffs' arguments, we conclude that there were serious errors in the instructions given to the jury that deprived Jeffs of the fair trial to which all are entitled under our laws. We therefore reverse the convictions and remand for a new trial.

¶2 Recognizing the highly publicized nature of this case, we remind the parties, the trial court, and observers, that the presumption of innocence guaranteed to all by our Constitution demands great care from the courts and those who prosecute on behalf of the people. As this state's court of last resort, we

are not at liberty to accept less, nor could we, consistent with our oaths to support, obey, and defend the constitutions of this state and country.

## BACKGROUND

¶3 "On appeal, we review the record facts in a light most favorable to the jury's verdict." State v. Holgate, 2000 UT 74, ¶ 2, 10 P.3d 346 (internal quotation marks omitted). Conflicting evidence is presented "only as necessary to understand issues raised on appeal." Id. We recite the facts of this case accordingly.

¶4 Elissa Wall was raised as a member of the Fundamentalist Church of Jesus Christ of Latter-day Saints ("FLDS Church"). As a follower of that religion, she was extensively exposed to the teachings of the defendant, Warren Jeffs ("Jeffs"), who is the son of, and the former first counselor to, then-FLDS leader Rulon Jeffs ("Rulon"). From the first through the sixth grade, Wall attended school at Alta Academy, a private FLDS school where Jeffs acted as a teacher and as the principal. Outside of school, Wall was further exposed to Jeffs' teachings through Sunday meetings, church literature, and recordings that were broadcast through her home on a speaker system and that she listened to on a personal cassette player.

¶5 Proper relationships between the sexes figured prominently in Jeffs' teachings. He taught that, prior to marriage, boys and girls were to treat each other as "snakes," avoiding all intermingling or social contact. Girls were to relax this standard only with their husbands after marriage. However, most FLDS girls, including Wall, received no instruction about anatomy or reproduction. Jeffs taught that girls would be trained in these matters by their husbands.

¶6 Jeffs' teachings also focused extensively on the importance of obedience. As "God on earth," the FLDS prophet and his counselors were to be obeyed completely and willingly. Failure to do so would result in forfeiture of spiritual salvation, loss of family and friends, denial of marriage, and removal from the FLDS community. In addition to obeying their church leaders, Jeffs taught that women should obey their husbands, who were their individual "priesthood heads."

¶7 Wall witnessed the consequences of failing to follow these teachings firsthand in 1999 when her father was deemed disobedient to FLDS leaders and had his family "stripped from him." Wall, her mother, and her siblings were removed from her father's home in Salt Lake City and sent to live with Fred

Jessop, Rulon's then second counselor, in Hildale, Utah. Jeffs subsequently performed a ceremony marrying Wall's mother to Jessop as one of his plural wives.

¶8 The doctrine that God will reveal to the FLDS prophet which of his followers should be joined in marriage relationships is fundamental to the FLDS faith. Wall, therefore, expected that church leaders would arrange her marriage. But she was shocked when, in 2001, Jessop told her that the prophet had a "place of marriage" for her and that she was to prepare herself for that place. Wall, who was then only fourteen years old, objected because of her age, but Jessop again told her that she needed to prepare herself. When Wall asked who she was to marry, Jessop told her that it would be "revealed" to her later. A few days before the wedding, Jessop told her she would marry Allen Steed, her nineteen-year-old first cousin. Wall told Jessop she would not marry Steed, but Jessop told her she would have to discuss the matter with the prophet, Rulon, since it was he who had arranged the marriage.

¶9 Rulon had recently suffered a debilitating stroke and Jeffs was managing his affairs. Wall called Jeffs and arranged a meeting with Rulon. Jeffs was present when Wall spoke with Rulon. She told Rulon that she did not wish to be disobedient, but asked him to let her wait until she was at least sixteen to be married and to place her with someone other than her cousin. Rulon told Wall, "Follow your heart, sweetie. Follow your heart." Wall understood this to mean that she would not have to marry Steed. Jeffs, however, told her afterwards, "The prophet wanted me to remind you that this is the right thing to do. And you will go forward with this." Later that day, Jessop, despite Wall's pleading, confirmed that her wedding to Steed would still take place.

¶10 Two of Wall's older sisters, both of whom were married to Rulon, tried to intervene on Wall's behalf. Jeffs was present during their conversation with Rulon. Rulon expressed concern over the arrangements, but Jeffs said that Jessop was "insisting that this happen because of who he is" and "[w]e would like to honor his request."

¶11 Knowing that she would no longer be welcome in Jessop's home and that she would have to give up her relationships with her mother and her siblings if she did not marry Steed, Wall felt she had no option but to go through with the marriage. In April 2001, Wall was taken to Caliente, Nevada, for the wedding. Jeffs performed the ceremony, throughout which Wall cried tears of despair and fear. When Jeffs asked her if she took Steed to be her husband, she hung her head and said nothing. Jeffs repeated

the question, and again Wall did not answer. After a long silence, Jeffs asked Wall's mother to stand by Wall and hold her hand. Jeffs repeated the question a third time, and Wall's mother squeezed her hand. Finally, Wall answered, "Okay, I do." Jeffs told Steed he could kiss the bride, but Wall hung her head and shook it. Jeffs commanded, "Lisi, kiss Allen." Wall gave Steed "a peck on the lips," then dropped his hand. Jeffs rejoined Wall's and Steed's hands and pronounced, "Now go forth and multiply and replenish the earth with good priesthood children." Wall then ran from the room and locked herself in a bathroom. Although no marriage license had been obtained, Wall considered herself married to Steed, which made him her leader and "priesthood head."

¶12 During the honeymoon trip that followed, Steed began touching Wall sexually. Still ignorant of sex, Wall did not understand why he was touching her and was "terrified" and "horrified." She repeatedly asked Steed to stop, telling him that she hated him and did not want him to touch her. Two to three weeks after the wedding, Steed exposed his genitals to Wall at a park. She ran away from him crying and hid in her mother's room. She stayed in her mother's room until the early hours of the morning, hoping that Steed would go to sleep. When she returned to her own room, however, she found Steed sitting on the bed. Over Wall's extensive protests, Steed began to undress her. She broke away and fled back to her mother's room, where she stayed for several days. When Wall eventually returned to her own room, Steed told her, "It is time for you to be a wife and do your duty." Although Wall cried and begged him not to, Steed then had sexual intercourse with Wall. The first of the State's two charges against Jeffs is based on this act of intercourse.

¶13 In the late spring of 2001, Wall had another meeting with Jeffs. She told Jeffs that Steed was touching her and doing things that she "was not comfortable with and didn't fully understand." She begged Jeffs for a "release" from the marriage, the FLDS equivalent of a divorce. In response, Jeffs told Wall that she needed to "repent" and that she was not being "obedient . . . [and] submissive." Instead of releasing her from the marriage, Jeffs told her that she "needed to go home and give [her]self to [Steed], who was [her] priesthood head and husband, mind, body, and soul and obey without any question." Within days of this meeting, Steed again had sexual intercourse with Wall. The second of the State's two charges against Jeffs is based on this act of intercourse. The relationship between Wall and Steed continued through September 2003, with sex sometimes occurring without Wall's consent and sometimes with her consent.

¶14 The State charged Jeffs with two counts of rape as an accomplice, a first degree felony, under Utah Code sections 76-2-202 and 76-5-402 (2008). Following a preliminary hearing, Jeffs was bound over for trial. A jury convicted him as charged. Jeffs moved to arrest judgment, alleging that the evidence was insufficient to support his convictions. The trial court denied the motion and sentenced Jeffs to two consecutive prison terms of five years to life. Jeffs moved for a new trial, arguing that the court had erred in seating an alternate juror after deliberations had begun. The court denied this motion on the basis of invited error. This appeal followed. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(I) (2008).

## ANALYSIS

¶15 Jeffs raises seven issues that he claims invalidate either the jury verdict or the resulting sentences. Jeffs argues that: (1) the accomplice liability and consent instructions given to the jury were erroneous, (2) the trial court erred by failing to instruct the jury that it must reach a unanimous decision on whichever of the prosecution's theories supported its finding that the victim did not consent, (3) there was insufficient evidence to sustain Jeffs' convictions, (4) there was insufficient evidence that Jeffs enticed Wall into a sexual relationship with Steed, (5) the "enticement" language of Utah Code section 76-5-406(11) is unconstitutionally vague, (6) the trial court erred in denying Jeffs' motion for a new trial because the court reconstituted the jury after deliberations had begun, and (7) the trial court erred in imposing consecutive sentences. We agree with Jeffs that the consent instructions given to the jury were erroneous and warrant a reversal of his convictions. Accordingly, we need not reach the remainder of his claims. We do address, however, Jeffs' argument with respect to the correctness of the jury instruction on accomplice liability to give guidance to the trial court on remand.

### I. THE JURY INSTRUCTIONS ON CONSENT AND ACCOMPLICE LIABILITY WERE ERRONEOUS

¶16 Jeffs contends that instructions given to the jury on the issues of consent and accomplice liability were erroneous. Specifically, Jeffs argues that the instruction on consent erroneously focused the jury on Jeffs' relationship with Wall rather than on Steed's relationship with Wall. With respect to the accomplice liability instruction, Jeffs argues that the trial court erred by refusing to instruct the jury that Jeffs could not be found guilty as an accomplice to rape unless Jeffs intended that Steed engage in nonconsensual sexual intercourse with Wall.

Claims of erroneous jury instructions present questions of law that we review for correctness. State v. Miller, 2008 UT 61, ¶ 13, 193 P.3d 92. We therefore review the instructions given to the jury without deference to the trial court. Before turning to the actual jury instructions themselves, however, we outline the law applicable to the State's charges against Jeffs.

A. The Charges Against Jeffs

¶17 The State charged Jeffs with two counts of rape as an accomplice. The first count was alleged to have occurred shortly after Wall and Steed were married when they first had intercourse. The second count was alleged to have occurred after Jeffs refused to "release" Wall from her marriage to Steed and counseled her to "give herself to [Steed], . . . mind, body and soul."

¶18 These charges implicate three different sections of the Utah Code: (1) the rape statute found in section 76-5-402, (2) the consent statute found in section 76-5-406, and (3) the accomplice liability statute found in section 76-2-202. We begin our discussion with the rape statute.

¶19 "A person commits rape when the actor has sexual intercourse with another person without the victim's consent." Utah Code Ann. § 76-5-402(1) (2008). A rape can be committed "whether or not the actor is married to the victim." Id. § 76-5-402(2).

¶20 To establish the required lack of consent, the State relied on three separate subsections of section 76-5-406, the statute that defines the circumstances under which an act of sexual intercourse is deemed to be without the victim's consent. The relevant sections provide:

> An act of sexual intercourse . . . is without consent of the victim under any of the following circumstances:
>
> (1) the victim expresses lack of consent through words or conduct;
>
> . . .
>
> (10) the victim is younger than 18 years of age and at the time of the offense the actor was the victim's parent, stepparent, adoptive parent, or legal guardian or occupied a position of special trust in

> relation to the victim as defined in Subsection 76-5-404.1(4)(h);
>
> (11) the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate . . . .

Id. §§ 76-5-406(1), (10)-(11).

¶21 Because the sexual intercourse on which the charges were based was between Wall and Steed, rather than between Wall and Jeffs, the accomplice liability statute also comes into play. It provides: "Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." Id. § 76-2-202.

¶22 Therefore, to convict Jeffs as an accomplice to rape, the State was required to establish that Jeffs, acting with the requisite mental intent, solicited, requested, commanded, encouraged or intentionally aided Steed to have nonconsensual sexual intercourse with Wall. We analyze the jury instructions in light of these statutes to determine whether they accurately stated the State's burden. We begin with the consent instruction and then turn to the accomplice liability instruction.

B. The Consent Instruction Was Erroneous

¶23 We first address Jeffs' claim that the jury instruction regarding consent was erroneous. Jeffs argues that the instruction erroneously focused the jury on Jeffs' actions and position of special trust, rather than on Steed's, for the purpose of determining whether Wall consented to sexual intercourse. We agree that the consent instruction was erroneous.

¶24 As previously indicated, the State identified three different sections of the consent statute pursuant to which it argued that the sexual intercourse between Wall and Steed was without Wall's consent. First, under subsection (1) of the consent statute, the State argued that Wall showed "express[] lack of consent through words or conduct." Id. § 76-5-406(1). As evidence of this lack of consent, the State relied on Wall's pleas to Jeffs not to make her marry Steed, her repeated refusal during the marriage ceremony to answer "I do," her reluctance to

kiss Steed, and her running from the room and locking herself in the bathroom after the ceremony. The State additionally argued that Wall continued to show an express lack of consent after the ceremony by attempting to avoid physical contact with Steed, crying, and begging Steed not to have sexual intercourse with her.

¶25 Second, under subsection (10), the State argued that Wall was under eighteen years of age and that Jeffs was in a "position of special trust" in relation to Wall. Id. § 76-5-406(10). As used in subsection (10), "'position of special trust' means [a] position occupied by a person in a position of authority, who, by reason of that position is able to exercise undue influence over the victim, and includes, but is not limited to, a . . . religious leader . . . ." Id. § 76-5-404.1(4)(h). At trial, the State argued that Jeffs occupied a position of special trust in relation to Wall because he was her religious leader, and as such had near absolute control over her, her family, and her entire community. Further, he used his position as a religious leader to put Wall in a circumstance where she had no choice but to submit to unwanted sexual intercourse.

¶26 Third, under subsection (11), the State argued that Wall was over fourteen years of age but under eighteen years of age, that Jeffs was more than three years her senior, and that Jeffs used psychological and religious manipulation to entice Wall to submit to unwanted sexual intercourse. See id. § 76-5-406(11). To support this theory, the State cited Jeffs' actions of convincing Wall to enter into the marriage, his direction during the wedding ceremony that Wall and Steed "multiply and replenish the earth," and his later refusal to release her from the marriage coupled with his counsel that she "go home and give [her]self to [Steed] . . . mind, body and soul."

¶27 The instruction given to the jury reflected the State's three theories. It stated the following:

> An act of sexual intercourse is without consent of a person under any, all, or a combination of the following circumstances:
>
> 1. The person expresses lack of consent through words or conduct; or
>
> 2. The person was 14 years of age or older, but younger than 18 years of age, and the actor was more than three years older than the person and enticed the person to submit or participate; or

> 3. The person was younger than 18 years of age and at the time of the offense the actor occupied a position of special trust in relation to the person.

¶28 In order to clarify the State's second and third theories, the court also gave the following instructions:

> In order to find the victim's lack of consent because the victim is younger than 18 years of age and at the time of the offense that the Defendant occupied a position of "special trust" in relation to Elis[s]a Wall you must be convinced that the State has proven beyond a reasonable doubt that the offense was committed by a person who occupied a position of special trust in relation to the victim.
>
> . . .
>
> In order to find that Elissa Wall was enticed the State must prove beyond a reasonable doubt that the Defendant lured or induced a person to submit to or to participate in an act of sexual intercourse. (Emphasis added.)

¶29 Jeffs argues that it was impermissible for the court to focus the jury on his own position of special trust and on his own enticing actions in determining whether the intercourse between Steed and Wall was consensual. Rather, Jeffs contends that the jury should have been asked to consider whether Steed was in a position of special trust and whether Steed enticed Wall. We agree with Jeffs.

¶30 While the jury instruction appears to track the statutory language, the instruction erroneously interprets the statute's use of the term "actor," as used in Utah Code sections 76-5-406(10) and (11), to refer to the defendant, Jeffs, rather than to Steed. Those sections provide that the intercourse will be deemed to be nonconsensual if "the victim is younger than 18 years of age and at the time of the offense the actor . . . occupied a position of special trust in relation to the victim," or if "the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate . . . ." Id. § 76-5-406(10)-(11) (emphases added).

As evidenced by the additional clarifying instruction, the State interprets the term "actor" to mean the "defendant."

¶31 We conclude that the State's interpretation is erroneous. In interpreting a statute, we look to its plain language. Dale T. Smith & Sons v. Utah Labor Comm'n, 2009 UT 19, ¶ 7, 208 P.3d 533. We read statutory provisions literally, unless such a reading "would result in an unreasonable or inoperable result." State v. Jeffries, 2009 UT 57, ¶ 7, 217 P.3d 265. And "'we assume the legislature used each term advisedly and in accordance with its ordinary meaning.'" Id. (quoting State v. Martinez, 2002 UT 80, ¶ 8, 52 P.3d 1276). "'[E]ach part or section should be construed in connection with every other part or section so as to produce a harmonious whole.'" State v. Moreno, 2009 UT 15, ¶ 10, 203 P.3d 1000 (quoting Sill v. Hart, 2007 UT 45, ¶ 7, 162 P.3d 1099).

¶32 "Actor" is defined by statute as "a person whose criminal responsibility is in issue in a criminal action." Utah Code Ann. § 76-1-601(2). The person whose criminal responsibility is at issue in a criminal action will usually be the defendant. For example, under the rape statute, "[a] person commits rape when the actor has sexual intercourse with another person without the victim's consent." Id. § 76-5-402(1). Under the rape statute, therefore, the "actor" must be the person who has nonconsensual sexual intercourse with the victim or, in other words, the defendant who is being prosecuted for an act of rape.

¶33 But section 76-1-601 also provides that its definition of "actor" does not apply to those statutes that provide otherwise. And we conclude that the consent statute provides otherwise. The opening words of section 76-5-406 specifically indicate that the section discusses the "act of sexual intercourse" and the circumstances under which that act occurs without consent. Id. § 76-5-406. Because the act at issue is the act of sexual intercourse, the term "actor" as used in subsections (10) and (11) must necessarily relate back to the underlying "act of sexual intercourse." And the term "actor" must refer to the person who engages in the act at issue. Therefore, the "actor" is the person who engages in sexual intercourse. To read the statute otherwise would require us to sever the term "actor" from the context of the surrounding provisions. Because Jeffs did not engage in sexual intercourse with Wall, it was erroneous for the jury instructions to equate the term "actor" with the term "defendant" in instructing the jury as to whether the State had met its burden of proving that the sexual intercourse between Steed and Wall was nonconsensual.

¶34 Our conclusion that the term "actor" refers to the individual engaging in the act of intercourse is consistent with the principle that, in order for accomplice liability to arise, there must be an underlying offense. Only after there is a determination that an offense has been committed can the law impose liability on another party who "solicit[ed], request[ed], command[ed], encourag[ed], or intentionally aid[ed]" in the commission of that offense. Id. § 76-2-202. To determine whether a rape has occurred, section 76-5-406 is applied and a determination is made of whether there was sexual intercourse without consent. The question of accomplice liability cannot enter the equation until after a determination has been made that a crime has been committed. As a result, the use of the term "actor" under the consent statute can refer only to the person engaging in the act of intercourse.

¶35 To construe the statute otherwise would lead to absurd results. For example, if the term "actor" as used in subsection (10) of the consent statute is deemed to refer to the defendant in an accomplice-liability case, a parent who encourages his pregnant minor daughter to marry the adult father of her unborn baby would satisfy the requirements of that subsection, thereby rendering any further intercourse between the couple nonconsensual and the parent guilty of a first degree felony as an accomplice to rape.

¶36 In summary, we hold that the term "actor" as used in subsections (10) and (11) of Utah Code section 76-5-406 refers to the person who engaged in the act of sexual intercourse. As a result, those subsections could not be applied to Jeffs. Only Steed's position of special trust or Steed's efforts of enticement were relevant in determining whether Wall consented to sexual intercourse. Because the consent instructions told the jury that defendant Jeffs' position of special trust and defendant Jeffs' enticement of Wall could give rise to a lack of consent, they were erroneous.

¶37 Having concluded that the jury instructions on consent were erroneous, we must consider whether they require reversal of Jeffs' convictions. "[T]o reverse a trial verdict, [we] must find not a mere possibility, but a reasonable likelihood that the error affected the result." Cheves v. Williams, 1999 UT 86, ¶ 20, 993 P.2d 191 (quoting Steffensen v. Smith's Mgmt. Corp., 862 P.2d 1342, 1347 (Utah 1993)). We find such a likelihood here.

¶38 The consent instruction given to the jury stated: "An act of sexual intercourse is without consent of a person under any, all, or a combination of the following circumstances

. . . .” (emphasis added). It then listed the State’s three theories of non consent, two of which we have held to be erroneous. Because no special verdict form was employed at trial, the jury was not required to indicate the basis for its finding that the intercourse between Steed and Wall was nonconsensual. We therefore cannot determine with certainty whether Jeffs was convicted on the basis of the one valid theory, the two erroneous theories, or on some combination of the three. And because there was no real dispute at trial that Jeffs was in a position of special trust with respect to Wall, a theory we have held to be erroneous, it is highly likely that Jeffs was convicted on the basis of an erroneous theory. Such a likelihood requires reversal of his convictions and a remand for a new trial.

C. The Accomplice Liability Instruction Was Erroneous

¶39 Because we reverse Jeffs’ convictions on the basis of the erroneous consent instructions, his remaining claims of error are not dispositive and we need not reach them. We nevertheless address his claim that the trial court erroneously instructed the jury with regard to the mens rea element of the accomplice liability statute in order to guide the trial court on remand. See IHC Health Servs., Inc. v. D & K Mgmt., 2003 UT 5, ¶ 10, 73 P.3d 320 (considering nondispositive argument for guidance of the parties on remand).

¶40 Jeffs asserts that he could not be convicted as an accomplice to the rape of Wall unless the State proved that he intended that Steed rape Wall. At trial, Jeffs unsuccessfully requested a jury instruction stating that, in order to reach a conviction, the jury must find that Jeffs “intended that the result of his conduct would be that Allen Steed rape Elissa Wall.” We agree with Jeffs that he was entitled to the requested instruction.

¶41 The trial court instructed the jury on party liability as follows:

> To convict Warren Jeffs as an accomplice to the crime of rape, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime:
>
> 1. That the defendant, Warren Jeffs:
> a. intentionally, knowingly, or recklessly solicited, requested, commanded, or encouraged another––
> I. to have sexual intercourse

ii. with Elissa Wall without consent; or
b. intentionally aided another--
I. to have sexual intercourse
ii. with Elissa Wall without consent; and
2. Allen Steed had sexual intercourse with Elissa Wall without consent.

¶42 Jeffs argues that one cannot be found guilty as an accomplice unless he has the required mental state for the underlying crime to be committed. In this case, Jeffs argues that the jury was not adequately instructed of this requirement. The State disagrees, pointing out that the instruction properly informed the jury of the mental state required which, in the case of rape, is an "intentional, knowing or reckless mental state." State v. Calamity, 735 P.2d 39, 43 (Utah 1987); see also Utah Code Ann. § 76-2-102 ("[W]hen the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility."). The problem, however, is that the instruction only indicated that the reckless, knowing, or intentional mental state attached to the actions of "solicited, requested, commanded, or encouraged," not to the underlying criminal conduct of rape.

¶43 We addressed the requisite mental state under the accomplice liability statute in State v. Briggs. 2008 UT 75, 197 P.3d 628. There, we stated that "[a]n accomplice must . . . have the intent that the underlying offense be committed." Id. ¶ 14. "Intent," as used in this context, is a legal term of art that means "[t]he state of mind accompanying an act." Black's Law Dictionary 881 (9th ed. 2009). It should not be confused with the mental state designated as "intentionally." See Utah Code Ann. § 76-2-103(1). To restate the essential principle, "accomplice liability adheres only when the accused acts with the mens rea to commit the principal offense." State v. Calliham, 2002 UT 86, ¶ 64, 55 P.3d 573.

¶44 The accomplice liability statute reflects this principle in the requirement that the defendant act "with the mental state required for the commission of [the] offense." Utah Code Ann. § 76-2-202. This mandates that the defendant, in this case one who acts as an accomplice to rape, undertake his actions intentionally, knowingly, or recklessly. But intentionally, knowingly, or recklessly in regard to what? The obvious answer is that he must act intentionally, knowingly, or recklessly as to the results of his conduct. And in order for criminal liability to attach, the results of his conduct must be a criminal offense.

¶45 This principle is further clarified by the statutory definitions of the possible "mental state[s] required for the commission of" rape. Id. A person acts "[i]ntentionally . . . with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result." Id. § 76-2-103(1). Under this mental state, the accomplice desires to cause rape. "A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." Id. § 76-2-103(2). Under this mental state, the accomplice knows that his conduct will most likely cause rape. Finally, a person acts "[r]ecklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." Id. § 76-2-103(3). Under this mental state, the accomplice recognizes that his conduct could result in rape but chooses to proceed anyway. Thus, in specifying that the accomplice act with the mental state required for the commission of the underlying offense, the accomplice liability statute clearly contemplates that the accomplice is aware of, at a minimum, the substantial and unjustifiable risk that his actions will result in the commission of a crime--in this case rape--by another person.

¶46 The State urges an alternate interpretation of the accomplice liability statute, under which one could act intentionally, knowingly, or recklessly in the abstract and incur criminal liability if his actions resulted in soliciting, requesting, commanding, encouraging, or intentionally aiding another in committing a crime. We reject this alternate interpretation because it would sweep in too much innocent behavior. Taken to its logical extreme, this interpretation could result in accomplice liability attaching to a person who leaves his house unlocked, leading to the theft of his own personal property inside the house. But we have been careful to avoid expanding the law to this extent.

¶47 In State v. Comish, we held that a security officer who purchased marijuana in a sting operation could not be considered an accomplice for testimonial purposes because "[u]nder [the] statute and under the [generally accepted meaning of the term, . . . 'accomplice' . . . does not include a person who . . . merely provides an opportunity for one who is disposed to commit a crime." 560 P.2d 1134, 1136 (Utah 1977).

¶48 And we have also held that even less innocent behaviors do not appropriately categorize an individual as an accomplice if that individual had no intention that the underlying crime be

committed. In State v. Schreuder, for example, we held that a man who knew that a woman wanted to kill her father and who concealed the murder weapon after the crime was committed was not an accomplice. 726 P.2d 1215, 1220 (Utah 1986). In so holding, we stated that "[p]rior knowledge does not make a person an accomplice when that person does not have the mental state required" for the underlying crime. Id. While there were clearly other crimes with which the defendant in Schreuder could have been charged, "there was insufficient evidence to establish that he . . . had the mental state required to commit the crime [of murder]," and thus he was not an accomplice. Id.

¶49 We clarify that an accomplice need not act with the same intent, or mental state, as the principal. "Party liability under section 76-2-202 does not require that the persons involved in the criminal conduct have the same mental state." State v. Alvarez, 872 P.2d 450, 461 (Utah 1994). "A defendant can be criminally responsible for an act committed by another, but the degree of his responsibility is determined by his own mental state in the acts that subject him to such responsibility, not by the mental state of the actor." State v. Crick, 675 P.2d 527, 534 (Utah 1983) (emphasis omitted). "[I]t is not necessary for the accomplice to have the same intent that the principal actor possessed as long as the accomplice intended that an offense be committed." State v. Briggs, 2008 UT 75, ¶ 14.

¶50 Jeffs was also entitled to his requested instruction for the independent reason that it was necessary to clarify the "intentionally aids" portion of the accomplice liability statute. In those cases where the defendant solicits, requests, commands, or encourages another to commit an offense, the accomplice liability statute incorporates the default mental state of recklessly, knowingly, or intentionally. However, in those cases where the defendant is charged with aiding another in the commission of the offense, the accomplice liability statute requires that the defendant's aiding be "intentional." See Utah Code Ann. § 76-2-202.

¶51 While the jury instruction used in this case did incorporate the phrase "intentionally aided," it was nevertheless confusing with respect to the issue of intent. As we explained in Briggs, "To show that a defendant is guilty under accomplice liability, the State must show that an individual acted with both the intent that the underlying offense be committed and the intent to aid the principal actor in the offense." 2008 UT 75, ¶ 13. This is precisely the alternate instruction that Jeffs requested, but was denied.

¶52 Without Jeffs' proposed instruction as to intent, the jury could have convicted Jeffs if it found that Jeffs "intentionally" did some act, and such intentional act unintentionally "aided" Steed in having nonconsensual sexual intercourse with Wall. For example, even if Jeffs never intended for Steed to rape Wall, the jury instruction allowed for the possibility that he would be found guilty simply because he intentionally performed the marriage ceremony and the existence of the marriage aided Steed in raping Wall. For this reason, the jury instruction was also erroneous.

## CONCLUSION

¶53 Because we hold that the trial court's instructions to the jury regarding lack of consent were in error, we reverse Jeffs' two convictions of rape as an accomplice and remand for a new trial.

¶54 We regret the effect our opinion today may have on the victim of the underlying crime, to whom we do not wish to cause additional pain. However, we must ensure that the laws are applied evenly and appropriately, in this case as in every case, in order to protect the constitutional principles on which our legal system is based. We must guarantee justice, not just for this defendant, but for all who may be accused of a crime and subjected to the State's power to deprive them of life, liberty, or property hereafter.

¶55 Chief Justice Durham, Associate Chief Justice Durrant, and Justice Nehring concur in Justice Parrish's opinion.

¶56 Justice Wilkins sat for oral argument; however, due to his retirement from this court, did not participate herein.

ADDENDUM G

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

| | |
|---|---|
| STATE OF UTAH,<br><br>PLAINTIFF,<br><br>VS.<br><br>MATTHEW GORDON EYRE,<br><br>DEFENDANT. | Case No. 161909443<br><br>Transcript of:<br><br>JURY TRIAL<br>VOLUME II |

BEFORE THE HONORABLE ROYAL I. HANSEN

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84114

OCTOBER 18, 2017

TRANSCRIBED BY: Susan S. Sprouse, RPR, CSR

that time, the court is going to be in recess.

(Recess taken by the court.)

**THE COURT:** The record should reflect that counsel have approached the Court in chambers and the Court wanted to make a record with regard to that conversation.

And Mr. Bautista, why don't I hear from you first and then I'll hear from Mr. Burmester as well.

**MR. BAUTISTA:** Thank you, Your Honor. I believe yesterday I had a conversation with the State of their intention of playing the interview of Mr. Eyre to the jury. And we had a discussion whether -- some judges don't allow the video, some judges want -- ask question and answers through traditional means of a witness. We discussed that. I didn't object to playing of the video, so we played it.

I believe we had a discussion, however, that that normally does not go back to the jury because that would be giving them testimony that they can review. We didn't ever -- I didn't believe, discuss it thoroughly and had an agreement because I didn't think there was any issue there. We didn't raise it to the Court because we didn't think it was an issue.

**THE COURT:** And it was not admitted as a separate exhibit; is that right?

**MR. BURMESTER:** It was a separate exhibit. It was State's Exhibit 11.

**THE COURT:** 11. And was 11 admitted?

**MR. BURMESTER:** It was admitted. And as far as the conversation, I remember the conversation. I don't remember saying, thinking about it not going back in particular or it being the case law or anything, but rather we did in addition, I'm sure now a discussion about the videos and how it was going -- how -- we didn't want to send the computer back. And so I had just believed we were talking about both videos and we had that discussion.

**THE COURT:** Okay.

**MR. BURMESTER:** And you may have had a completely different understanding in the same meeting.

**THE COURT:** Good. Let me hear from --

**MR. BAUTISTA:** Needless to say, unfortunately, I did not make a record of that. We didn't ask to make sure that that was admitted for the record only and not as part of evidence.

Twenty minutes ago, about 20 minutes ago the jury came out and asked to see videos. It didn't occur to me that they were asking to see that interview. I thought they were talking about the traffic. So we were out here discussing why are they looking at the traffic accident. That's after the fact. That doesn't -- so we had that discussion. And then it occurred to me, oh, my, do they have his interview? Did that go back?

**MR. BURMESTER:** And I said yes.

**MR. BAUTISTA:** Yes. So we went back immediately to speak to either you or the clerks. I think we asked the clerks if it went back. Right there and then the bailiff came around the corner with the laptop in his hands. Mr. Burmester said it might be moot now, and we asked him what video did they watch, and he said the defendant's interview.

We then brought it to your attention. I don't believe that they are supposed to watch that. I don't believe that that is allowed to be watched. It's akin to giving them a transcript, and it has unfair -- it might put an unfair taint on the evidence to -- overemphasis on that evidence versus the others. The defendant's statements to the police, I believe, are supposed to be akin to just regular live testimony.

I may have messed up, but I think I am forced to make a motion to -- for a mistrial because this may have improperly have an influence on the jury that could have some undue influence on the verdict.

**THE COURT:** Great. Thank you. And Mr. Burmester, let me get the State's input as well.

**MR. BURMESTER:** Your Honor, I -- I'm unaware of a particular case. There's nothing that says a video interview can't go back if the case existed. It may very well. I would like permission to research that issue.

And I think we both stipulate that it was about 20 minutes or so that they had the potential to watch the video.

And I would ask the Court that we allow the case to continue, take it under advisement. Once there is a verdict then, if it's a verdict of not guilty then, of course, it's a moot issue. If it's a guilty verdict -- a guilty verdict, then perhaps we could address the issue and have appropriate briefing.

**THE COURT:** Good. Tell me, I want to make sure that Exhibit 11 was the interview.

**MR. BURMESTER:** Yeah. It was.

**THE COURT:** And Exhibit 11 was moved to having it admitted and it was admitted into evidence. Is that your understanding?

**MR. BURMESTER:** That was my understanding. Yes, that was my understanding.

**THE COURT:** And with regard to that point, Mr. Bautista, I'm interested in that. I mean, whether that was admissible or not, if, in fact, the parties stipulated to its admissibility seems like whether you have second thoughts now that was the appropriate way and there was no harm in the jury going through it.

**MR. BAUTISTA:** My intention was to agree that it be played to the jury, and that's why I stipulated to its admission when he did a blanket admission to all of them. But it was under the belief that that wouldn't be sent back to the jury. So I recognize that I may have created some invited

error.

**THE COURT:** And it appears as if the -- all other exhibits that were admitted were taken back to the jury room and given to the jury for purposes for their review and consideration --

**MR. BURMESTER:** I went through all the evidence -- sorry your Honor for stepping in on your conversation -- but, yes, I went through, and I was the one who put 1 through 11 plus 13 into the pile.

**THE COURT:** Okay. Let's see, Mr. Bautista, assuming that it was unintended or invited error somehow to do what's been done here, is there anything we can do at this stage that's going to correct any perceived concerns that you have?

**MR. BAUTISTA:** I'm afraid that if we ask the jury to come up and gave them another instruction, that that might inadvertently actually do put undue influence on it. And so at this time, I don't believe there's an instruction that can be given to remedy it.

**THE COURT:** Good.

**MR. BAUTISTA:** When we went back, I was hoping that they hadn't started it, and we were going to stop them.

**THE COURT:** Good. And Mr. Burmester, anything we can do by taking corrective action at this juncture that may alleviate the issue that we've got?

**MR. BURMESTER:** No, I think that it is out there.

It's gone back. I think that if one listens to the record of the interview, it is about a 15-minute interview. And if they had it about 20 minutes, I don't see them -- possible that they could have listened to it over and over again. But as far as us taking some action now to remedy the problem, I don't see how we can do that.

**THE COURT:** Good. Thank you, Counsel, for calling this to the Court's attention. I appreciate your assistance with regard to that.

You know, it appears to me as if, at least on its face, the Exhibit 11 was admitted into evidence and all admitted evidence was sent back to the jury. And so I'm -- I'm not finding that to be something that's inappropriate. All the rest of the evidence was sent back there, and the jury has access to it. And I advised the jury that every -- all the exhibits that were admitted, they would be able to read and review.

With regard to and any larger issue with regard to any prejudice that may take place or undue influence with regard to that, the Court is of a mind to reserve that issue, Mr. Bautista. And depending upon our -- and allow the proceedings to go forward.

The Court at this stage would anticipate receiving a verdict back, assuming it's reached by the jury. And I think it was the suggestion of the Court that it was important that

you raise this issue, that you did it timely, and the Court notes that as soon as the issue was raised, that it was timely raised by defense counsel and the State, and jointly they've asked it be put on the record and that we deal with the issue at this point.

Anything else that we need to do to complete that record, do you think, Mr. Bautista?

**MR. BAUTISTA:** Just that my motion for mistrial is not prosectorial's fault, so prejudice would not attach.

**THE COURT:** Thank you. Mr. Burmester, anything you think?

**MR. BURMESTER:** No, Your Honor.

**THE COURT:** Okay. Good. And tell me how that would work if, in fact, we were to go forward and get a verdict, is there a downside in doing that?

**MR. BAUTISTA:** If there is a verdict of guilty and we brief the issue, if we prevailed on the issue that it should have been mistried, it would be mistried without prejudice which would allow the State to retry the case.

**THE COURT:** Okay. Good. Mr. Burmester, is that your analysis of this as well?

**MR. BURMESTER:** Yes, Your Honor, that's what I would assume.

**THE COURT:** Good. Let's do that. And the Court is taking the motion under advisement with the understanding that

at least on its face that the -- I would anticipate that all the admitted exhibits would go back and that those, that there has been no breach with regard to that notion, and the jury has not done anything improper by reviewing the exhibits that have been admitted.

With that, we're going to be in recess and I'll reconvene as soon as we hear from the jury and do so.

**MR. BAUTISTA:** Thank you, Your Honor.

**THE COURT:** Thanks. Thanks, Counsel.

Court's in recess.

(Recess taken by the court.)

**THE COURT:** Let's see, ladies and gentlemen, this is the matter of the State versus Matthew Gordon Eyre. The record shall reflect that Mr. Eyre is present as -- and that all counsel and parties are also present.

I'm advised by our bailiff that the jury has reached a verdict in this matter.

I would note that we met previously with regard to the introduction of Exhibit 11. And as I've looked at the Exhibit 11 and its potential effect, as I noted previously, it had been stipulated by all parties to come in. It was admitted. And, frankly, I think the parties have the ability to stipulate to the admission of most evidence, even evidence that traditionally doesn't come in at the time of trial.

And I would further note that it's the same evidence

that was introduced at trial. So it's not additional information. The jury has not been exposed to anything that's new or different than what was raised at trial. And I'll give you a chance to speak on these with regard to that. And that the -- it could also be noted that it was cumulative in the sense that we heard evidence from other witnesses that also discussed the issue and that that evidence was introduced and that the Court doesn't on -- at least on its face of the introduction of Exhibit 11, find that there's prejudice in having the jury hear that. But as I've indicated to you previously, I'm prepared to reserve that issue with regard to a mistrial and deal with that.

Mr. Bautista, let me hear you before we leave that subject as well.

**MR. BAUTISTA:** Your Honor, after we, we had our discussion, I was replaying the video, and it appears that we stopped it when there was -- according to the screen, it looked to me like there was still seven more minutes.

**THE COURT:** Okay.

**MR. BAUTISTA:** There was some more on that tape that was afterwards mainly from what I saw, a conversation of the defendant asking him why he was being arrested and taken to jail and things of that nature. I haven't finished watching the rest of it.

**THE COURT:** Okay.

**MR. BAUTISTA:** But there may have been some additional stuff.

**THE COURT:** Thank you. And I appreciate that clarification.

And Mr. Burmester, anything else you have with regard to that issue and whether or not the jury had something other than what was admitted at the time of trial?

**MR. BURMESTER:** Yes, he asks the defendant -- the defendant asks "Am I going to jail?" And Detective Mount says, "I don't know. We're on the phone to talk to the district attorney." Beyond that, there is laying on the floor doing pushups and waiting around for eventual taking him out of the room and a rest check.

**THE COURT:** Is that something that either side sees as prejudicial at this juncture? You may be less likely --

**MR. BURMESTER:** Yes.

**THE COURT:** -- to find prejudice --

**MR. BURMESTER:** I definitely find it not prejudicial, but maybe counsel.

**THE COURT:** Anything else I should know on that, Mr. Bautista, with regards to presently?

**MR. BAUTISTA:** I would just ask to reserve it as --

**THE COURT:** Okay. The Court is inclined to do that.

Okay. With regard to the jury verdict, before bringing the jury in, let me admonish members of the audience

there should be no reaction to the jury verdict that's read. Proceedings are not over until court's adjourned. Regardless of what the jury may be, the jury is entitled to the same respect they've been shown during all of these proceedings. Therefore, there will be no comment about the verdict until after adjournment.

Anything else we need to raise, Counsel, before we invite the jury in? Mr. Burmester?

**MR. BURMESTER:** Nothing from the State.

**THE COURT:** Anything from the Defense?

**MR. BAUTISTA:** Not for the Defense.

**THE COURT:** Thank you. Let's invite our jury to come join us.

(Pause in proceedings.)

**THE COURT:** Please be seated.

This is the matter of State versus Matthew Gordon Eyre. The record should reflect that all parties and counsel are present and as well as all eight of our jurors. And it's my understanding that our jury has reached a verdict in this case.

And before we receive that verdict, let me express appreciation to our jury on behalf of all of us for the outstanding work you've undertaken. We appreciate the care and attention you've had in carefully following and listening to this case. We appreciate your deliberations and your efforts

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

| | |
|---|---|
| STATE OF UTAH,<br><br>PLAINTIFF,<br><br>VS.<br><br>MATTHEW GORDON EYRE,<br><br>DEFENDANT. | Case No. 161909443<br><br>Transcript of:<br><br>SENTENCING |

BEFORE THE HONORABLE ROYAL I. HANSEN

SCOTT M. MATHESON COURTHOUSE
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DECEMBER 8, 2017

TRANSCRIBED BY: Susan S. Sprouse, RPR, CSR

December 8, 2017

P R O C E E D I N G S

* * *

**MR. BAUTISTA:** May we address the Matthew Eyre matter, please?

**THE COURT:** Ear or Eyre?

**MR. BAUTISTA:** Oh, it is Eyre. I'm sorry.

**THE COURT:** Let's see, this is the Matthew Eyre matter. The record should reflect that Mr. Eyre is present as well as all counsel. I've got a presentence report. Any additions or corrections in that report, Mr. Bautista?

**MR. BAUTISTA:** Not to the presentence report, Your Honor.

**THE COURT:** Okay.

**MR. BAUTISTA:** But before we get there, we'd like to address -- we received a copy of the Court's ruling and order regarding the motion for a mistrial.

**THE COURT:** Okay. Good. Thank you.

**MR. BAUTISTA:** And if I may just have the benefit of the record, Your Honor.

**THE COURT:** You may. Go ahead.

**MR. BAUTISTA:** We anticipated that we were actually going to have a brief oral argument today on this and neither party submitted a notice to request.

**THE COURT:** Right.

**MR. BAUTISTA:** We didn't request oral arguments because my practice and normal understanding is in criminal cases that we get oral arguments. I understand --

**THE COURT:** Well, I want to give you the benefit of the record.

**MR. BAUTISTA:** I understand the Court's ruling. I intended to argue that I don't believe that this is harmless error, and the reason for that is in this case the jury was deliberating for some time, and it was only when they requested the C- -- a video, a computer, it went back there with them. Moments later I was confused why they would want to see the traffic cam videos, and I inquired as to what videos did they want to look at. And then I asked that his interview -- if his interview had gone back to the jury, and I was informed it was.

We immediately came back to chambers to discuss this with you. The court bailiff came out with a computer in his hands, and we asked what video did the jury look at, and we were told his interview.

It was shortly thereafter, I don't remember the exact time period, but I think it was shortly thereafter that the jury came back with a guilty verdict. And so this is why I don't believe it is harmless. I think because the jury was deliberating for some time, they were having obviously some confusion or discussions about what he may have said to the police.

They heard his interview at the trial, but one of the reasons why we don't give them transcripts and we don't give them, is it allows them to rehear evidence presented. If they missed evidence or if they have a dispute of what the evidence is, it's for them to deliberate and for them to come to a conclusion. If they cannot come to a conclusion, then the defendant is entitled to an acquittal because they are not able to come to a conclusion that he is guilty beyond a reasonable doubt.

We believe that by them watching his video again, they were able to quash any questions they had whatsoever about what statements he may have said, or they may have heard it differently or something to that effect. And it was outside of an opportunity to address it more in an additional closing argument.

With that in mind, that's why we do not believe it is harmless error. It emphasized too much of what he was saying and not what the other evidence was.

**THE COURT:** Okay. Good. Mr. Burmester, any response from the State?

**MR. BURMESTER:** The State joins in the Court's ruling, and also for the reasons stated in the State's brief.

I would like to also add that there was no distinction made at any time between any items of evidence. And that, that computer, Defense counsel helped me make it so

the jury could not access anything that was extraneous. And the time it was out to the jury was the approximate length of the questioned recording. And for the reasons that Defense counsel state, it might have, it might have, it is clearly not -- well, it is as the Court said. So we would join in that.

**THE COURT:** Thank you. And let's see, the Court's looked at this closely. I appreciate the argument that's additionally provided here and finding that it's -- that prejudice has not been established and that for the reasons the Court has denied the motion, the Court is confirming that response to the State's motion at this point in time. And therefore, denying the defendant's motion.

And the Court's prepared to proceed with regard to sentencing. And let's see, Mr. Bautista, I'm interested in knowing if there's any additions or corrections to the presentence?

**MR. BAUTISTA:** There are not, Your Honor. We are ready to proceed and no legal reason for sentencing not to go forward.

**THE COURT:** And Mr. Burmester, let me hear from the State first, and then I'd like to hear from defense counsel. I don't know if you have any victims that are here that wish to be heard at this point in time.

**MR. BURMESTER:** They are not here.