Case No. 20180016-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

MATTHEW GORDON EYRE,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for aggravated robbery, a first degree felony, in the Third Judicial District, Salt Lake County, the Honorable Royal Hansen presiding

LINDSEY WHEELER (14519)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: lwheeler@agutah.gov

BYRON BURMESTER
JEREMY DEUS
Salt Lake District Attorney's Office

Counsel for Appellee

ALEXANDRA MCCALLUM
Salt Lake Legal Defender Assoc.
424 East 500 South
Suite 300
Salt Lake City, Utah 84111
appeals@sllda.com

Counsel for Appellant

TABLE OF CONTENTS

ADDENDA

Addendum A: Constitutional Provisions, Statutes, and Rules

- Rule 17, Utah Rules of Criminal Procedure
- UTAH CODE ANN. § 76-6-301 (West 2017) (robbery)
- UTAH CODE ANN. § 76-6-302 (West 2017) (aggravated robbery)
- UTAH CODE ANN. § 76-2-202 (West 2017) (accomplice liability)

Addendum B: Relevant jury instructions (R215, 222, 226-28)

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

Case No. 20180016-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

MATTHEW GORDON EYRE,
Defendant/Appellant.

Brief of Appellee

INTRODUCTION

Defendant and two friends tried to steal Victim's car. For his participation in the attempted carjacking, Defendant was charged with aggravated robbery as an accomplice.

At trial, the jury was instructed on aggravated robbery and given three accomplice liability instructions: a statutory instruction, an elements instruction, and a definition instruction.

The jury also viewed Defendant's videotaped police interview. In the video, Defendant told different stories of what happened but also appeared cooperative with the detective, remorseful, and consistently stated that he did not have a gun during the attempted robbery. The jury was allowed to take

the video to the jury room during its deliberations. Defense counsel did not object. After the jury had the video for about twenty minutes, defense counsel moved for a mistrial based on the jury having access to the video during deliberations. The trial court denied the motion, finding that no prejudice resulted because the State presented sufficient evidence to support the jury's guilty verdict.

On appeal, Defendant argues that his counsel was ineffective for not objecting to one of the three accomplice liability instructions—the elements instruction—Instruction 40. To prevail, Defendant must prove both deficient performance and prejudice. Defendant's ineffectiveness claim fails. Defendant cannot show his counsel performed deficiently because competent counsel could have reasonably concluded that Instruction 40 adequately conveyed the correct mental state alone or when read with the other instructions. For this same reason, Defendant cannot show prejudice. He also cannot show prejudice because ample evidence supported the jury's verdict.

Defendant also argues that the video of his police interview should not have gone back to the jury room during deliberations. Defendant first argues his claim as though it had been preserved by a motion for mistrial made after the jury re-watched the video; alternatively, Defendant argues that his counsel was ineffective. But Defendant's after-the-fact mistrial motion did

not suffice to preserve an objection to the jury re-watching the video during its deliberations. Accordingly, Defendant can prevail only if he proves that his counsel was ineffective. Because Defendant cannot prove either element, of his ineffectiveness claim, it necessarily fails. He cannot show prejudice because ample evidence supports that he intended to aid Rakes in the attempted carjacking and his arguments as to the impact of the video on the jury's deliberations are purely speculative. Nor can Defendant show that no competent counsel would have allowed the jury to have access to the video during deliberations because the video was the only evidence of Defendant's story.

STATEMENT OF THE ISSUES

1. Has Defendant established that his trial counsel was ineffective for approving the accomplice liability elements instruction where competent counsel could have reasonably concluded that the instruction conveyed the correct mental state either by itself or when read with the other instructions?

2. Has Defendant established that his counsel was ineffective for allowing the jury to have access to Defendant's police interview during their deliberations?

Standard of Review. An ineffective assistance of counsel claim raised for the first time on appeal is a question of law. *State v. Ott,* 2010 UT 1,¶16, 247 P.3d 344.

3. Did the cumulative effect of the alleged errors deprive Defendant of a fair trial?

Standard of Review. This Court "will reverse only if the cumulative effect of the several errors undermines [its] confidence … that a fair trial was had." *State v. Cruz*, 2016 UT App 234, ¶78, 387 P.3d 618 (citing *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993)) (omission in original).

STATEMENT OF THE CASE

A. Summary of relevant facts.[1]

Jesse Rakes, Michael Polk, and Defendant drove together to the Rio Grande area of Salt Lake City in Polk's PT Cruiser and parked. R773. When Rakes saw Victim's Dodge Challenger, he planned for the three men to steal it by pretending that the PT Cruiser needed a jump-start. *Id*.; State's Exhibit (SE)11 (8:55-16:04). Defendant's part in the robbery was perpetuating Rakes's ruse by pretending to look for jumper cables and threatening Victim with a gun. R845,848-51.

[1] The facts are recited "in the light most favorable to the jury's verdict.' *State v. Verde*, 770 P.2d 116,117 (Utah 1989) (citation omitted).

*****

Victim and Girlfriend were homeless and lived in Victim's Dodge Challenger with their two dogs and all their possessions. R631. Early one the morning, Victim and Girlfriend drove to the Rio Grande area so Girlfriend could buy heroin. R551, 581. Before she could, Rakes approached their car and asked Victim to jump-start the PT Cruiser. R554. Victim agreed. R555.

Victim moved his Dodge Challenger, parked it "nose-to-nose" with the PT Cruiser, and popped the hood. R556. Rakes then popped the hood of the PT Cruiser. R636. As Defendant and Polk pretended to look for jumper cables, Victim stood on the passenger side of his car chatting with Rakes. R556-57, 772.

Victim noticed that Defendant and Polk were taking a long time to find the cables and asked Rakes about it. R557. In response, Rakes pulled up his shirt, showed Victim his gun, and told Victim, "You know what this is. We are taking everything,." R560, Tell your bitch to get out of the car or I'm going to pistol whip her." R534,557-58. Defendant stood side-by-side with Rakes and showed his gun to Victim. R558.

Rakes pointed his gun at Victim and chased him around the Dodge Challenger. R562. In self-defense, Victim shot Rakes. R563. Rakes staggered to the middle of the street and fell over, unconscious. R564.

Victim and Girlfriend tried to drive to safety. R563-64. But before Victim could shut the driver's side door, Polk, driving the PT Cruiser, hit their car twice, causing the PT Cruiser to flip onto its roof. R563-65; SE 4, 5, 10. Victim and Girlfriend then drove their damaged car around the corner, tossed their gun and bullets, and waited for police. R566; SE 10.

After Rakes was shot, Defendant ran. R603, 714; SE 8, 9. An officer saw Defendant "walking at a quicker than normal pace" several blocks from the Rio Grande area. R712. The officer stopped Defendant because he matched a witness's description. *Id*. When the officer asked Defendant if he had been near the Rio Grande area, Defendant denied it. R716. He told the officer that he "did not shoot anybody" and he did not "see anybody get shot." R719.

Defendant was interviewed again at the police station and that interview was videotaped. SE 11. Defendant told the detective that he "[d]idn't see nothing," but "heard the sirens" and "heard a shot." R752; SE 11 (00:34-1:14).

After the detective told Defendant that Polk "put him in the car" and that Polk, Victim, and Girlfriend gave statements, Defendant gave a different story. R752, 756; SE 11 (1:14-1:60, 2:31, 5:46-7:39). Defendant told the detective that Victim asked for a jump-start and that Victim shot Rakes. R756; SE 11 (2:31-3:23,5:46-7:39). Defendant said that he then ran from the scene. R756; SE

11 (2:31-3:23,5:46-7:39). Defendant admitted that he was at the trunk of the PT Cruiser looking for jumper cables and he approached the passenger side of the car, where Victim and Rakes were standing. SE 11 (2:31-3:20, 5:46-7:39). Defendant denied that either he or Rakes had a gun. SE 11 (7:28-7:30). Defendant said that was "all [he] knew." SE 11 (3:18-3:22).

The detective then told Defendant that Rakes died. R763; SE 11 (7:42-16:04). Defendant told a third story. R763; SE 11 (7:42-16:04). According to Defendant, it was Rakes's idea to steal Victim's car. R765-67, 775; SE 11 (8:55-16:04). Defendant explained that Rakes "decided to [] pretend" the PT Cruiser needed a jump-start and asked Victim for one. SE 11 (9:37-9:50); R765-67. Defendant acknowledged that he knew Rakes' jump-start story was a ruse but admitted that he went along with it by pretending to look for jumper cables. R765-66, 772; SE 11 (9:10-14:36). According to Defendant, Victim moved his car nose-to-nose with the PT Cruiser and stood on the passenger side of the Challenger with Rakes. SE 11 (11:20-15:18). Defendant walked up to Rakes and Victim, heard Rakes say "something" to Victim. R764, 773; SE 11 (8:55-15:21). Defendant then saw Rakes chase Victim around Dodge Challenger and Victim shot Rakes. R764, 773; SE 11 (8:55-15:21). Defendant said that after he heard a gunshot, he walked away. R769, 773; SE 8, 9, 11 (13:15-13:59).

Although the video showed Defendant's multiple versions of events and incriminating admissions, it also showed Defendant tell the detective that he did not have a gun, he tried to talk Rakes out of stealing the car, and there was not a plan to steal the car. R768; SE 11 (9:10-16:04).

B. Summary of proceedings and disposition of the court.

Defendant was charged as an accomplice to aggravated robbery, a first degree felony. R66-68.

At trial, the parties agreed to give the jury three accomplice liability instructions: one quoting the language of the accomplice liability statute, Instruction 39, (R226); one setting forth the elements of accomplice liability, Instruction 40, (R227); and one defining the term accomplice, Instruction 41, (R228). R540. The trial court approved the instructions. *Id*.

The State supported its case with the testimony of Victim, (R547); Girlfriend, (630); the officer who saw Defendant walking quickly, (666); and the detective who interviewed Defendant, (R727); a surveillance video of the PT Cruiser repeatedly ramming Victim's car, (SE10); photos taken from surveillance videos of Defendant leaving the scene, (SE8,9); and Defendant's videotaped police interview, (SE11). The State argued that Defendant acted as an accomplice to aggravated robbery in two ways: when he pretended to

look for jumper cables and when he threatened Victim with a gun. R845, 848-51.

During the State's case-in-chief, the jury watched Defendant's videotaped police interview and the video was entered into evidence. R751; SE 11. Defense counsel stipulated to both. R751, 799, 875; *see also* R248.

The video was approximately twenty-three-minutes long, but at trial, the State played only about the first seventeen minutes of it. R750-73; SE 11. The portion played showed the detective Mirandizing Defendant, questioning Defendant, and Defendant's multiple stories. R750-73; SE 11 (00:34-16:04). However, the State did not present the last seven minutes of the video that showed the detective telling Defendant that he was calling the district attorney, handcuffing Defendant, and photographing Defendant. R880; SE 6, 7, 11.

After closing argument, the trial court asked both parties to make sure that it had all the exhibits that needed to go to the jury room. R870-71. The court also asked the parties to provide a laptop for the jury to watch the video evidence. R870-71. Defense counsel did not object to the jury having access to any of the exhibits during its deliberations, including the video exhibit of Defendant's police interview. *Id*.

Defendant did not testify at trial, but he called two witnesses: an eyewitness that saw Victim shoot Rakes and Defendant running away, R801-09; and the officer who initially interviewed Victim, R809-20. Defendant also based his defense on cross-examination of the State's witnesses and his videotaped police interview. R579-621, 649-63, 778-94. Defendant argued that he did not participate in the crime, that he actively tried to dissuade Rakes from committing the crime, and he challenged Victim and Girlfriend's credibility. R853-61.

At some point during its deliberations, the jury asked for the video evidence and it was provided—including the video of Defendant's police interview. R872-73. The jury watched the interview video, but it is unknown how much of it the jury watched. R874. About twenty minutes after the jury requested the video evidence, defense counsel alerted the trial court that he had not intended for the video of Defendant's police interview to go back to the jury room. R782-73. The bailiff removed the laptop from the jury room, but the jury had already watched at least some of the video. R874.

Defense counsel moved for a mistrial. R873-78. The court took the motion under advisement pending the jury verdict. R878. After the jury found Defendant guilty as charged, the trial court ordered briefing. R883-84, 878-79.

After oral argument and briefing, the trial court denied Defendant's mistrial motion. R240-42, 248-53, 257-60, 913-15. The court found that the jury should not have viewed the interview during deliberations, but any error was harmless. R259. The court explained that Defendant had not shown harmlessness because the State presented sufficient evidence to support the jury's guilty verdict even without the video. *Id*. The court also explained that Defendant would have benefitted from any undue weight the jury may have given the video, the jury only had access to the video for twenty minutes, and the jury did not have the ability to repeatedly view the testimony during deliberations. R259-60.

The trial court sentenced Defendant to an indeterminate prison term of ten years to life. R926. Defendant timely appealed. R269.

SUMMARY OF ARGUMENT

Point I. Defendant argues that his counsel was ineffective for not objecting to the inclusion of the accomplice liability elements instruction, Instruction 40. In support, Defendant argues that the instruction was incorrect because it did not specifically require the jury to find that Defendant had the intent to facilitate the commission of an aggravated robbery.

Defendant's claim fails because he cannot show either deficient performance or prejudice. Defendant cannot show that his counsel's

performance was constitutionally deficient where the instruction, whether read alone or with the other two accomplice liability instructions, properly instructed the jury that Defendant must possess the culpable mental state of the principal crime. For this same reason, Defendant cannot show prejudice. He also cannot show prejudice because ample evidence supported the verdict.

Point II. Defendant argues that the trial court erred when it allowed the jury to view his videotaped police interview during deliberations. At trial, Defendant did not object to the jury taking the video during deliberations. However, after the jury watched at least some of the video during its deliberations, Defendant moved for a mistrial on this ground. Defendant argues his mistrial motion preserved his claim. Alternatively, Defendant argues that his counsel was ineffective.

To preserve a claim of error, a defendant must make a timely objection. Defendant's objection was not timely. Defendant's mistrial motion was made after the alleged error occurred, depriving the trial court of the opportunity to timely address the issue at trial, before jury deliberations, or before the video was sent back to the jury room. His mistrial motion, therefore, did not preserve his claim.

Thus, to prevail, Defendant must show that his counsel was ineffective. On this record, Defendant cannot prove either deficient performance or prejudice. Defendant cannot prove that all competent counsel would have objected to the jury re-watching the video of his police interview during deliberations because the interview is the only evidence supporting that Defendant attempted to stop the carjacking, that Rakes's plan to steal Victim's car was not mutual, and that Defendant did not have a gun. Nor can Defendant show prejudice where ample evidence supported his conviction and his argument was speculative.

Point III. Defendant argues that this Court should reverse on cumulative error. His claim fails because there was no error, let alone cumulative error.

ARGUMENT

I.

DEFENDANT HAS NOT PROVEN THAT HIS COUNSEL PERFORMED INEFFECTIVELY BY APPROVING THE ACCOMPLICE LIABILITY ELEMENTS INSTRUCTION

Defendant argues that his trial counsel performed deficiently for not objecting to the accomplice liability elements instruction, Instruction 40. Br.Aplt.15-29. Defendant argues that his counsel should have objected to Instruction 40 because, he says, it omitted the required mental state that he

intended to aid the commission of an aggravated robbery. Br.Aplt.15-23. This, Defendant argues, means the jury could have convicted him of being an accomplice to the aggravated robbery even though he only intended to aid the commission of a lesser crime. Br.Aplt.15-23. But a competent attorney could have concluded that Instruction 40 alone or the instructions as a whole, especially read in light of the evidence, adequately conveyed the correct mental state requirement. And read in light of the evidence, there is no reasonable likelihood that the jury convicted without finding that Defendant intended to aid the commission of an aggravated robbery.

To show that his counsel was ineffective, Defendant must prove that his counsel performed deficiently and that he was prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668, 687-89, 694 (1984); *State v. Litherland*, 2000 UT 76, ¶19, 12 P.3d 92. Defendant must prove both elements. *See Strickland*, 466 U.S. at 697. Under *Strickland*, it is never enough to "show that counsels' performance could have been better" or that it "might have contributed to [a] conviction." *State v. Tyler*, 850 P.2d 1250, 1258–59 (Utah 1993). Instead, Defendant must show "*actual unreasonable representation and actual prejudice*." *Id.* 1259 (emphasis in original). This standard is "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). And

"[s]urmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

A. Defendant has not proven deficient performance.

To show deficient performance under *Strickland*, Defendant must show that his counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688. "[T]rial counsel's error must be so egregious that no reasonably competent attorney would have acted similarly." *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011). This Court's review of counsel's performance thus begins with a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997) (citation omitted).

The *Strickland* standard of objective reasonableness demands that "judicial scrutiny of counsel's performance" be "highly deferential." *Strickland*, 466 U.S. at 689. Because there are a "variety of circumstances faced by defense counsel" in any given case counsel must be given "wide latitude" to choose between a "range of legitimate decisions," frequently in the heat of trial. *Id.*; *see State v. J.A.L.*, 2011 UT 27, ¶25, 262 P.3d 1 ("[A]n attorney's job is to act quickly, under pressure, with the best information available."). After all, there is rarely "one [right] technique or approach" in a given situation. *Harrington v. Richter*, 562 U.S. 86, 106 (2011). "Even the best criminal defense

attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

Accordingly, the purpose of the deficiency inquiry "is not to grade counsel's performance" or determine whether counsel made the best or most reasonable choice. *Id.* 697. Rather, it is to determine whether counsel's "acts or omissions were outside the wide range of professionally competent assistance" given "the facts of the particular case." *Id.* 690.

A defendant bears the heavy burden of overcoming the "strong presumption" of reasonableness by "identify[ing] the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* He then must show that counsel's actions "amounted to incompetence under 'prevailing professional norms.'" *Richter*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 690).

At bottom, a defendant must prove that "no competent attorney" would have done what his attorney did. *Premo v. Moore*, 562 U.S. 115, 124 (2011). Consequently, a defendant cannot prevail merely by showing that a reasonable alternative choice, even a "more reasonable or effective" one, could have been implemented, so long as the choice actually made was reasonable. *State v. Lucero*, 2014 UT 15, ¶¶41, 43, 328 P.3d 841, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016; *see also Roe v.*

Flores-Ortega, 528 U.S. 470, 479 (2000) (the Sixth Amendment "imposes one general requirement: that counsel make objectively reasonable choices").

An appellate court's "highly deferential" review, therefore, "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct" and "from counsel's perspective at the time." *Strickland*, 466 U.S. at 689–90. It must not "second-guess counsel's assistance after conviction or adverse sentence," but must make "every effort…to eliminate the distorting effects of hindsight." *Id.* 689. Indeed, the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judge with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). And again, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

Defendant has failed to overcome this presumption and show deficient performance. Defendant argues that his counsel performed deficiently by approving Instruction 40 because it did not explain that he needed to possess the culpable mental state of aggravated robbery. Br.Aplt.15-23. But a competent attorney could have concluded that Instruction 40 alone or the instructions as a whole, especially read in light of the evidence, adequately

conveyed the correct mental state requirement. Thus, Defendant has not shown that no competent attorney would have approved the instruction.

Jury instructions "must accurately and adequately inform a criminal jury as to the basic elements of the crime charged." *State v. Lucero*, 866 P.2d 1, 3 (Utah App. 1993). Even when jury instructions are assessed for technical correctness, they "cannot be viewed in isolation." *State v. Lambdin*, 2017 UT 46, ¶50, 424 P.3d. 117. Instructions "must be evaluated as a whole to determine their adequacy." *State v. Garcia*, 2001 UT App 19, ¶13, 18 P.3d 1123. Thus, this Court "'will affirm when the instructions, taken as a whole, fairly tender the case to the jury [even where] one or more of the instructions, standing alone, are not as full or accurate as they might have been.'" *Id.* (citations omitted); *accord State v. Malaga*, 2006 UT App 103, ¶18, 132 P.3d 703.

When reviewing jury instructions within the context of an ineffectiveness claim, however, Defendant also carries his burden of proving deficient performance. *See State v. Lee*, 2014 UT App 4, ¶¶22–25, 318 P.3d 1164. And that requires more than merely showing that his attorney could have secured "better" instructions. *See Lucero*, 2014 UT 15, ¶¶41, 43 (defendant cannot show deficient performance by pointing to an alternative, possibly more reasonable choice, so long as choice actually employed was reasonable); *Tyler*, 850 P.2d at 1258 ("it is not enough [to] show that counsels' performance

could have been better"). Indeed, there has likely never been a case where an attorney could not have done something better. For that reason, the Sixth Amendment does not guarantee perfect counsel, only a reasonably competent one. *Burt v. Titlow*, 571 U.S. 12, 24 (2013); *Richter*, 562 U.S. at 110.

Here, Defendant has not shown his counsel performed deficiently by approving Instruction 40. A competent attorney could have concluded that Instruction 40 adequately conveyed the correct mental state requirement. Instruction 40 provided:

> 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, 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.

R227 (emphasis in original).

Although aggravated robbery was not expressly identified in the instruction, on this record, there could be no confusion that "the offense" referred to aggravated robbery. Indeed, Defendant was only charged with one crime—aggravated robbery. R222. And the jury was instructed that to find Defendant guilty of aggravated robbery, it had to find that beyond a

reasonable doubt, that Defendant "as a party to the offense unlawfully and intentionally took or attempted to take personal property in the possession of another, from his person or immediate presence against his will by means of force or fear, with the purpose or intent to deprive the person permanently or temporarily of the personal property; and [] that in the course of committing these acts as a party: used or threatened to use a dangerous weapon; or took or attempted to take an operable motor vehicle." R222 (instruction 35). In short, the instructions informed the jury that it had to find that Defendant "intentionally" committed aggravated robbery to find him guilty as an accomplice. *Id*; R227. Given these instructions, competent counsel could have reasonably concluded that Instruction 40 adequately conveyed the required mental state.

Additionally, competent counsel would not object to Instruction 40 because the other instructions clarify any possible confusion. The jury was given two other accomplice liability instructions in addition to Instruction 40. Instruction 39 (statutory instruction) provided:

> 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.

R226.

Instruction 41 (definition instruction) provided:

> 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 the 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.

R228.

In *State v. Augustine*, Augustine was charged as an accomplice to attempted murder. 2013 UT App 61, ¶10, 298 P.3d 693. The accomplice liability instruction at his trial quoted the accomplice liability statute, UTAH CODE ANN. § 76-2-202 "word-for-word." *Id.* ¶10. A separate instruction informed the jury that to convict Augustine of attempted murder, it had to find that he "intentionally attempted to cause the death of another person." *Id.* This Court held that an instruction that quoted the accomplice liability statute, together with a correct instruction on the mental state element of the

charged crime, correctly instructed the jury on accomplice liability. *See* 2013 UT App 61, ¶¶8-10. This Court explained that the statutory language "clearly indicate[d] that a requirement of accomplice liability is that the accomplice "'act[ ] with the mental state required for the … offense.'" *Id.* ¶10 (quoting UTAH CODE ANN. §76-2-202) (alteration in original). This Court, therefore, held that the language of the accomplice liability statute, coupled with the element instruction on attempted murder, "adequately explained" the "mens rea required for accomplice liability." *Id.*

And in *State v. Clark*, this Court reiterated its holding in *Augustine*. 2014 UT App 56, ¶55, 322 P.3d 761. In *Clark*, Clark was charged with, among other things, as an accomplice to aggravated robbery. *Id*. ¶¶7, 52, 56. The accomplice liability instruction at his trial quoted section 76-2-202 and a separate instruction detailed the aggravated robbery elements, including the required mental state. *Id*. ¶55. This Court held that the instructions "accurately and adequately informed the jury as to accomplice liability when read and evaluated as a whole." *Id*. (quotation and citation omitted).

Like *Augustine* and *Clark*, the jury instructions, in this case, were equally clear. Instruction 39 quoted the accomplice liability statute verbatim, thus, it likewise "clearly indicate[d]" that the jury could not convict Defendant without first finding that he "act[ed] with the mental state

required for the" offenses with which he was charged. *See Augustine*, 2013 UT App 61, ¶10 (quoting UTAH CODE ANN. § 76-2-202). Instructions 40 and 41 then explained accomplice liability further. Instruction 40 explained that Defendant could only be found guilty if the jury believed that he intentionally acted as an accomplice when committing "the offense"—referring the jury back to the aggravated robbery instruction. *See* R227. Instruction 41 repeatedly instructed the jury that Defendant could only be found guilty if he had "the mental state required" to commit aggravated robbery and he acted as an accomplice. *See* R228. And because the aggravated robbery elements instruction explained the requisite mental state, the instructions as a whole adequately explained the mental state required for accomplice liability. *See* R222 (instruction 35); *Augustine*, 2013 UT App 61, ¶10. Thus, Defendant cannot show his counsel was deficient for not objecting to the instruction because when the three accomplice liability instructions are read together, they indicated that accomplice liability requires that the accomplice "'act[ ] with the mental state required for the … offense.'" *Augustine*, 2013 UT App 61, ¶10 (quoting UTAH CODE ANN. § 76-2-202) (alteration in original).

But even if Instruction 40 could have been more "full or accurate," that is not sufficient to show error, let alone deficient performance. *See Lee*, 2014 UT App 4, ¶23. Again, the question here is not whether the instructions were

erroneous, but whether no competent counsel would have approved them. Because the instructions when read together correctly stated the law, it was objectively reasonable for counsel to not object to the instructions as given.

In arguing the contrary, Defendant argues that because Instruction 40 is identical to the erroneous accomplice liability instruction in *State v. Jeffs*, 2010 UT 49, 243 P.3d 1250 and *State v. Grunwald*, 2018 UT App 46, 424 P.3d 990, his counsel performed deficiently by not objecting to its inclusion. Br.Aplt.16-23,24. Defendant's reliance on *Jeffs*, 2010 UT 49, and *Grunwald*, 2018 UT App 46, is misplaced.

In *Jeffs*, Jeffs was convicted of two counts of rape as an accomplice. *Jeffs*, 2010 UT 49, ¶1. On appeal, Jeffs claimed that the accomplice liability instruction at his trial was erroneous. The supreme court agreed, holding that the instruction was inadequate because it "only indicated" that the "mental state attached to the actions of 'solicited, requested, commanded, or encouraged,' not to the underlying criminal conduct of rape." *Id.* ¶42.

In *Grunwald*, Grunwald was convicted of eleven counts as an accomplice, including aggravated murder, attempted aggravated murder, and aggravated robbery. 2018 UT App 46, ¶¶1, 19. On appeal, Grunwald argued that her counsel was ineffective for not objecting to the accomplice liability jury instructions because the instructions allowed her to be convicted

as an accomplice even if she did not possess the mental state of the principal offense. *Id*. ¶¶33-36. This Court agreed with Grunwald that her counsel performed deficiently by not objecting, but held that she had not proven her counsel was ineffective because she did not prove prejudice. *Id*. ¶¶42, 50-58.

In *Jeffs* and *Grunwald*, the accomplice liability instructions only included the erroneous accomplice liability elements instruction. Neither case included the additional accomplice liability statute or definition instructions, as is the case here. *Jeffs* and *Grunwald* are therefore inapplicable. *See* 2010 UT 49, ¶41; 2018 UT App 46, ¶31.

Thus, Defendant has not overcome the strong presumption of reasonableness. Nor has he established "*actual unreasonable representation*." *See Tyler*, 850 P.2d at 1259 (emphasis in original); *accord Strickland*, 466 U.S. at 687–89. This Court should deny Defendant's ineffectiveness claim for this reason alone.

B. Defendant has not proven prejudice.

Defendant argues that there is a reasonable probability that the jury would have acquitted him but for the omitted mental state language in Instruction 40. Br.Aplt.26-30.

To prove prejudice, Defendant must demonstrate "a reasonable probability" that but for counsel's performance, "the result of the proceeding

would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Proof of prejudice "must be a demonstrable reality," not mere speculation. *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993). Errors that have an "isolated" or "trivial effect" on the verdict are not prejudicial. *Strickland*, 466 U.S. at 695-96. Thus, even where a jury instruction is erroneous, the error may nevertheless be harmless in light of the evidence. *See State v. Hutchings*, 2012 UT 50, ¶¶24-28, 285 P.3d 1183.

For essentially the same reasons Defendant fails to show all competent counsel would have objected to Instruction 40, he fails to show prejudice. Instruction 40, whether read alone or with the other instructions, adequately conveyed the correct mental state to the jury.

Additionally, on this record, there is no reasonable likelihood that Defendant would have been acquitted but for counsel's alleged error of including Instruction 40. To prevail, Defendant must show that there is a reasonable likelihood of a more favorable result if the jury had been correctly instructed. *See, e.g., State v. Powell*, 2007 UT 9, ¶¶21-23, 154 P.3d 788. When assessing whether this is so, this Court must "'consider the totality of the evidence'" that was before the jury. *Hutchings*, 2012 UT 50, ¶28 (quoting *Strickland*, 466 U.S. at 695). This Court must also "'review the record facts in

a light most favorable to the jury's verdict.'" *Id.* ¶26 (quoting *State v. Holgate*, 2000 UT 74, ¶2, 10 P.3d 346). When assessing those facts, this Court "can rely on the presumption that the jury disbelieved the evidence in conflict with the jury verdict . . . ." *State v. Gardner*, 2007 UT 70, ¶25, 167 P.3d 1074; *see also Hutchings*, 2012 UT 50, ¶26.

In *Grunwald*, the erroneous jury instruction was not prejudicial because the evidence overwhelmingly demonstrated that Grunwald acted with the required mental state. 2018 UT App 46, ¶¶49-54. Thus, Grunwald had not proven ineffective assistance of counsel because her counsel's deficient performance did not prejudice her. *Id*. ¶75.

State v. Apodaca provides another example of a harmless jury instruction error. *See* 2018 UT App 131, 428 P.3d 99. The jury instructions erroneously allowed the jury to convict Apodaca of aggravated robbery as an accomplice if he acted knowingly instead of intentionally. *Id*.¶76. On appeal, Apodaca argued that his counsel was ineffective for not objecting to the aggravated robbery instruction. *Id.* ¶68. This Court held that the inclusion of the erroneous jury instruction was not prejudicial because the evidence overwhelmingly demonstrated that Apodaca acted with the required intentional mental state. *Id*. ¶¶79-83. Thus, Apodaca's counsel was not

ineffective because he had not proven the prejudice element of *Strickland v. Washington*. *Id*. ¶84.

So too here. The objective evidence overwhelmingly demonstrated that Defendant acted with the require intentional mental state.

At trial, the State presented Victim, Girlfriend, and police testimony, video surveillance of the PT Cruiser flipping over, photos of Defendant leaving the scene, and Defendant's videotaped police interview. R558-60, 637-38; SE 8-11. Both Victim and Girlfriend testified that Defendant looked for jumper cables—perpetuating Rakes's ruse. R559, 637-38. And Victim testified that Defendant also threatened him with a gun. R558, 560. Victim and Girlfriend's accounts never changed. *See* R863.

The jury saw Defendant's police interview where Defendant gave multiple stories—at first denying any knowledge and finally admitting to the plan and his participation. R716-19, 752, 756, 763-775; SE11 (00:34-16:04). Defendant's videotaped police interview corroborated much of Victim and Girlfriend's testimony. During the interview, Defendant admitted that the Victim moved his car nose-to-nose with the PT Cruiser, Victim stood on the passenger side in between the cars, and Rakes chased Victim. SE 11 (8:55-16:04). Defendant admitted that he knew that Rakes wanted Victim's car and planned to isolate Victim by asking him for a jump-start. *Id*. Defendant

admitted that he went along with Rakes's ruse by pretending to look for jumper cables. *Id*. And Defendant admitted that he did not walk away from the robbery. *Id*. Thus, objective evidence showed that Defendant intentionally participated in Rakes's plan.

Despite this, Defendant argues that the jury heard "compelling evidence upon which they could have doubted" Defendant's guilt. Br.Aplt.26. Defendant argues that the evidence did not support that there was a mutual plan to rob Defendant, Defendant wanted to take part in the crime, or Victim was credible. Br.Aplt. 26-28. But the jury heard all of the evidence—including the evidence Defendant points to—and convicted anyway.

Defendant also argues that the jury "could perhaps conclude" that Defendant acted "recklessly." Br.Aplt.28. But the jury was never instructed on the reckless mental state. R205-29. Indeed, the only mental state the jury was instructed on was intentionally. R215. Without an instruction, Defendant cannot show that the jury would have relied on the wrong mental state to convict.

Thus, Defendant has not—and cannot—show but for counsel's alleged error, there was a reasonable likelihood that the jury would have acquitted him.

II.

DEFENDANT HAS NOT PROVEN THAT HIS COUNSEL PERFORMED INEFFECTIVELY BY NOT OBJECTING TO THE JURY RE-WATCHING THE VIDEO OF HIS POLICE INTERVIEW DURING DELIBERATIONS

Defendant argues that the trial court erred when it denied his mistrial motion because he was prejudiced by the jury re-watching the video of his police interview during its deliberations. Br.Aplt.32-39.

The trial court agreed with Defendant that the jury should not have viewed the interview during deliberations, but denied his motion because any error was harmless. R259. The court explained that any error was harmless because the State presented ample evidence to support the jury's guilty verdict. *Id*. The court also explained that Defendant would have benefitted from any undue weight the jury may have given the video, the jury only had access to the video for twenty minutes, and the jury did not have the ability to repeatedly view the testimony during deliberations. R259-60.

Although Defendant did not object before the jury requested the video evidence—and re-watched at least a portion of the interview video, he argues that his mistrial motion sufficed to preserve an objection; alternatively, Defendant argues that his counsel was ineffective for not preventing the videotaped interview from "stay[ing] out of the jury room," in the first instance. Br.Aplt.32-39.

But Defendant's after-the-fact mistrial motion was too late to preserve his claim of error. He can therefore prevail only if he proves both *Strickland* elements: deficient performance and prejudice. 466 U.S. at 697. On this record, Defendant cannot prove either element.

A. Defendant's claim is unpreserved.

Defendant argues that his claim is preserved because the trial court ruled on his mistrial motion. Br.Aplt.37. Defendant is incorrect.

The purpose of the preservation rule is "two-fold." *State v. Larrabee*, 2013 UT 70, ¶15, 321 P.3d 1136. First, preservation affords the trial court "'an opportunity to address the claimed error, and if appropriate, correct it,'" "thereby promoting judicial economy." *Id*. And second, it prevents "defendants from foregoing an objection 'with the strategy of enhancing the defendant's chances of acquittal and then if that strategy fails … claiming on appeal that the court should reverse,' thereby encouraging fairness." *Id*. (alteration in original).

To preserve a claim, a defendant must make a timely objection. *Id*. ¶16. An objection is not timely if it is made after the alleged error has occurred. *Id.* In *Larrabee*, Larrabee's motion to arrest judgment made two months after the trial concluded was not timely. *Id*. Larrabee's after-the-fact motion did not preserve his claims. *Id*. The supreme court explained that allowing

defendants to preserve a claim in an after-the-fact motion like a motion to arrest judgment "directly contradict[s] the purposes of the preservation rule." *Id*. The court explained that an after-the-fact motion is insufficient to preserve an issue because it deprives the trial court of any opportunity to timely address the issue at trial, allowing defendants to strategically forgo objecting without the risk of losing their ability to appeal that issue. *Id*.

In *State v. Fullerton*, 2018 UT 49, ¶50, 428 P.3d 1052, Fullerton's objection was not preserved because he raised it for the first time in a motion to arrest judgment. The supreme court explained that an objection not made during trial is "not timely if it is filed in a post-trial motion." *Id*. ¶49.

Like in *Larrabee* and *Fullerton*, Defendant's objection was untimely. Although Defendant had many opportunities to object to the jury re-watching the video of his police interview during its deliberations, he did not do so.

For example, Defendant did not object to the video being admitted as an exhibit—he instead stipulated to its admission. R735. Nor did Defendant object or bring the video to the court's attention at the close of the State's case when the State informed the court that it had all the evidence. R799. Defendant did not object when the trial court asked both parties to ensure that all the exhibits the jury should have access to during its deliberations

were compiled. R870-71. He did not object when the trial court asked the parties to examine the laptop the jury would presumably use to watch the video evidence, including the video of Defendant's police interview. *Id.* And he did not object when the jury requested the video evidence and the video of his interview was sent back to the jury room. R873.

To preserve his claim, Defendant should have either (1) at the time the State moved to admit the video into evidence, objected; (2) at the time the trial court asked the parties to make sure it had all of the exhibits for the jury to access during its deliberations, moved to exclude the video under Rule 17 (k), Utah Rules of Criminal Procedure; or (3) before the jury was excused to deliberate, moved to exclude the video under Rule 17 (k). Rule 17 (k) allows the jury to "take with them …all exhibits which have been received as evidence except exhibits that should not, in the opinion of the court, be in possession of the jury." But Defendant did none of this.

Defendant's after-the-fact mistrial motion deprived the trial court of the opportunity to address the issue during trial, before the video was given

to the jury during their deliberations. Thus, his objection was untimely. *See Larrabee*, 2018 UT 70, ¶¶15-16. Defendant's claim is therefore not preserved.[2]

B. Defendant has not proven prejudice.

Because Defendant's claim is not preserved, he must prove that his counsel was ineffective for not preventing the jury from re-watching the video of his police interview during their deliberations. Br.Aplt.37-38.

As explained, to prove ineffective assistance of counsel, Defendant carries the heavy burden of proving that counsel performed deficiently. *Strickland*, 466 U.S. at 687–88. He must also affirmatively prove "*actual prejudice*" resulting from counsel's deficient performance. *Tyler*, 850 P.2d at 1259.And where, as here, "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 670.

Defendant cannot prove that he was prejudiced by the jury re-watching the video of his police interview because there was no reasonable likelihood

[2] Even if preserved, however, Defendant's claim still fails. First, Defendant affirmatively waived any objection, thus he is foreclosed from "taking advantage of an error committed at trial" because he "led the trial court into committing the error." *State v. Hamilton*, 2003 UT 22, ¶54, 70 P.3d 111 (defendant cannot take advantage of an error when he led the trial court into committing the error). In any event, as explained below, Defendant's claim fails because he cannot show harm. *See State v. Butterfield*, 2001 UT 59, ¶¶46-47, 27 P.3d 1133 (defendant must show "that there is a substantial likelihood that the jury would have found him not guilty").

that the jury would have acquitted him if it had not re-watched the video. *See Strickland*, 466 U.S. at 695-96. As shown in Point I, ample evidence supported Defendant's intention to aid Rakes in the commission of an aggravated robbery. *See Strickland*, 466 U.S. at 695 (in assessing whether a defendant has carried his burden, a reviewing court "must consider the totality of the evidence before the judge or jury.").

At trial, the State presented Victim's and Girlfriend's testimony, photos of Defendant leaving the scene, and Defendant's videotaped police interview. R558-560, 637-38; SE 8-11. Both Victim and Girlfriend testified that Defendant's role in the robbery was to perpetuate the ruse by searching for jumper cables. R558, 637-38. Victim testified that Defendant threatened him with his gun. R558-59. Victim and Girlfriend's accounts never changed. R863. The jury watched Defendant's police interview during trial, including his multiple versions of events and his last story where he admitted looking for jumper cables fully knowing that he was aiding Rakes in the carjacking. SE 11 (2:31-16:04).

Despite this evidence, Defendant argues that he was prejudiced by the jury re-watching the video of his police interivew because (1) the multiple versions of events he gave during the interview "could" have caused the jury to question his credibility; (2) the jury was "likely" exposed to video content

it had not seen at trial including Defendant in handcuffs; (3) the jury "likely" gave undue weight to the video; and (4) the fact the jury returned a verdict soon after requesting the video "suggests" that re-watching it influenced the jury verdict. Br.Aplt.35-36.

Defendant's claim fails because it is speculative. "[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *Fernandez*, 870 P.2d at 877. Speculation "cannot substitute for proof of prejudice." *State v. Arguelles*, 921 P.2d 439, 441 (Utah 1996). Defendant's argument rests entirely on conjecture. He provides no evidence that re-watching the videotape influenced the jury at all. Without such supporting evidence and analysis, Defendant has not—and cannot—prove prejudice. *See Tyler*, 850 P.2d at 1259 (Defendant "has the difficult burden of showing…*actual prejudice*") (emphasis in original).

Regardless, Defendant argues that re-watching the video may have caused the jury to question his credibility because the video showed him telling multiple stories. Br.Aplt.33. But the jury already saw this evidence during trial. Thus, re-watching it was cumulative and unlikely to sway the jury. *See State v. Thomas*, 777 P.2d 445, 450 (Utah 1989) (in hearsay context, cumulative statements are harmless); *State v. Cruz*, 2016 UT App 234, ¶49, 387 P.3d 618 (no prejudice where jury watched CJC video during deliberations).

Defendant also argues that he was prejudiced because the jury may have watched footage not presented during trial of the detective handcuffing him and telling him he would "probably go to jail for robbery." Br.Aplt.34. As a threshold matter, there is no record evidence that the jury saw this part of the video. *See Arguelles*, 921 P.2d at, 441 (speculation is not proof of prejudice).

Relying on *Lucas v. State*, 791 S.W. 2d 35, 55-56 (Tex. Crim. App. 1989), Defendant argues that the jury seeing him on video in handcuffs prejudiced him. But Defendant's reliance is misplaced. In *Lucas*, the court held that no prejudice resulted when the jury watched a video of Lucas handcuffed at the crime scene. 791 S.W. 2d at 55-56. The court explained that the jury viewing Lucas handcuffed on video did not contribute to Lucas's conviction because Lucas was not handcuffed at trial, and the jury was instructed on the presumption of innocence. *Id*.

Like *Lucas*, if the jury saw Defendant on video handcuffed inside a police station, Defendant was not prejudiced. Defendant was not in restraints during trial, and the jury was instructed on the presumption of innocence. R205. Moreover, it is common knowledge that individuals who are under arrest are typically handcuffed. *See, e.g.,* Arrest, https://en.wikipedia.org/wiki/Arrest last visited October 29, 2018 (photos

of individuals under arrest in handcuffs). Thus, Defendant cannot show prejudice.

The detective's statement to Defendant that he "would probably go to jail for robbery" does not change this calculus. Br.Aplt.34. If the jury saw this part of the video, there is not a reasonable likelihood that Defendant would have been acquitted because Defendant was charged with and on trial for aggravated robbery. The statement did not provide the jury with any information that they did not already know.

Defendant argues that it is "likely" that the jury gave undue weight to the video and the record "suggests" that re-watching it influenced the verdict because the jury returned a verdict soon after requesting the video. Br.Aplt.35-36. At bottom, Defendant asks this Court to intrude into the jury's deliberative process by speculating on how the jury perceived and weighed the evidence. Such intrusion is prohibited. *Jessop v. Hardman*, 2014 UT App 28, ¶26, 319 P.3d 790 (citation omitted); *see* Utah R. Evid. 606(b) (prohibiting jurors from testifying or giving statement "about any statement made or incident that occurred during the jury's deliberations.").

Jury "decision-making is designed to be a black box: the inputs (evidence and argument) are carefully regulated by law, and the output (the verdict) is publicly announced, but the inner workings and deliberation of

the jury are deliberately insulated from subsequent review." *Jessop*, 2014 UT App 28, ¶26 (citation omitted). As this Court explained, the rule protecting jury deliberations "insulates …the jury from subsequent second-guessing by the judiciary." *Jessop*, 2014 UT App 28, ¶26. This Court recognized that this "approach may seem to offend the search for perfect justice," but explained that if "what went on in the jury room were judicially reviewable for reasonableness or fairness, trials would no longer truly be by jury, as the Constitution commands," because "[f]inal authority would be exercised by whomever is empowered to decide whether the jury's decision was reasonable enough, or based on proper considerations." *Id*. ¶27 (quotation omitted).

Because Defendant asks this Court to speculate on how the jury weighed the evidence, his claim fails.

On this record, Defendant has not proven prejudice. *See Tyler*, 850 P.2d at 1259 (defendant must show "*actual prejudice*" to prevail) (citation omitted) (emphasis in original). This, his ineffectiveness claim fails.

C. Defendant has not proven deficient performance.

Defendant argues his counsel performed deficiently because he did not have a strategic reason for allowing the jury to re-watch his police interview during its deliberations. Br.Aplt.39. In support, Defendant argues that trial

counsel admitted that he did not have a strategic reason for the exhibit to go to the jury room. *Id*. But Defendant's reliance on strategy alone is misplaced.

The United States Supreme Court has made clear that "the relevant question, in a deficient performance analysis "is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 U.S. at 481. A defendant who "persuad[es] the court that there was no conceivable tactical basis for counsel's actions" has merely rebutted the "strong presumption" that counsel rendered adequate assistance. *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162; *see Strickland*, 466 U.S. at 689. But rebutting the presumption of reasonableness does not establish that counsel was in fact objectively unreasonable—the standard announced by the Supreme Court. *See Strickland*, 466 U.S. at 687–89 ("defendant *must show* that counsel's representation fell below an objective standard of reasonableness") (emphasis added).

Thus, even if no definitive "strategy" can be identified, Defendant cannot prevail unless he shows that counsel's performance was objectively unreasonable. *See Flores-Ortega*, 528 U.S. at 479 (Sixth Amendment "imposes one general requirement: that counsel make objectively reasonable choices").

Counsel may perform reasonably even when his decision or action proves to be erroneous. *Strickland* asks only "whether an attorney's

representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Richter*, 562 U.S. 86, 105 (quoting *Strickland*, 466 U.S. at 690). The Sixth Amendment requires that counsel's representation "be only objectively reasonable, not flawless or to the highest degree of skill." *Dows v. Wood*, 211 F.3d 480,487 (9th Cir.2000). Thus, counsel does not necessarily perform deficiently even if he makes "minor mistakes" and appears "momentarily confused during trial. *Id*. 487. Counsel's performance is deficient under *Strickland*, only when "no competent attorney" would have acted similarly. *Premo*, 562 U.S. at 124; *Harvey*, 629 F.3d at 1239 (counsel is deficient only when his "error is so egregious that no reasonably competent attorney would have acted similarly").

Defendant has not shown that no competent attorney would have sent his police interview back to the jury room. There "are countless ways to provide effective assistance of counsel in any given case." *Strickland*, 466 U.S. at 689. Although trial counsel here determined that the jury should not watch the video during deliberations, another competent attorney may come to a different decision. *See id*. ("Even the best criminal defense attorneys would not defend a particular client in the same way."). As the trial court explained, "it was Defendant who would have benefitted from any undue weight the

jury might have placed on [the video] based on repeated viewings." R259. Indeed, the video was the only evidence of Defendant's story that he tried to dissuade Rakes from committing the carjacking, that the carjacking had not been the result of mutual plan, and that Defendant did not have a gun. SE 11 (9:10-16:04). Moreover, the video captured Defendant's cooperation, remorse, sincerity, and body language. *Id*.

Given these circumstances, Defendant cannot show that "no competent attorney" would have acted similarly, or that no "competent attorney" would have allowed the jury to re-watch the video during its deliberations. *See Premo*, 562 U.S. at 124. Thus, Defendant cannot prove deficient performance.

III.

CUMULATIVE ERROR DOES NOT JUSTIFY OVERTURNING THE JURY VERDICT

Defendant finally claims that this Court should reverse on cumulative error, if nothing else. Br.Aplt.39-40. An appellate court reverses on cumulative error only if errors are so pervasive and prejudicial that they "undermine[] [this Court's] confidence" in the essential fairness of the trial. *State v. Maestas*, 2012 UT 46, ¶363, 299 P.3d 892. Because there was no error, there is no cumulative error. And even if there were any error, its impact was de minimis, and would not have been collectively prejudicial.

CONCLUSION

Summary of State's position and statement of specific relief sought.

Respectfully submitted on November 15, 2018.

SEAN D. REYES
Utah Attorney General

/s/ Lindsey Wheeler
LINDSEY WHEELER
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 8,954 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

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

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

/s/ Lindsey Wheeler
LINDSEY WHEELER
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on November 15, 2018, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

Alexandra McCallum
Salt Lake Legal Defender Assoc.
424 East 500 South
Suite 300
Salt Lake City, Utah 84111
appeals@sllda.com

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

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

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

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

/s/ Melanie Kendrick

Addenda

Addendum A

Utah R. Crim. P. 17. The Trial

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

(1) misdemeanor cases when defendant is in custody;

(2) felony cases when defendant is in custody;

(3) felony cases when defendant is on bail or recognizance; and

(4) misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

(g) After the jury has been impaneled and sworn, the trial shall proceed in the following order:

(1) The charge shall be read and the plea of the defendant stated;

(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;
(3) The prosecution shall offer evidence in support of the charge;
(4) When the prosecution has rested, the defense may present its case;
(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;
(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and
(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.
(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.
(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.
(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(j) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other

material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

(k) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(l) Upon retiring for deliberation, 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, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(m) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(n) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury

brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(o) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(p) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Utah Code Annotated § 76-6-301

(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.

Utah Code Annotated § 76-6-302

(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.

Utah Code Annotated § 76-2-202

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.

Addendum B

INSTRUCTION NO. 28

The intent with which an act is done denotes a state of mind and connotes a purpose in so acting. Intent, being a state of mind, is seldom susceptible of proof by direct and positive evidence and may ordinarily be inferred from acts, conduct, statements and circumstances.

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. 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.