

**IN THE UTAH COURT OF APPEALS**

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THE STATE OF UTAH,  
*Plaintiff/Appellee,*

v.

MATTHEW GORDON EYRE  
*Defendant/Appellant.*

Appellant is incarcerated.

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**REPLY BRIEF OF APPELLANT**

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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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INTRODUCTION

As required by rule 24(b), Utah Rules of Appellate Procedure, this reply brief is “limited to responding to the facts and arguments raised in the appellee’s ... principal brief.” Specifically, it responds to the State’s claim that Eyre failed to prove deficient performance. Eyre’s opening brief adequately addresses the State’s remaining arguments. This reply does not restate arguments from the opening brief or address matters that do not merit reply.

ARGUMENT

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

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.” That is,

he needed to act with the intent or desire to cause aggravated robbery. Instruction 40 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.” And the instructions as a whole did not cure this deficiency.

The State disagrees, arguing that Eyre “has not proven deficient performance.” SB at p.25. It argues that “read together” the instructions adequately instructed the jury, contending that Eyre’s case is similar to *State v. Augustine*, 2013 UT App 61, and distinguishable from *State v. Grunwald*, 2018 UT App 46. SB at pp. 20-25. Eyre addresses these claims.

The State likens this case to *Augustine*, 2013 UT App 61, and *State v. Clark*, 2014 UT App 56. *See* SB at pp. 21-23. It argues that—as in those cases—the elements instruction on the underlying crime (aggravated robbery) along with the abstract statutory definition of accomplice liability adequately instructed the jury on accomplice liability’s mens rea. The State is incorrect.

Eyre distinguishes this case from *Clark* in the opening brief at pages 22-23. For the reasons asserted in opening, *Clark* is distinguishable from Eyre’s case. *See* OB at pp. 22-23. *Augustine* is similarly distinguishable.

In *Augustine* this Court held that the instructions as a whole adequately instructed the jury on accomplice liability. 2013 UT App 61. In that case, it appears that only one instruction set forth the principles of accomplice liability. *See id.* ¶10. That instruction “quot[ed] the relevant statutory provision word-for-

word.” *Id.* Then, in another instruction, the court outlined the elements of the underlying offense of murder. *Id.* This Court reasoned that “read[] . . . together,” the elements instruction and the statutory definition instruction “adequately explained” the mens rea required for accomplice liability. *Id.*

But unlike Eyre’s case, *Augustine* did not present a situation where the jury was given an incorrect instruction that *conflicted with* the statutory definition of accomplice liability. *Compare id.*, with R.226-228; OB at pp. 16-23. As explained in opening, Eyre’s jury was not given a way to reconcile the statutory definition with Instruction 40, which—like the erroneous instruction in *State v. Jeffs*, 2010 UT 49, ¶42—failed to connect a mens rea requirement to the underlying crime. *See* OB at pp. 21-23. Indeed, “[l]anguage that merely contradicts and does not explain a[n] [] infirm instruction will not suffice to absolve the infirmity.” *Francis v. Franklin*, 471 U.S. 307, 322 (1985); *see also State v. Campos*, 2013 UT App 213, ¶43 (finding error in a verdict form that “directly contradicted” a correct instruction on imperfect self-defense). Thus, unlike the instructions in *Augustine*, the conflicting instructions in this case failed to adequately instruct the jury on accomplice liability.

Additionally, the State attempts to distinguish this case from *Jeffs* and *Grunwald*, arguing that in those cases, “the accomplice liability instructions only included the erroneous accomplice liability elements instruction. Neither case included the additional accomplice liability statutes or definition instructions.” SB at p.25.

Contrary to the State’s suggestion, the instructions given in *Grunwald* and *Jeffs* included an instruction setting forth the statutory definition of accomplice liability—much like the instruction given here. See Briefing (OB at pp. 50-54, SB at Addendum B), *State v. Grunwald*, Case No. 20160079-CA; Jury Instructions (No. 28), *State v. Grunwald*, Trial Ct. Case No. 141400517; Briefing (SB at Addendum B), *State v. Jeffs*, Case No. 20080408-SC; Jury Instructions (No. 14-C), *State v. Jeffs*, Trial Ct. Case No. 061500526.<sup>1</sup> While the *Grunwald* and *Jeffs* courts did not mention the statutory definition instruction in their decisions, this Court may nevertheless take judicial notice that such an instruction was given in those cases. Specifically, this Court may take judicial notice of the jury instructions and appellate briefs filed in *Grunwald* and *Jeffs*, which demonstrate that the trial courts gave instructions setting forth the statutory definition of accomplice liability. See Briefing (OB at pp. 50-54, SB at Addendum B), *State v. Grunwald*, Case No. 20160079-CA; Jury Instructions (No. 28), *State v. Grunwald*, Trial Ct. Case No. 141400517; Briefing (SB at Addendum B), *State v. Jeffs*, Case No. 20080408-SC; Jury Instructions (No. 14-C), *State v. Jeffs*, Trial Ct. Case No. 061500526; Addendum A-B.

An appellate court may consider evidence and allegations of which it takes judicial notice, even if it is not part of the appellate record. *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶31 n.8; see also Utah R. Evid. 201 (providing for judicial

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<sup>1</sup> The relevant jury instructions from *Grunwald* and *Jeffs* are attached at Addendum A-B.



notice of certain adjudicative facts). Judicial “notice may be taken of the record of another case,” including whether a filing has been made. *Carter v. Carter*, 563 P.2d 177, 178 (Utah 1977); *see also State v. Cooper*, 2011 UT App 412, ¶15 n.8 (suggesting that Rule 201 of the Utah Rules of Evidence allows courts “to take judicial notice of whether a filing has been made in another case”). “Likewise, a Court can take judicial notice that court filings contained certain allegations.” *Cooper*, 2011 UT App 412, ¶15 n.8 (quoting Federal Rules of Evidence Manual § 201.02 (Matthew Bender & Co. 2010)).

Furthermore, appellate courts may take judicial notice of public records. *Thayn*, 2003 UT 50, ¶31 n.8; *Lehi Irr. Co. v. Jones*, 202 P.2d 892, 895 (Utah 1949); *McGarry v. Thompson*, 201 P.2d 288, 291 (Utah 1948); *see also BMBT, LLC v. Miller*, 2014 UT App 64, ¶¶6-7 (holding that the trial court could take judicial notice of “the Note as a public record”). In Utah, court records are presumptively public records. Utah Code Jud. Admin. R. 4-202.02(1). Moreover, “[p]ublic court records include but are not limited to ... appellate filings, including briefs.” Utah Code Jud. Admin. R. 4-202.02(2)(C).

Here, it follows that this Court may take judicial notice of the appellate briefs in *Grunwald* and *Jeffer*s, which contemplate that the trial courts gave the statutory definition of accomplice liability. *See* Briefing (OB at pp. 50-54, SB at Addendum B), *State v. Grunwald*, Case No. 20160079-CA; Briefing (SB at Addendum B), *State v. Jeffer*s, Case No. 20080408-SC. It may also take judicial notice of the *Grunwald* and *Jeffer*s jury instructions, which constitute court filings

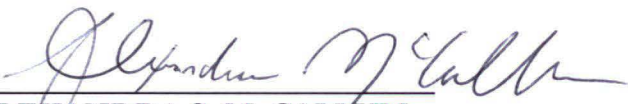
and public records. See Jury Instructions (No. 28), *State v. Grunwald*, Trial Ct. Case No. 141400517; Jury Instructions (No. 14-C), *State v. Jeffs*, Trial Ct. Case No. 061500526; Addendum A-B; see also Utah Code Jud. Admin. R. 4-202.02(2)(C); *BMBT, LLC*, 2014 UT App 64, ¶¶6-7; 2011 UT App 412, ¶15 n.8; *Thayn*, 2003 UT 50, ¶31 n.8; *Carter*, 563 P.2d at 178; *Cooper*; *Lehi Irr. Co.*, 202 P.2d at 895; *McGarry*, 201 P.2d at 291.

The *Grunwald* and *Jeffs* briefs and instructions demonstrate that the statutory definition of accomplice liability was given to the juries in those cases. Thus, as in *Grunwald* and *Jeffs*, the statutory definition—combined with the incorrect elements instruction (Instruction 40)—failed to adequately instruct Eyre’s jury. And as discussed in opening, counsel performed deficiently by failing to object to erroneous instructions on accomplice liability. *Grunwald*, 2018 UT App 46, ¶42; see also OB at pp.16-25.

#### CONCLUSION

For the reasons here and in opening, Eyre asks this Court to reverse his aggravated robbery conviction and remand for a new trial.


SUBMITTED this 15<sup>th</sup> day of January 2019.

  
ALEXANDRA S. McCALLUM  
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

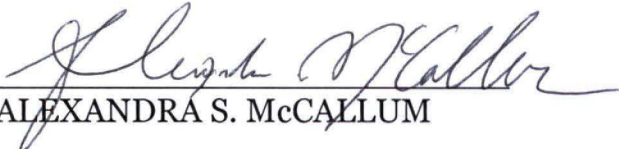
In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 13,355 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), 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, 5<sup>th</sup> Floor, Salt Lake City, Utah 84114; and two copies to the Utah Attorney General's Office, 160 East 300 South, 6<sup>th</sup> Floor, PO Box 140854, Salt Lake City, Utah 84114, this 15<sup>th</sup> day of January 2019. A searchable pdf will be emailed to the Utah Court of Appeals at [courtofappeals@utcourts.gov](mailto:courtofappeals@utcourts.gov) and to the Utah Attorney General's Office at [criminalappeals@agutah.gov](mailto:criminalappeals@agutah.gov) within 14 days, pursuant to Utah Supreme Court Standing Order No. 8.

  
ALEXANDRA S. McCALLUM

DELIVERED this \_\_\_\_\_ day of January 2019.

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## ADDENDUM A



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IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR

WASHINGTON COUNTY, STATE OF UTAH

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STATE OF UTAH, )

Plaintiff, )

vs. )

WARREN STEED JEFFS, )

Defendant. )

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JURY INSTRUCTION

Case No. 061500526

**FILED**  
SEP 21 2007  
FIFTH DISTRICT COURT  
WASHINGTON COUNTY

1. JURY INSTRUCTIONS

These jury instructions are given to assist you in your deliberations in this case. The order in which these instructions are given has no significance as to their relative importance, and you should not single out any one and ignore the rest. Consider the instructions as a whole.

These instructions are intended to be applicable to either gender. Any use of the male pronouns (he, him, his) should be read to include the appropriate female pronoun if needed.

2. ROLE OF JUDGE AND JURY

This is a criminal trial. In every criminal trial there is a disagreement about whether someone has committed a crime. You must decide that question in the case.

My duty as judge requires me to instruct you concerning the law which applies to this case. It is your duty as jurors to follow the law as I shall state it to you.

Your function is to decide the issues of fact presented by the charges in the Information and the defendant's plea of "not guilty" thereto. You should not be influenced by pity for the defendant or by prejudice against the defendant. The fact that an Information has been filed or that the defendant has been brought before the court to stand trial cannot be considered by you as any evidence of guilt.

You are to be governed only by the evidence introduced in this trial and the law as I state it to you. You are expected to act conscientiously and calmly in weighing the evidence and applying the law applicable to this case to reach a just verdict, regardless of what the consequences of the verdict may be.

INSTRUCTION NO. 14-C

**CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER**

Every person, acting with the mental state required for the commission of rape who directly commits the rape, who solicits, requests, commands, encourages, or intentionally aids another person to engage in sexual intercourse without consent shall be criminally liable as a party for the rape.



## ADDENDUM B



**FILED**

MAY 07 2015

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

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IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH

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STATE OF UTAH, : **JURY INSTRUCTIONS**  
Plaintiff, :  
vs. : Case Number: 141400517  
MEAGAN DAKOTA GRUNWALD, : Judge Darold J. McDade  
Defendant. :

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MEMBERS OF THE JURY:

INSTRUCTION NO. 1

You have two main duties as jurors.

The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine.

The second duty is to take the law I give you in the instructions, apply it to the facts, and decide if the prosecution has proved the defendant guilty beyond a reasonable doubt.

You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before trial, any instructions I may have given you during the trial, and these instructions. All the instructions are important, and you should consider them as a whole. The order in which the instructions are

INSTRUCTION NO. 28

A person can commit a crime as a “party.” Under Utah law, 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 as if that person was the actual actor.

In other words, a person can commit a criminal offense even though that person did not personally do any or all of the acts that make up the offense. If you find beyond a reasonable doubt that 1) the defendant had the mental state required to commit an offense, and 2) the defendant solicited, requested, encouraged, or intentionally aided another to commit an offense, and 3) the offense was committed, then you can find the defendant guilty of that offense.

The defendant is charged as a “party” in a number of the counts in this case.