Case No. 20170498-CA

In the Utah Court of Appeals

STATE OF UTAH,
Plaintiff/Appellee,

v.

REYNALDO THOMAS MARTINEZ,
Defendant/Appellant.

On appeal from the Third Judicial District Court, Salt Lake County, Honorable Paul B. Parker presiding
Defendant is incarcerated

BRIEF OF APPELLANT

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INTRODUCTION

A jury convicted Defendant Reynaldo Thomas Martinez of aggravated robbery and failure to stop at injury accident. *See* Utah Code Ann. §§ 76-6-302, 41-6a-401.3(3)(a). [R.381]. He was acquitted of domestic violence assault. *See id.* § 76-5-102. [R.381]. Defendant now appeals his convictions.

STATEMENT OF THE ISSUES

1. Did defense counsel render ineffective assistance of counsel when they failed to exclude unreliable eyewitness identification evidence?
2. Did defense counsel render ineffective assistance of counsel when they failed to request a *Long* instruction?
3. Did defense counsel render ineffective assistance of counsel when they failed to object to the admission of hearsay statements that ran directly afoul of the Confrontation Clause?
3. Did defense counsel's several missteps throughout trial, combined with plain error by the district court, warrant reversal under the cumulative-error doctrine?

All of the issues raised on appeal involve claims of ineffective assistance of counsel. As these claims are raised for the first time on appeal, they were not preserved below, and no statement of preservation is provided. *Cf.* Utah R. App. P.

24(a)(5)(B). Instead, each of these claims operate within an exception to this court's preservation requirement:

> Ineffective assistance of counsel is thought of as an exception to preservation because a claim for ineffective assistance does not mature until after counsel makes an error. Thus, while it is not a typical exception to preservation, it allows criminal defendants to attack their counsel's failure to effectively raise an issue below that would have resulted in a different outcome. Such a claim can be brought in a post-trial motion or on direct appeal.

State v. Johnson, 2017 UT 76, ¶ 23, 416 P.3d 443 (citation omitted). The standard of review applicable to all of these claims is as follows:

> An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. To prove ineffective assistance, [Defendant] must show (1) that counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment and (2) that counsel's deficient performance was prejudicial—i.e., that it affected the outcome of the case.

State v. Christensen, 2014 UT App 166, ¶ 10, 331 P.3d 1128 (cleaned up).

The other issue raised on appeal also involves plain errors committed by the district court. Plain error is also an exception to preservation requirement.

> The plain error exception enables the appellate court to balance the need for procedural regularity with the demands of fairness. At bottom, the plain error rule's purpose is to permit us to avoid injustice. To demonstrate plain error, a defendant must establish that (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

State v. Holgate, 2000 UT 74, ¶ 13, 10 P.3d 346 (cleaned up).

STATEMENT OF THE CASE

The State charged Defendant with three crimes for conduct alleged to have occurred during three distinct episodes one Saturday morning. First, a witness reported seeing a man assault a young woman. Second, a different witness reported that a masked man demanded his phone and wallet while aiming a gun at his head. Third, yet another individual was involved in a car accident, and the driver of the other car exited his vehicle and fled the scene. For the second and third episodes, the jury convicted Defendant of aggravated robbery and failure to stop at injury accident. The jury acquitted Defendant of assault.

STATEMENT OF FACTS

On appeal from a jury trial, this court views the facts in a light most favorable to the verdict. *See State v. Liti*, 2015 UT App 186, ¶ 3 n.2, 355 P.3d 1078. Given that Defendant was acquitted on one count and convicted on two, Defendant attempts to convey the facts in accordance with those separate verdicts. He also presents conflicting evidence as necessary to develop the issues on appeal. *See State v. Bluff*, 2002 UT 66, ¶ 2, 52 P.3d 1210.

Prior to trial, counsel had not firmly pre-determined the admissibility of such evidence with the trial court, the gatekeeper of any material presented to the jury. Nor had counsel retained an expert witness to testify about the pitfalls of eyewitness identification. At the trial itself, counsel failed to require a *Long* instruction.

The Events of January 30, 2016

On a cold and snowy morning, Mindy Sipes heard a car horn and saw a girl trying to get out of a car four houses down from where Sipes stood, on her porch. [R.597–99]. She then saw a man run out of a nearby house, grab the girl, and start assaulting her. [R.599]. The man got in the car, and Sipes decided to follow him while she talked to 911. [R.602, 605]. She watched as he pulled straight through an intersection that led out of the neighborhood, causing an accident. [R.608]. The man jumped out of the car and ran away from the accident. [R.609]. She continued following him in her car, ending up at a Harmon's grocery store. [R.609]. He went into the grocery store and she was still waiting in the parking lot when he came back out. [R.611].

Mindy Sipes was shown a number of photographs at trial, which she claimed depicted the man she saw enter Harmon's. [R.616]. She could not testify when the picture was taken. [R.617]. She was not asked—by either the State or defense counsel—whether she had ever seen those photographs before. [R.616–18]. Trial counsel objected, "I don't think it's reliable." [R.618–19]. The court overruled the objection and admitted the photographs into evidence. [R.619]. The exhibits admitted under this line of testimony and over the "[s]ame objection" were Exhibits 34 through 47. [R.616–20]. Sipes identified Reynaldo Martinez, who was the only

non-attorney person seated at counsel's table as the man who entered the Harmon's that day. [R.621].

While waiting in the Harmon's parking lot, Mindy Sipes noticed another truck that had followed the man and was waiting in the parking lot. [R.610–11]. The driver of that truck was Lee Clay. R.646–652. Clay had been driving behind the second car involved in the car accident earlier that morning. [R.647–48]. A male left the scene of the accident and walked quickly into Harmon's. [R.650–51]. Clay did not actually see anyone exit the car but saw the driver side door pop open. [R.664]. Clay followed the male into the Harmon's parking lot, where he eventually made contact with Sipes. [R.651–52]. It was snowing pretty heavily by the time the driver went into Harmon's. [R.664]. Clay was shown Exhibits 34 through 47 and testified that they depicted the "person that caused the accident in front of" him. [R.655].

Sometime before the car accident, David Barnes was outside snowblowing. [R.684, 669]. A young lady came running around the corner of a house with no coat on. [R.671]. The woman asked if she could borrow his cell phone and make one call. [R.672]. Then, a car came around the corner from the same the direction the woman had appeared from. [R.674]. The driver yelled multiple times at the woman to get in the car. [R.676].

David Barnes used his phone to take a picture of the car. [R.676]. As soon as he did, the driver came out of the car toward Barnes, holding a gun. [R.676–77].

The gun was a western-style, long-barreled, six-inch revolver. [R.677–78]. The driver demanded Barnes's phone, which Barnes dropped in the snow. [R.679]. After bending down to retrieve the phone, the driver demanded, "I want your wallet too because I want to know where you live," and took the wallet. [R.680]. Pre-trial proceedings did not address the stress or circumstances at issue when the identification was made.

Around the time the driver took David Barnes's wallet, a neighbor—later identified as Troy Martinez, who was deceased by the time of trial—stuck his head outside his door and told the driver that the police were on their way. [R.682, 1038]. The driver got back in his car, which had tinted windows (plus, the snow prevented Barnes from seeing if anyone else was inside the car). [R.683]. Barnes then observed the car get T-boned by a female driver, Annie Vu. [R.684, 770–72].

Vu was driving down a snowy road when a car on a side street ran a stop sign. [R.772]. She had no time to stop and T-boned the other car. [R.772]. Her airbag deployed, and by the time it started to deflate, she noticed the driver of the other car was getting out of his vehicle, then started running up the street. [R.773]. A female approached Vu's car from the neighborhood and opened the passenger door. [R.774]. She asked Vu "where did he go" and Vu "just told her he ran up the street." [R.774]. Vu was "pretty sure" the person she saw running up the street was the same person who exited the other vehicle. [R.788].

A Raiders hat was found outside the other vehicle, on the ground. [R.821, 823]. Officer Hagemann, who collected the hat, did not place it in an evidence bag because he did not have one on the scene large enough to fit the hat. [R.823, 826]. A DNA expert matched a DNA sample from the hit with the profile obtained from a sample of Defendant's DNA. [R.1066, 1081–82].

Officer Hagemann also found a driver license on the ground by the driver side of the car. [R.824]. It belonged to Stevie Manzanarez, who was the registered owner of the vehicle. [R.824–25].

Jennifer Fish, a forensic investigator, testified that she was asked to process the vehicle Vu T-boned. [R.801]. Fish took DNA samples or swabs from the driver's side handle and gearshift. [R.811–12]. She did not perform an analysis of these samples; she is not a DNA analyst. R.812. She found latent prints on the interior door lock on the rear passenger door, which matched Defendant's fingerprints. [R.802, 804]. There were also latent prints found on the review mirror of the car, but there was not enough data from those prints to perform a comparison. [R.815]. Fish also found latent prints on the front passenger interior door lock, which matched Erika Vigil's prints. [R.808–09].

Erika Vigil was the woman David Barnes and Annie Vu interacted with the morning of the crash. [*Compare* R.673 (where Barnes says Exhibits 12 and 13 depict the woman he saw that morning), *and* R.774–75 (where Vu "believe[d], yes" that

the woman in Exhibits 12 and 13 was the woman who came to her car), *with* R.696 (where Officer Denning identifies the woman in Exhibits 12 and 13 as Erika Vigil)].

Officer Denning interviewed Vigil, who informed him that Defendant had not committed the crimes charged; instead it was someone she knew named Joey. [R.696, 700, 755, 767]. Officer Denning passed this name on to Detective Jeppson. [R.702–03 (Denning says he passed information on to the initial officer); R.838 (Jeppson says she was assigned as the initial officer on this case)]. Vigil was also interviewed by Detectives Jeppson and Hill. [R.841, 951]. Vigil told Detective Hill that Defendant was in the car the morning of the car accident but that he "wasn't the one that did it." [R.951]. She showed Detective Hill a picture of Joey from Facebook. [R.1028]. However, Detective Hill made it clear that he did not believe the story about Joey and did not preserve a screenshot of Joey's Facebook profile. [R.1027, 1029].

"An Identification Case"

After the close of evidence, the district court observed, "This is an identification case, as everyone seems to have acknowledged and argued." [R.1111]. Counsel did little to challenge the scope of the eyewitness identification or obtain a trial court gatekeeping ruling before the evidence was presented to the jury. No defense expert witness of eyewitness identification testified. The flaws and

deficiencies of the identification policies and procedures had not been explained to the jury prior to them receiving the evidence.

Mindy Sipes testified that the man she saw on January 30 had short hair, a tattoo or something on the left side of his face, was 5'4" or 5'5", in his mid-twenties, wearing black baggy sweats, a white t-shirt, and a gray hoodie. [R.601]. The closest she was to him was when he drove past. [R.604]. At the time he drove past, she was dialing 911 and running to the garage to get her car. [R.605]. On cross-examination, Sipes admitted that she did not include in her written report that she saw something on the driver's face. [R.637]. She claimed that she remembered certain information right before trial that she had never said before. [R.637–38]. But counsel did not seek a continuance of the trial based on Ms. Sipes' newfound recollection, which was completely different than her memory right then and there at the time of the incident. No defense witness testified about the unreliable nature of a witness' subsequent recollection much later after the fact.

Mindy Sipes was never shown a photo lineup because she was not sure she would recognize him again. [R.1014]. David Barnes, also, was not shown a photo lineup. [R.1015].

Lee Clay testified that he had been shown a photo lineup of possible suspects and was unable to pick out an individual as the one involved in the car accident.

[R.658]. He also said that he could "[p]robably not" recognize today the male that he followed to Harmon's, unless he was wearing the same clothes. [R.658].

David Barnes testified that the driver of the car, who pointed a gun at him and took his phone and wallet, was wearing a maroon bandanna—or it could have been brown—as a "mask," a Raiders hat, and a hoodie. [R.677, 685, 692]. He was slender build and medium height. [R.685]. Barnes believed the driver's ethnicity to be Hispanic. [R.685]. These observations were made while a gun was pointed at his head. [R.679]. It was gray outside and snowing "fairly good." [R.692].

Annie Vu was unable to get a good look at the driver of the car she T-boned. [R.773]. She "only saw basically the back of him running down the road." [R.773]. All she knew was that he had dark hair that was cut "pretty short." [R.781]. It did not look like he had a jacket, but he was wearing light blue jeans and a sweatshirt. [R.781, 789].

Detective Hill reviewed surveillance video from Harmon's. [R.939]. Without Detective Hill identifying who was depicted in the video, the State asked a question regarding "when the defendant is entering Harmon's." [R.941]. No objection was made. [R.941]. Subsequent to this statement, Detective Hill identified in open court the Defendant as the person on the surveillance video. [R.945].

Detective Hill also created a photo array of possible suspects, which was shown to Lee Clay and Troy Martinez. [R.1037]. Tony Martinez identified someone

other than Reynaldo Martinez, and Clay was not able to identify anyone from the lineup. [R.1038, 1040]. Nevertheless, Detective Hill was permitted to testify, without objection, that Lee Clay first went to the photo of Reynaldo and hesitated or "he held that one for a while." [R.1040].

Defense counsel approved of the jury instructions provided by the district court and the State with "[n]o objection." [R.1122]. Those instructions did not contain a *Long* instruction regarding eyewitness identification. [*Generally* R.352–75].

Body Camera Video

When defense counsel first attempted to elicit information about Joey, the State objected that such information was hearsay. [R.700]. While the court initially sustained that objection, [R.700], it later reversed its ruling and found that the statement regarding Joey being the suspect in this case was not offered for the truth of the matter asserted; it was instead used to show context and a failure of police to investigate all leads. [R.754]. Then the court concluded that if it ruled that the statement about Joey was not used for the truth, "it is as true for one side as it is true for the other side." [R.761].

When Detective Jeppson began laying foundation for her body camera video, which captured her interview with Jeppson, defense counsel agreed, "I'm not going to object to having this played right now." [R.842–43]. The video was accordingly

played for the jury in its entirety, without objection. [R.853; *see generally* R.1399–1429].

Additional Facts

One of the jurors recognized Officer Denning when he took the stand. [R.752]. She informed the bailiff that she used to work with him while the other jurors were within earshot. [R.752]. Defense counsel did not move for a mistrial, and the district court sua sponte fund that no error was made in not moving for a mistrial and any error was not prejudicial. [R.752, 754].

An Officer Maxfield was involved in the execution of a search warrant on Erika Vigil's apartment. [R.862]. There, he found a BB gun, .40 caliber handgun ammunition, and a holster. [R.864–73]. Initially, defense counsel objected to the BB gun being discussed, arguing it was irrelevant because it was not a revolver. [R.864]. The judge agreed that the BB gun was irrelevant. [R.866].

Defense counsel also objected to mention of the holster but hedged that if the court was inclined to let it in, they would withdraw their objection to the BB gun. [R.872–73]. Outside the presence of the jury, the court inquired whether someone would be able to testify that the particular holster found served a long-barreled pistol. [R.873]. Officer Maxfield replied, "I couldn't tell you either way." [R.873]. The court then explained, "I will allow it on the testimony that it would fit a long-barreled gun and possibly a revolver. If you can't say that, I won't." [R.873]. In response,

Officer Maxfield reversed himself and assured the court, "I can say that, yeah. I can say that was made for a revolver or it wasn't." [R.873].

No objection was made to this exchange between the court and the witness. [R.873–74]. Instead, defense counsel withdrew its objection to the BB gun. [R.874]. Officer Maxfield went on to testify that the holster found at the residence would fit a long-barreled revolver. [R.878].

Officer Maxfield also testified that Defendant's father was at the apartment when the search warrant was executed and that he knew the father well. [R.881]. Because of Officer Maxfield's position in law enforcement, defense counsel argued that the statement "Reynaldo Martinez, Senior, who I do know well," cast dispersions on Defendant by suggesting criminal connections. [R.881, 904–05]. The district court denied the motion for a mistrial, finding the statement was not elicited, was made during cross-examination, was not degrading, and was not emphasized. [R.910].

During cross-examination of Detective Hill, defense counsel elicited that Vigil was arrested for obstructing justice in conjunction with this case. [R.1022].

SUMMARY OF THE ARGUMENT

A lot went wrong in Defendant's trial. Given the multiplicity of errors, this is the sort of unique case that warrants reversal under the cumulative error doctrine. But even without reference to all of the several errors that combined to reduce

confidence in the jury's verdicts, there are two glaring errors that independently require reversal.

First, and most critically, this was a case that turned on eyewitness identification. Yet defense counsel failed to ensure the jury received critical information regarding the shortcomings of eyewitness identifications—information that was directly relevant to the specific shortcomings involved in this case.

Second, defense counsel allowed the jury to essentially hear from a witness who was not under oath, was not present at trial, and was not subject to cross-examination. By accepting or acquiescing to the district court's broad pronouncement that a hearsay ruling on one specific statement applied to an entire interview, defense counsel obliterated the protections provided by our rules against hearsay and the Confrontation Clause.

ARGUMENT

For arguments involving ineffective assistance of counsel, it is of course necessary for Defendant to demonstrate both that defense counsel's performance was objectively deficient and that the deficient performance prejudiced Defendant. *See State v. Christensen*, 2014 UT App 166, ¶ 10, 331 P.3d 1128.[1]

[1] The issues raised in this appeal are unusually fact-intensive. Given the brief length limitations, Mr. Martinez incorporates by reference each section into the other section.

I. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO EXCLUDE EYEWITNESS IDENTIFICATION EVIDENCE AND BY FAILING TO PROPERLY INSTRUCTION THE JURY

A. Defense Counsel Rendered Ineffective Assistance of Counsel When He Failed to Exclude Unreliable Eyewitness Identification Evidence

As a threshold gatekeeping function, the trial court and/or defense counsel must first screen eyewitness identification evidence to determine whether it should or should not be admissible at trial. Such a threshold determination was neglected below, which compounded the prejudice due to the omitted *Long* instruction. *See infra* Point I.B. *State v. Lujan,* 2015 UT App 199, ¶ 10 n.1, 357 P.3d 20, *cert. granted,* 364 P.3d 48 (Utah 2015), lends guidance on the issue.

In *Lujan,* this Court "determine[d] that the trial court [had] erroneously admitted unreliable eyewitness testimony [and] . . . reverse[d] and remand[ed] for a new trial." 2015 UT App 199, ¶ 1. There, officers investigated a robbery and tracked a suspect who had driven a few blocks away and was found hiding inside an air conditioning unit at a school. Police brought the suspect to the victim and "asked if he could identify Defendant, who stood handcuffed in the dark, the only non-officer present, illuminated by the headlights of police cars. The man identified Defendant as the robber." 2015 UT App 199, ¶ 6.

> After being arrested and charged, Defendant requested a lineup, which the trial court granted. At the lineup, the man was unable to positively

> identify anyone as the robber. He did indicate that Defendant and another man looked familiar, but he was unsure whether either was the robber.
>
> At the preliminary hearing, the man was asked to identify the robber, and he pointed to Defendant. As Defendant observes, he "was the only defendant sitting at counsel table and the only realistic choice."

2015 UT App 199, ¶¶ 7-8.

In the case at bar, the isolated pictures or videos of Reynaldo Martinez, who was pictured alone in visual depictions at a Harmon's store (i.e. not in conjunction with photographs of five or six similar looking individuals), *see* Exhibits 34-47 (Harmon's was a few blocks away from the scene and Reynaldo was viewed alone walking into the store [i.e. no line-up]), and was not subject to the gatekeeping function for admissibility. Being alone in the visual depictions, he was "the only realistic choice" for the jury to consider. Like the unduly suggestiveness of being handcuffed in the dark and illuminated by the headlights of police cars, the isolated visual depictions of Mr. Martinez (sans photos with comparable suspects) should have been -- but were not -- subject to the gatekeeping determination. Counsel performed ineffectively in failing to obtain such a threshold admissibility determination and/or to present an expert witness who would have testified about matters similar to that well established in the Rule 617 list of important factors. *Cf. Lujan,* 2015 UT App 199, ¶¶ 7-8; *see* Addenda.

The error was prejudicial as the evidence at trial was far from overwhelming. The victim, David Barnes, was not shown a photo lineup. [R.1015]. Witness Mindy

Sipes was never shown a photo lineup because she was not sure she would recognize him again. [R.1014].

Lee Clay testified that he had been shown a photo lineup of possible suspects, but was unable to pick out an individual as the one involved in the car accident. [R.658]. He also said that he could "[p]robably not" recognize today the male that he followed to Harmon's, unless he was wearing the same clothes. [R.658].

David Barnes testified that at the time of the incident, it was gray outside and snowing "fairly good." [R.692]. The driver of the car, who had pointed a gun at him and took his phone and wallet, was wearing a maroon bandanna—or it could have been brown—as a "mask," a Raiders hat, and a hoodie. [R.677, 685, 692]. He was a slender build and medium height. [R.685]. Barnes believed the driver's ethnicity to be Hispanic. [R.685]. These observations were made while a gun was pointed at his head. [R.679].

Annie Vu was unable to get a good look at the driver of the car she T-boned, which was fleeing from the scene. [R.773]. She "only saw basically the back of him running down the road." [R.773]. All she knew was that he had dark hair that was cut "pretty short." [R.781]. It did not look like he had a jacket, but he was wearing light blue jeans and a sweatshirt. [R.781, 789].

A person who arrived on scene in order to investigate the reported robbery, Detective Hill, had not personally witnessed whether Mr. Martinez was involved,

yet the officer suggested that very fact by recounting his hearsay observations of the defendant on the Harmon's surveillance video. [R.939]. Without Detective Hill initially identifying who was depicted in the video, the State asked a question regarding "when the defendant is entering Harmon's." [R.941]. No objection was made to the video or photographs, [R.941], and counsel performed ineffectively by failing to object on hearsay grounds, *see* Utah R. Evid. 802, failing to object based on lack of foundation, *see* Utah R. Evid. 602 (a person from Harmon's was listed, but not called, as a foundational witness to authenticate and provide the ground work for such exhibits), and failing to object to the above gatekeeping threshold determinations. Subsequent to the prosecution's statement, Detective Hill identified in open court the Defendant as the person on the surveillance video. [R.945].

Detective Hill also created a photo array of possible suspects, which was shown to Lee Clay and Troy Martinez. [R.1037]; *cf.* [R.682, 1038] (the victim's neighbor, Troy Martinez, had passed away before trial and the prosecutor conceded that he couldn't think of a way to admit Troy's temporary hovering over Reynaldo's picture at trial, particular since Troy had picked out a different individual in the photo line-up). Troy Martinez had not identified Reynaldo Martinez, and Mr. Clay was not able to identify anyone from the lineup. [R.1038, 1040]. Nevertheless, Detective Hill was permitted to testify, without objection, that Lee Clay first went to the photo of Reynaldo "and he held that one for a while." [R.1040]. The threshold

admissibility function should have limited evidence only to Mr. Clay's inability to identify anyone versus the non-gatekeeper analyzed testimony about Clay's hesitation over a photograph that was never selected.

Another example of what gatekeeping functions should have been followed is contained in the attached rule of evidence, which outlines a series of procedures that were similarly bypassed. *See* Utah R. Evid. 617 (a copy of the soon-to-be effective rule is attached in the Addendum with its many protections based upon law enforcement policies and the Department of Justice procedures); *see id.* Committee Note ("This rule ensures that when called upon, a trial court will perform a gatekeeping function and will exclude unreliable eyewitness identification evidence in a criminal case. Several organizations, including the Department of Justice and the ABA, have published best practices for eyewitness identification procedures when a witness is asked to identify a perpetrator who is a stranger to the witness"). The rule reads in pertinent part:

> **(b) Admissibility in General.** In cases where eyewitness identification is contested, the court shall exclude the evidence if a factfinder, considering the factors in this subsection (b), could not reasonably rely on the eyewitness identification. In making this determination, the court may consider expert testimony and other evidence on the following:
>
> > **(1)** Whether the witness had an adequate opportunity to observe the suspect committing the crime;
> >
> > **(2)** Whether the witness's level of attention to the suspect committing the crime was impaired because of a weapon or any other distraction;

(3) Whether the witness had the capacity to observe the suspect committing the crime, including the physical and mental acuity to make the observation;

(4) Whether the witness was aware a crime was taking place and whether that awareness affected the witness's ability to perceive, remember, and relate it correctly;

(5) Whether a difference in race or ethnicity between the witness and suspect affected the identification;

(6) The length of time that passed between the witness's original observation and the time the witness identified the suspect;

(7) Any instance in which the witness either identified or failed to identify the suspect and whether this remained consistent thereafter;

(8) Whether the witness was exposed to opinions, photographs, or any other information or influence that may have affected the independence of the witness in making the identification; and

(9) Whether any other aspect of the identification was shown to affect reliability.

(c) Identification Procedures. If an identification procedure was administered to the witness by law enforcement and the procedure is contested, the court must determine whether the identification procedure was unnecessarily suggestive or conducive to mistaken identification. If so, the eyewitness identification must be excluded unless the court, considering the factors in subsection (b) and this subsection (c), finds that there is not a substantial likelihood of misidentification.

(1) Photo Array or Lineup Procedures. To determine whether a photo array or lineup is unnecessarily suggestive or conducive to mistaken identification, the court should consider the following:

(A)Double Blind. Whether law enforcement used double blind procedures in organizing a lineup or photo array for the witness making the identification. If law enforcement did not use double blind procedures, the court should consider the degree to which the witness's identification was the product of another's verbal or physical cues.

(B)Instructions to Witness. Whether, at the beginning of the procedure, law enforcement provided instructions to the witness that

(i) the person who committed the crime may or may not be in the lineup or depicted in the photos;

(ii) it is as important to clear a person from suspicion as to identify a wrongdoer;

(iii) the person in the lineup or depicted in a photo may not appear exactly as he or she did on the date of the incident because features such as weight and head and facial hair may change; and

(iv) the investigation will continue regardless of whether an identification is made.

(C)Selecting Photos or Persons and Recording Procedures. Whether law enforcement selected persons or photos as follows:

(i) Law enforcement composed the photo array or lineup in a way to avoid making a suspect noticeably stand out, and it composed the photo array or lineup to include persons who match the witness's description of the perpetrator and who possess features and characteristics that are reasonably similar to each other, such as gender, race, skin color, facial hair, age, and distinctive physical features;

(ii) Law enforcement composed the photo array or lineup to include the suspected perpetrator and at least five photo fillers or five additional persons;

(iii) Law enforcement presented individuals in the lineup or displayed photos in the array using the same or sufficiently similar process or formatting;

(iv) Law enforcement used computer generated arrays where possible; and

(v) Law enforcement recorded the lineup or photo array procedures.

(D)Documenting Witness Response. Whether law enforcement asked the witness how certain he or she was of any identification and documented all responses, including initial responses.

(E)Multiple Procedures or Witnesses. Whether or not law enforcement involved the witness in multiple identification procedures wherein the witness viewed the same suspect more than once and whether law enforcement conducted separate identification procedures for each witness, and the suspect was placed in different positions in each separate procedure.

(2) Showup Procedures. To determine whether a showup is unnecessarily suggestive or conducive to mistaken identification, the court should consider the following:

(A)Whether law enforcement documented the witness's description prior to the showup.

(B)Whether law enforcement conducted the showup at a neutral location as opposed to law enforcement headquarters or any other public safety building and whether the suspect was in a patrol car, handcuffed, or physically restrained by police officers.

(C)Whether law enforcement instructed the witness that the person may or may not be the suspect.

(D)Whether, if the showup was conducted with two or more witnesses, law enforcement took steps to ensure that the witnesses were not permitted to communicate with each other regarding the identification of the suspect.

(E)Whether the showup was reasonably necessary to establish probable cause.

(F)Whether law enforcement presented the same suspect to the witness more than once.

(G)Whether the suspect was required to wear clothing worn by the perpetrator or to conform his or her appearance in any way to the perpetrator.

(H)Whether the suspect was required to speak any words uttered by the perpetrator or perform any actions done by the perpetrator.

(I)Whether law enforcement suggested, by any words or actions, that the suspect is the perpetrator.

(J)Whether the witness demonstrated confidence in the identification immediately following the procedure and law enforcement recorded the confidence statement.

(3) Other Relevant Circumstances. In addition to the factors for the procedures described in parts (1) and (2) of this subsection (c), the court may evaluate an identification procedure using any other circumstance that the court determines is relevant.

(d)Admissibility of Photographs. Photographs used in an identification procedure may be admitted in evidence if:

(1) the prosecution has demonstrated a reasonable need for the use;

(2) the photographs are offered in a form that does not imply a prior criminal record; and

(3) the manner of their introduction does not call attention to their source.

Utah R. Evid. 617 (comment period closed November 10, 2018) (a copy of the rule is attached in the Addenda). Although the rule was not then formally in place at the time of Reynaldo Martinez's trial, the principles were in place through the *Long* instruction and by policies and procedures implemented by the Government itself. The evidentiary expectations and protections of the Rule were glaringly omitted from Mr. Martinez's situation. Such omitted protections allowed unfiltered and flawed eyewitness identification evidence to be presented to the jury without first withstanding the scrutiny of the initial gatekeeper of evidence, the trial court. Counsel performed ineffectively in allowing such evidence to bypass the threshold admissibility determination.

B. Defense Counsel Rendered Ineffective Assistance of Counsel When He Failed to Request a *Long* Instruction

It "has been the common practice in Utah since [the supreme] court's decision in *State v. Long*, 721 P.2d 483 (Utah 1986)," to explain "potential problems with eyewitness identification . . . using a jury instruction . . . (hereinafter a '*Long* instruction')." *State v. Clopten*, 2009 UT 84, ¶ 4, 223 P.3d 1103. Given "the overwhelming weight of the empirical research" establishing "the difficulties inherent in any use of eyewitness identification testimony," the supreme court was "convinced that, *at a minimum*, additional judicial guidance to the jury in evaluating

such testimony is warranted." *State v. Long*, 721 P.2d 483, 492 (Utah 1986), *holding modified by State v. Clopten*, 2009 UT 84, 223 P.3d 1103. In other words, a jury instruction about the failings of eyewitness identification is the floor. And "whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense," trial courts are required to so instruct the jury. *Id.*

The record below clearly shows that counsel failed to request the *Long* instruction. Counsel failed to meet the minimum jury instruction standard for eyewitness identification cases. *Clopten*, 2009 UT 84.

The trial court expressly found that eyewitness identification was a central issue in the present case. It observed, "This is an identification case, as everyone seems to have acknowledged and argued." [R.1111]. Therefore, the only thing standing in the way of the district court being required to provide a *Long* instruction was a request by the defense. Yet no request was made. Given the problems with the identifications made in this case, failure to request a *Long* instruction was objectively unreasonable. *Lujan* provided a concise past history of relevant caselaw.

> We decide this case within the framework established by *State v. Ramirez,* 817 P.2d 774 (Utah 1991). We have every reason to believe, however, that *Ramirez* must be revisited. *See* Anne E. Whitehead, Note, State v. Ramirez, *Strengthening Utah's Standard for Admitting Eyewitness Identification Evidence*, 1992 Utah L. Rev. 647, 689 (1992) (generally approving of *Ramirez* but recognizing that it is not without flaws‘ because ,the court's conclusion seems incongruous with the results of its application of the reliability analysis, leaving uncertain the future impact of the new Utah

analytical framework‘). Aside from any flaws inherent in the *Ramirez* analysis, scientific and legal research regarding the reliability of eyewitness identifications has progressed significantly in the last twenty-four years. *See generally* National Research Council of the National Academies, *Identifying the Culprit: Assessing Eyewitness Identification* 11–12 (2014).

Before *Ramirez*, the Utah Supreme Court first took an in- depth look at the potential shortcomings of eyewitness identifications in *State v. Long*, 721 P.2d 483 (Utah 1986). In *Long*, the Court accepted the invitation to ‚either abandon any pretext of requiring a cautionary eyewitness instruction or make the requirement meaningful‘ by deciding ‚to follow the latter course.‘ *Id.* at 487. The Court did this by abandon[ing its] discretionary approach to cautionary jury instructions and direct[ing] that in cases tried from th[at] date forward, trial courts shall give such an instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense.‘ *Id.* at 492.

Then, after *Ramirez*, the Court considered another aspect of cases involving eyewitness identifications—expert testimony. In *State v. Butterfield*, 2001 UT 59, 27 P.3d 1133, the Court affirmed a trial court's exclusion of an expert witness because the trial court had found that the proposed expert testimony did not deal with the specific facts from *that+ case but rather would constitute a lecture to the jury about how it should judge the evidence.‘ *Id.* ¶ 44 (internal quotation marks omitted). The issue was revisited in *State v. Hubbard*, 2002 UT 45, ¶ 14, 48 P.3d 953. In *Hubbard*, while leaving *Butterfield* untouched, the Court did invite trial courts ‚to specifically tailor instructions other than those offered in *Long* that address the deficiencies inherent in eyewitness identification.‘ *Id.* ¶ 20.

But in *State v. Clopten*, 2009 UT 84, 223 P.3d 1103, the Court recognized that its ‚previous holdings ha[d] created a de facto presumption against the admission of eyewitness expert testimony, despite persuasive research that such testimony is the most effective way to educate juries about the possibility of mistaken identification.‘ *Id.* ¶ 30. The Court sought to change this by announcing ‚that the testimony of a qualified expert regarding factors that have been shown to contribute to inaccurate eyewitness identifications should be admitted whenever it meets the requirements of rule 702 of the Utah Rules of Evidence.‘ *Id.* The Court ‚expect[ed] this application

> of rule 702 [to] result in the liberal and routine admission of eyewitness expert testimony.' *Id.*
>
> While Utah jurisprudence now better recognizes the problematic nature of eyewitness identification, *Ramirez* remains the standard by which courts must evaluate the admissibility of this evidence. It is a standard that does not accurately reflect the changed views about handling this problematic evidence. And the disconnect between the legal analysis in *Ramirez* and its outcome makes it an unreliable tool for resolving particular cases, as shown by the two opinions in this case. All of this, taken together, indicates that it is time for our Supreme Court to reconsider *Ramirez*, a proposition with which the dissent agrees.

State v. Lujan, 2015 UT App 199, ¶ 10 n.1, 357 P.3d 20, *cert. granted,* 364 P.3d 48 (Utah 2015).

State v. Heywood, 2015 UT App 191, provides a framework for establishing when it would be reasonable for trial counsel to forego focusing on the shortcomings of eyewitness identifications and thus, through inverse analysis, when trial counsel should pursue the introduction of such evidence.

By relying on *Long* and *State v. Clopten*, 2009 UT 84, 223 P.3d 1103—which focused on the admissibility of expert testimony regarding eyewitness identifications—the court in *Heywood* explained that the factors rendering identifications more or less reliable should be considered in the context of any given case. *See Heywood*, 2015 UT App 191, ¶¶ 18–20, 36; *see also* Utah R. Evid. 617 (a copy of the proposed rule is attached in the Addendum with its many protections based upon law enforcement policies and the Department of Justice procedures). Logically, when factors diminishing the reliability of an eyewitness identification

are present, an adequate defense attorney would seek to educate a jury on those factors. Conversely, when such diminishing factors are present, or when bolstering factors are, such education is less critical. These factors come from *Clopten* and *Long*. The court in *Heywood* explained:

> *Clopten*'s first category of factors pertains to the observer:
>
> > The first category pertains to the eyewitness and includes factors such as uncorrected visual defects, fatigue, injury, intoxication, presence of a bias, an exceptional mental condition such as an intellectual disability or extremely low intelligence, age (if the eyewitness is either a young child or elderly), and the race of the eyewitness relative to the race of the suspect (cross-racial identification).

State v. Heywood, 2015 UT App 191, ¶ 19, 357 P.3d 565 (quoting *Clopton*, 2009 UT 84, ¶ 32 n.22).

> *Clopten's* second category of factors pertains to the circumstances of the observation:
>
> > The second category relates to the event witnessed and includes the effects of stress or fright, limited visibility, distance, distractions, the presence of a weapon (weapon focus), disguises, the distinctiveness of the suspect's appearance, the amount of attention given to the event by the witness, and whether the eyewitness was aware at the time that a crime was occurring.

Id. ¶ 20 (quoting *Clopton*, 2009 UT 84, ¶ 32 n.22).

And the court in *Long*

> identified several factors supporting the need for a *Long* instruction in certain cases, including the more important factors affecting the accuracy of one's perception originating with the observer, such as an

> individual's physical condition and emotional state. The court also identified the distance of the observer from the event, the length of time available to perceive the event, the amount of light available, and the amount of movement involved as important considerations.

Id. ¶ 36 (cleaned up).

Several of these factors are relevant to the instant case. All witnesses who purported to observe Defendant or someone who shared some of his physical characteristics did so on a day that was gray and snowing. Furthermore, the descriptions of the man involved in the crimes that morning relied on the identification of race—Defendant and the man observed were Hispanic. No record was made of the race of each witness, but it is likely that at least some of them were making cross-racial identifications. [*See, e.g.*, R.770, 771 (Annie Vu is the manager of a sushi bar and her daughter takes Vietnamese classes)].

Sipes provided physical details of the man she saw but did not positively identify Defendant as that person. She was not sure she would recognize him again. [R.1014]. But even the characteristics she observed amounted to unreliable eyewitness identification testimony. She was multi-tasking when she saw the man in question drive past her, calling 911 while simultaneously running to her garage. [R.605]. These tasks directly affected "the amount of attention given to the event by the witness." *See Clopten*, 2009 UT 84, ¶ 32 n.22.

All observations made by Barnes relating to identification were made while he had a gun pointing at him. *See id.* (discussing "weapon focus). Furthermore, much of his robber's face was covered by a bandanna.

The prejudice of not requesting a *Long* instruction under these circumstances is evident: The only in-court identification that came from an actual eyewitness was made by Sipes, after she had already expressed to law enforcement that she did not think she could identify the man if she saw him again [R.1014, 621]. The other in-court identifications came from Detective Hill, [R.945], and Nathan Evans [R.894], neither of whom observed the crimes charged and both of whom were identifying the defendant to connect his name to the person sitting in the courtroom at trial.

Yet despite the relative lack of positive identifications, the jury had no way of knowing the importance of the evidence it heard. With relatively thin identification evidence, defense counsel should have been able to exploit a huge weakness in the State's case. Instead, they chose not to request a *Long* instruction, leaving the jury to make whatever conclusions it wanted regarding how to interpret the piecemeal identifications that were made throughout trial.

There is no excuse for letting this legitimate avenue of defense fall by the wayside. Defendant was prejudiced by defense counsel's deficient performance, because the State's evidence to identify Defendant as the perpetrator of the crimes charged was never revealed for how weak it truly was.

II. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN THEY FAILED TO OBJECT TO THE ADMISSION OF HEARSAY STATEMENTS THAT RAN DIRECTLY AFOUL OF THE CONFRONTATION CLAUSE

The combined rules of hearsay and the Confrontation Clause demonstrate defense counsel's next area of deficient performance. They allowed an entire testimonial video to be played for the jury, acknowledging that it was akin to testimony, without objecting. Defense counsel did not have the opportunity to cross-examine and expose the flaws with Vigil, the main witness in the video. They did not have the opportunity to impeach or clarify her testimony. Vigil was not called as a witness. There was no showing that she was unavailable (or that the video would be admissible even if she were).

Defense counsel made clear what their reason was for allowing the body camera video to be played: they wanted the jury to know that there was an alternative suspect who had been provided to the police that police had not adequately followed up on. In this regard, they argued that Vigil's statements about Joey were not being used for the truth of the matter asserted, because they were not arguing that Joey was, in fact, the perpetrator. They were instead developing the possibility that police cut their investigation short and foreclosed other avenues for obtaining evidence. The district court acknowledged that this was a legitimate use of Vigil's statements about Joey.

But the rules against hearsay apply to individual statements, and not the wholesale introduction of unchecked and unchallenged interviews as testimony. Defense counsel should have properly pursued their failure-to-investigate defense while excluding, or at least severely limiting, the body camera video.

"'Hearsay' means a statement that the declarant does not make while testifying at the current trial or hearing and a party offers in evidence to prove the truth of the matter asserted in the statement." Utah R. Evid. 801(c) (formatting removed for readability). The use of the article "a" to modify "statement" reveals that this rule applies (or does not apply) on the basis of individual statements, and not entire conversations.

"Since all audio content recorded by police body cameras is derived from out-of-court statements, if the audio component of the record is offered for the truth of what it asserts, then it is hearsay for that purpose." Dru S. Letourneau, *Police Body Cameras: Implementation with Caution, Forethought, and Policy*, 50 U. Rich. L. Rev. 439, 458 (2015).

There was much more information included in the body camera video than just the fact that someone else might have been responsible for the January 30, 2016 crimes. For instance, Vigil gave an entire factual account of what happened that morning, from her altercation with a man in a car, to that car crashing with another,

to that man leaving the scene of an accident. [R.1403–05]. Defense counsel should not have allowed the entirety of this hearsay into evidence, unchecked.

Furthermore, the Supreme Court of the United States has "never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). Yet Defendant was denied this meeting with Vigil. The body camera video offends the Confrontation Clause, where it captures a witness to a crime providing statements to a police officer investigating that crime, and was then used to convict an individual of that crime. *Cf. State v. Cruz*, 2016 UT App 234, ¶ 38 n.7, 387 P.3d 618 ("There can be little doubt that a child's video-recorded statement, given under questioning from a police officer in anticipation of criminal prosecution, is classified as testimonial for purposes of the federal Confrontation Clause.").

The decision to allow this video without objection is particularly questionable because defense counsel destroyed the only conceivable basis for allowing any portion of Vigil's statements. As defense counsel articulated and the court accepted, one defense theory was that Vigil had told the police someone else had committed the crimes charged and they failed to follow up on that information. But defense counsel destroyed, or at least severely damaged, this defense when they asked Detective Hill whether Vigil had been arrested for obstructing justice in relation to this case. [R.1022,1048]. The main point on which Vigil's recorded testimony

diverged from the bulk of the other witness testimony was the existence of a third party. In all other respects, her account of the morning was very similar to others'. The jury could have logically concluded that if Vigil was charged with obstruction of justice for her statements to police, but the other witnesses were not, the obstruction likely came through her explanation of Joey.

If the jury had not seen the entire body camera video, they would not have known what all Vigil did or did not say to police. And if defense counsel had not elicited from Detective Hill that Vigil had obstructed justice, the jury would not have been able to even guess at how she had done so. But curiously, defense counsel allowed both to happen—by not objecting to the video and by introducing the obstruction of justice charge.

The deficiency of this performance is reflected in the harm it caused. The defense had a viable option of pursuing a failure-to-investigate theory. It destroyed that theory by allowing the video and complicated matters by undermining Vigil's credibility in a very focused and critical way.

III. DEFENSE COUNSEL'S SEVERAL MISSTEPS THROUGHOUT TRIAL, COMBINED WITH PLAIN ERROR BY THE DISTRICT COURT, WARRANT REVERSAL UNDER THE CUMULATIVE-ERROR DOCTRINE

Finally, even if this court were to conclude that the above deficient performance was not sufficiently prejudicial to require reversal, the cumulative-error doctrine applies. The cumulative-error doctrine, mandates reversal "if the

cumulative effect of the several errors undermines [this court's] confidence that a fair trial was had." *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993) (cleaned up). This doctrine applies even when the errors were the result of trial counsel's deficient performance. *See State v. Campos*, 2013 UT App 213, ¶ 61, 309 P.3d 1160 (applying cumulative-error analysis to ineffective-assistance claims).

The trial in this case was replete with several decisions that were curious at best and completely erroneous at worse.

The prosecution introduced stills from the surveillance video inside Harmon's through Sipes. [R.616–20]. These exhibits formed the basis for identifications of Defendant throughout trial. Yet Sipes expressed that she did not know when the pictures were taken. [R.617]. And no other authentication was asked or required of her.

Authentication of photographs requires "the testimony of a witness with knowledge that the photos were what they claimed to be." *State v. Hygh*, 711 P.2d 264, 271 (Utah 1985). Exhibits 34 through 47 claimed to be more than isolated pictures of Defendant; they displayed a date and time stamp, therefore purporting to place Defendant in a very particular location at a very particular time. Sipes acknowledged that she did not have the knowledge necessary to say whether those date and time stamps were accurate when she testified that she did not know when the pictures were taken. Defense counsel did not articulate an authenticity objection,

and the district court ruled on the objection that *was* made by specifically stating "I would note that they are not being offered with any time and date." [R.619]. That note is plainly erroneous by the Exhibits themselves.

Detective Hill was able to skirt well-established principles of photo lineups by suggesting that Clay had identified Defendant when he had not. *Cf. State v. Mecham*, 2000 UT App 247, ¶ 9, 9 P.3d 777 (mentioning that a police investigation "appeared to be at a dead end" when a "photo lineup . . . failed to produce a positive identification"). Without objection, Detective Hill emphasized that Clay went to the photo of Defendant "and he held that one for a while." [R.1040].

One of the jurors recognized Officer Denning as someone she had previously worked with. While the district court concluded that the situation, if disclosed during voir dire, would not have justified a for-cause challenge, it also—in the middle of trial without knowing all of the evidence—made a finding that the juror's acknowledgement in front of the rest of the jury was not prejudicial. [R.752, 754].

The district court, at another point in the trial, essentially coached a witness as to what he would need to say for the holster evidence to be admissible. [R.873]. The witness so testified, and the holster evidence was admitted. [R.878].

Office Maxfield mentioned knowing Defendant's father, where the inference could have been made that he knew him through his work as a police officer. [R.881]. The district court denied the associated motion for a mistrial. [R.904–05].

Each of these incidents is concerning. Utah R. Evid. 402 ("Irrelevant evidence is not admissible"); Utah R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury. . . ."). They represent times when defense counsel or the district court allowed evidence or procedures that undermine the reliability of the trial system. These errors constitute ineffective assistance of counsel where defense counsel allowed or elicited the information, because introducing the relevant evidence did nothing to help Defendant's case and, in fact, hurt it. They constitute plain error where the district court's own actions introduced the error—like when it coached a witness how to testify—because such an error should have been obvious to the court. *See State v. Holgate*, 2000 UT 74, ¶ 13, 10 P.3d 346.

And this is a situation where "[s]everal errors below, although possibly not individually prejudicial, when combined and considered with the weakness of the evidence against [Defendant], undermine our confidence that [Defendant] received a fair trial." *See State v. Havatone*, 2008 UT App 133, ¶ 17, 183 P.3d 257. This is where the prejudice or harm required for claims of ineffective assistance or plain error is visible. Remember, this is not a case where the jury bought everything the State put on sale. The jury found Defendant not guilty of assault and found on a special verdict form that he possessed a firearm. [R.381, 383]. In other words, the jury expressly acknowledged weaknesses in the State's case—evidence it

disbelieved or otherwise rejected. Where the State's evidence was weak in several regards, the cumulative-error doctrine is even more applicable. *See Havatone*, 2008 UT App 133, ¶ 17.

CONCLUSION

Defendant was denied the adequate assistance of counsel. Even more, there were so many problematic decisions made by defense counsel and the trial court that the jury's verdicts cannot be trusted. Whether for the failure to instruct the jury on the shortcomings of eyewitness identification or for the admission of problematic hearsay statements or for a combination of these or other errors, Defendant's convictions should be reversed.

DATED this 26th day of November, 2018.

/s/ Ron Fujino
RON FUJINO
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2018, a true copy of the foregoing **BRIEF OF APPELLANT** was served by the method indicated below, to the following:

Clerk of Court Utah Court of Appeals 450 S. State Street, 5th Floor Salt Lake City, Utah 84114	( ) U.S. Mail, Postage Prepaid (x) Hand Delivered ( ) Overnight Mail ( ) Facsimile (X) Electronic Transmittal
Sean D. Reyes Utah Attorney General 160 East 300 South, 6th Floor P.O. Box 140854 Salt Lake City, UT 84114-0854 Telephone: (801) 366-0180 ***Attorneys for Appellee***	( ) U.S. Mail, Postage Prepaid (x) Hand Delivered ( ) Overnight Mail ( ) Facsimile (X) Electronic Transmittal

/s/ Ron Fujino

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the foregoing brief complies with the type-volume limitation set forth in rule 24(g) of the Utah Rules of Appellate Procedure, requiring principal briefs to contain no more than 14,000 words or 30 pages. The brief, exclusive of cover page, table of contents, table of authorities, certificates of counsel, and addendum, contains 10,047 words

This brief also complies with rule 21(g) of the Utah Rules of Appellate Procedure, as it does not contain other than public information and records.

/s/ Ron Fujino
RON FUJINO

ADDENDA

Jury Instructions (Closing)

Rule 617 (comment period closed November 10, 2018)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, **Plaintiff,** **vs.** **REYNALDO THOMAS MARTINEZ,** **Defendant.**	**JURY INSTRUCTIONS TO BE GIVEN AT CLOSE OF EVIDENCE** **Case No. 161902133** **Judge Paul B. Parker**

The jury is hereby charged with the law that applies to this case in the following instructions, numbered (11) through 49, inclusive.

Dated this 15 day of May, 2017.

PAUL B. PARKER
DISTRICT COURT JUDGE

INSTRUCTION NO. 11

Members of the jury, you now have all the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments. The prosecutor will go first, then the defense. Because the prosecution has the burden of proof, the prosecutor may give a rebuttal.

Finally, you will go to the jury room to discuss and decide the case.

INSTRUCTION NO. 12

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 given does not mean that some instructions are more important than others. Whether any particular instruction applies may depend upon what you decide are the true facts of the case. If an instruction applies only to facts or circumstances you find do not exist, you may disregard that instruction.

Perform your duty fairly. Do not let bias, sympathy or prejudice that you may f eel toward one side or the other influence your decision in any way.

INSTRUCTION NO. 13

When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

INSTRUCTION NO. 14

During the trial I have made certain rulings. I made those rulings based on the law, and not because I favor one side or the other.

However,

- if I sustained an objection,
- if I did not accept evidence offered by one side or the other, or
- if I ordered that certain testimony be stricken,

then you must not consider those things in reaching your verdict.

INSTRUCTION NO. 15

As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.

INSTRUCTION NO. 16

You must base your decision only on the evidence that you saw and heard here in court. Evidence includes:

- what the witnesses said while they were testifying under oath;
- any exhibits admitted into evidence; and
- any facts to which the parties have stipulated, that is to say, facts to which they have agreed.

Nothing else is evidence. The lawyer's statements and arguments are not evidence. Their objections are not evidence. My legal rulings and comments, if any, are not evidence. In reaching a verdict, consider all the evidence as I have defined it here, and nothing else. You may also draw all reasonable inferences from that evidence.

INSTRUCTION NO. 17

Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.

Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained.

Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.

Before you can find the defendant guilty of any charge, there must be enough evidence–direct, circumstantial, or some of both–to convince you of the defendant's guilt beyond a reasonable doubt. It is up to you to decide.

INSTRUCTION NO. 18

In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony.

- How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- Does the witness have something to gain or lose from this case?
- Does the witness have any connection to the people involved in this case?
- Does the witness have any reason to lie or slant the testimony?
- Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
- How believable was the witness's testimony in light of other evidence presented at trial?
- How believable was the witness's testimony in light of human experience?
- Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether or not to believe a witness, you may also consider anything else you think is important. You do not have to believe everything that a witness said. You may believe

part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

INSTRUCTION NO. 19

There are two types of witnesses: fact witnesses and expert witnesses. Usually a fact witness can testify only about facts that (he) (she) can see, hear, touch, taste or smell. An expert witness has scientific, technical or other special knowledge that allows the witness to give an opinion. An expert's knowledge can come from training, education, experience or skill. Experts can testify about facts if they have personal knowledge of those facts, and they can give their opinions in their area of expertise.

You may have to weigh one expert's opinion against another's. In weighing the opinions of experts, you may look at their qualifications, the reasoning process the experts used, and the overall credibility of their testimony. You may also look at things like bias, consistency, and reputation.

Use your common sense in evaluating all witnesses, including expert witnesses. You do not have to accept an expert's opinion. You may accept it all, reject it all, or accept part and reject part. Give it whatever weight you think it deserves.

INSTRUCTION NO. 20

You have heard the testimony of a law enforcement officer. The fact that a witness is employed in law enforcement does not mean that his or her testimony deserves more or less consideration than that of any other witness. It is up to you to give any witness's testimony whatever weight you think it deserves.

INSTRUCTION NO. 21

A person accused of a crime may choose whether or not to testify. In this case the defendant chose not to testify. Do not hold that choice against the defendant. Do not try to guess why the defendant chose not to testify. Do not consider it in your deliberations. Decide the case only on the basis of the evidence. The defendant does not have to prove that he or she is not guilty. The prosecution must prove the defendant's guilt beyond a reasonable doubt.

INSTRUCTION NO. 22

Remember, the fact that the defendant is charged with a crime is not evidence of guilt. The law presumes that the defendant is not guilty of the crimes charged. This presumption persists unless the prosecution's evidence convinces you beyond a reasonable doubt that the defendant is guilty.

INSTRUCTION NO. 23

As I instructed you before, proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes

every possible doubt. If the evidence leaves you firmly convinced that the defendant is guilty of the crime charged, you must find the defendant "guilty." On the other hand, if there is a real possibility that he is not guilty, you must give the defendant the benefit of the doubt and return a verdict of "not guilty."

INSTRUCTION NO. 24

A person cannot be found guilty of a criminal offense unless that person's conduct is prohibited by law, and at the time the conduct occurred, the defendant demonstrated a particular mental state specified by law.

"Conduct" can mean both an "act" or the failure to act when the law requires a person to act. An "act" is a voluntary movement of the body and it can include speech.

As to the "mental state" requirement, the prosecution must prove that at the time the defendant acted, he did so with a particular mental state as to each element of the crime. For each offense, the law defines what kind of mental state the defendant had to have, if any. For some crimes the defendant must have acted "intentionally" or "knowingly." For other crimes it is enough that the defendant acted "recklessly," with "criminal negligence," or with some other specified mental state.

INSTRUCTION NO. 25

The law requires that the prosecutor prove beyond a reasonable doubt that the defendant acted with a particular mental state.

Ordinarily, there is no way that a defendant's mental state can be proved directly, because no one can tell what another person is thinking.

A defendant's mental state can be proved indirectly from the surrounding facts and circumstances. This includes things like what the defendant said, what the defendant did, and any other evidence that shows what was in the defendant's mind.

INSTRUCTION NO. 26

A defendant's "mental state" is not the same as "motive." Motive is why a person does something Motive is not an element of the crimes charged in this case. As a result, the prosecutor does not have to prove why the defendant acted (or failed to act).

However, a motive or lack of motive may help you determine if the defendant did what he is charged with doing. It may also help you determine what his mental state was at the time.

INSTRUCTION NO. 27

A person engages in conduct intentionally, or with intent or willfully 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.

A person engages in conduct knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. 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.

A person engages in conduct recklessly or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustified risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

INSTRUCTION NO. 28

Unless these instructions give a definition, you should give all words their usual and ordinary meanings.

INSTRUCTION NO. 29

You should not consider as evidence any statement of counsel made during the trial, unless such statement was made as a stipulation conceding the existence of a fact or facts.

INSTRUCTION NO. 30

Transcripts, recordings, police reports, or other written or visual materials may have been referenced by the parties during the examination of witnesses. It is common for jurors to ask to review these materials or to have transcripts of what witnesses said during this trial. These materials are not evidence and may not be requested as part of your deliberations. The only things you may consider as evidence in your deliberations are the testimony and exhibits admitted during this trial.

INSTRUCTION NO. 31

Before you can convict the defendant, Reynaldo Thomas Martinez, of the crime of Aggravated Robbery, as charged in Count 1 of the Information, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that offense:

1. That on or about January 30, 2016, in Salt Lake County, State of Utah, the defendant, Reynaldo Thomas Martinez;

2. Unlawfully and intentionally:

a. Took or attempted to take personal property in the possession of David Barnes, from David Barnes' person or immediate presence;

b. Against the will of David Barnes; and,

c. By means of force or fear;

3. With the purpose or intent to deprive David Barnes of his personal property permanently or temporarily; and

4. That the defendant intentionally or knowingly:

(a) Used or threatened to use a dangerous weapon.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Robbery, as charged in Count 1 of the Information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of Count 1.

INSTRUCTION NO. 32

You are instructed that:

"Dangerous Weapon" means any item capable of causing death or serious bodily injury; OR a facsimile or representation of the item, if the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury.

INSTRUCTION NO. 33

Evidence was introduced at trial that the defendant may have fled or attempted to flee from the crime scene. This evidence alone is not enough to establish guilt. However, if you believe that evidence, you may consider it along with the rest of the evidence in reaching a verdict. It is up to you to decide how much weight to give that evidence.

Keep in mind that there may be reasons for flight that could be fully consistent with innocence. Even if you choose to infer from the evidence that the defendant had a "guilty conscience," that does not necessarily mean he is guilty of the crime charged.

INSTRUCTION NO. 34

Before you can convict the defendant, Reynaldo Thomas Martinez, of the crime of Failure to Stop at Injury Accident, as charged in Count 2 of the Information, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that offense:

1. That on or about January 30, 2016, in Salt Lake County, State of Utah, the defendant, Reynaldo Thomas Martinez,

2. was the operator of a motor vehicle,

3. having reason to believe that he may have been involved in an accident resulting in injury to a person:

(i) Failed to immediately stop the vehicle at the scene of the accident or as close to it as possible without obstructing traffic more than is necessary;

AND

(ii) Failed to remain at the scene of the accident until he:

(a) provided his name, address, and the registration number of the vehicle being operated; and the name of the insurance provider covering the vehicle being operated.

(b) rendered to any person injured in the accident reasonable assistance, including transporting or making arrangements for transporting of the injured person to a physician or hospital for medical treatment if it is apparent that treatment is necessary; or transportation is requested by the injured person.

(c) immediately and by the quickest means of communication available give notice or cause to give notice of the accident to the nearest office of a law enforcement agency.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Failure to Stop at Injury Accident, as charged in Count 2 of the

Information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of Count 2.

INSTRUCTION NO. 35

Before you can convict the defendant, Reynaldo Thomas Martinez, of the crime of Assault, as charged in Count 3 of the Information, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that offense:

1. That on or about January 30, 2016, in Salt Lake County, State of Utah, the defendant, Reynaldo Thomas Martinez;

2. Knowingly, intentionally, or recklessly:

a. Attempted with unlawful force or violence to do bodily injury to another, or

b. Committed an act, with unlawful force or violence that caused bodily injury to another or created a substantial risk of bodily injury to another,

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Assault, as charged in Count 3 of the Information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of Count 3.

INSTRUCTION NO. 36

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

INSTRUCTION NO. 37

"Cohabitant" means a person who is 16 years of age or older who resides or has resided in the same residence as the other party.

INSTRUCTION NO. 38

A separate crime or offense is charged in each count of the information. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

INSTRUCTION NO. 39

In making your decision, do not consider what punishment could result from a verdict of guilty. Your duty is to decide if the defendant is guilty beyond a reasonable doubt. Punishment is not relevant to whether the defendant is guilty or not guilty.

INSTRUCTION NO. 40

You may take the following things with you when you go into the jury room to discuss the case: (a) all exhibits admitted into evidence; (b) your notes, if any; (c) your copy of these instructions; and (d) the verdict form.

INSTRUCTION NO. 41

In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach a unanimous agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach unanimous agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own.

Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found "guilty" or "not guilty." In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment as to whether the evidence presented by the prosecutor proved each charge beyond a reasonable doubt.

INSTRUCTION NO. 42

Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson's duties are (a) to keep order and allow everyone a chance to speak; (b) to represent the jury in any communications you make; and (c) to sign the verdict form and bring it back into the courtroom. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form on behalf of the entire jury.

For each offense, the verdict form will have two blanks—one for "guilty" and the other for "not guilty." The foreperson will fill in the appropriate blank to reflect the jury's unanimous decision. In filling out the form, the foreperson needs to make sure that only one blank is marked for each charge.

INSTRUCTION NO. 43

If you think you need more information or a clarification, write a note and give it to the bailiff. I will review it with the lawyers. We will answer your question whenever appropriate. However, these instructions should contain all the information you need to reach a verdict based upon the evidence.

INSTRUCTION NO. 44

When you have reached a verdict, the foreperson should date and sign the verdict form, and then notify the bailiff that you have reached a decision.

-Clarification to instruction 34.

"3i - Failed to immediately stop vehicle at scene of accident..."

The vehicle stopped → but not voluntarily by the defendant?

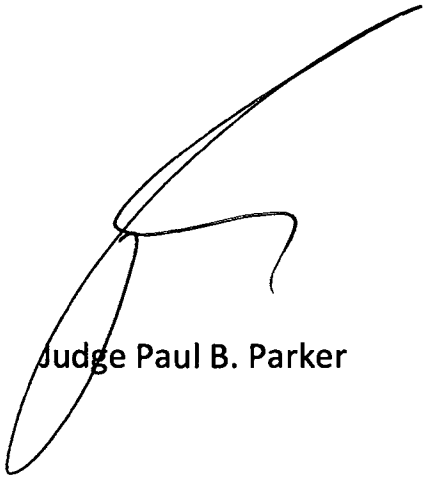
Therefore statement 3i is not true.

-What did Erika say in [redacted] detective Hill's ~~ofc~~ report regarding "If you know who did it, then why do you need me?"

What were her exact words?

The current Instruction number 34, as you point out, is incorrect. Attached is a substitute Instruction number 34. Please replace the incorrect instruction with the substitute.

A transcript of witness testimony cannot be provided; you must rely on your memories about the testimony.



Judge Paul B. Parker

SUBSTITUTE INSTRUCTION NO. 34

Before you can convict the defendant, Reynaldo Thomas Martinez, of the crime of Failure to Stop at Injury Accident, as charged in Count 2 of the Information, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that offense:

1.That on or about January 30, 2016, in Salt Lake County, State of Utah, the defendant, Reynaldo Thomas Martinez,

2. Was the operator of a motor vehicle,

3. Having reason to believe that he may have been involved in an accident resulting in injury to a person:

(i) Failed to immediately stop the vehicle at the scene of the accident or as close to it as possible without obstructing traffic more than is necessary;

OR

(ii) Failed to remain at the scene of the accident until he:

(b) provided his name, address, and the registration number of the vehicle being operated; and the name of the insurance provider covering the vehicle being operated.

(b) rendered to any person injured in the accident reasonable assistance, including transporting or making arrangements for transporting of the injured person to a physician or hospital for medical treatment if it is apparent that treatment is necessary; or transportation is requested by the injured person.

(c) immediately and by the quickest means of communication available give notice or cause to give notice of the accident to the nearest office of a law enforcement agency.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Failure to Stop at Injury Accident, as charged in Count 2 of the

The jury must consider each charge separately and the verdict on each must be unanimous to be either guilty or not guilty. If the jury cannot reach a unanimous decision then the jury is hung on that particular charge.

Judge Paul B. Parker

If we don't agree completely on a specific charge, is it not guilty on that charge or is it a "hung" jury?

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. REYNALDO THOMAS MARTINEZ, Defendant.	VERDICT Case No. 161902133 Judge Paul B. Parker

We, the jurors in the above case find the defendant, REYNALDO THOMAS MARTINEZ, as follows:

Count 1: AGGRAVATED ROBBERY
____ Not Guilty
__✓__ Guilty

Count 2: FAILURE TO STOP AT INJURY ACCIDENT
____ Not Guilty
__✓__ Guilty

Count 3: ASSAULT
__✓__ Not Guilty
____ Guilty

Dated this 25th day of May, 2017.

_____ Foreperson

Filed 5/25, 2017
By _____
Deputy Clerk

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE CITY

In the Third District Court, Salt Lake Department

In and For the County of Salt Lake, State of Utah

The State of Utah
Plaintiff

Special Verdict Form
Count 3

Vs

Case No. 161902133

Reynaldo Martinez
Defendant

Honorable Paul Parker

If you find the Defendant guilty beyond a reasonable doubt of Count 3 of the information, Assault, please choose between the following statements:

We , the jury, having found the Defendant guilty of Count 3 of the information

____ DO

____ DO NOT

Find from all the evidence and beyond a reasonable doubt that the Defendant and Erika Vigil, were "cohabitants" according to these jury instructions.

Dated this ____ day of May, 2017.

Foreperson

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, **Plaintiff,** **vs.** **REYNALDO THOMAS MARTINEZ,** **Defendant.**	**SPECIAL VERDICT** **FIREARM** **Case No. 161902133** **Judge Paul B. Parker**

We, the jury, find from all the evidence and beyond a reasonable doubt that the Defendant:

_____ **DID**

_____ **DID NOT**

Knowingly or intentionally possess, use or have under his custody or control any firearm on

January 30, 2016

Dated this 25th **day of May, 2017.**

FOREPERSON

5/25/2017
Clerk

INSTRUCTION NO. 45

You are instructed that:

"Firearm" means a pistol, revolver, shotgun, short barreled shotgun, rifle or short barreled rifle, or a device that could be used as a dangerous weapon from which is expelled a projectile by action of an explosive.

* Stipulation by the parties

The name of the person

given by Erika rigil to officer Denning

~~Bob~~ who was the person who

~~was~~ picked her up in the car

which was later involved in the accident

WAS "JOEY."

Utah Rules of Evidence – Comment Period Closed November 10, 2018

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URE0617. Eyewitness Identification. This new rule provides criteria and procedures to be used by a factfinder to evaluate a contested eyewitness identification.

Rule 617. Eyewitness Identification

(a) Definitions

(1) "Eyewitness Identification" means witness testimony or conduct in a criminal trial that identifies the defendant as the person who committed a charged crime.

(2) "Identification Procedure" means a lineup, photo array, or showup.

(3) "Lineup" means a live presentation of multiple individuals, before an eyewitness, for the purpose of identifying or eliminating a suspect in a crime.

(4) "Photo Array" means the process of showing photographs to an eyewitness for the purpose of identifying or eliminating a suspect in a crime.

(5) "Showup" means the presentation of a single person to an eyewitness in a time frame and setting that is contemporaneous to the crime and is used to confirm or eliminate that person as the perceived perpetrator.

(b) Admissibility in General. In cases where eyewitness identification is contested, the court shall exclude the evidence if a factfinder, considering the factors in this subsection (b), could not reasonably rely on the eyewitness identification. In making this determination, the court may consider expert testimony and other evidence on the following:

(1) Whether the witness had an adequate opportunity to observe the suspect committing the crime;

(2) Whether the witness's level of attention to the suspect committing the crime was impaired because of a weapon or any other distraction;

(3) Whether the witness had the capacity to observe the suspect committing the crime, including the physical and mental acuity to make the observation;

(4) Whether the witness was aware a crime was taking place and whether that awareness affected the witness's ability to perceive, remember, and relate it correctly;

(5) Whether a difference in race or ethnicity between the witness and suspect affected the identification;

(6) The length of time that passed between the witness's original observation and the time the witness identified the suspect;

(7) Any instance in which the witness either identified or failed to identify the suspect and whether this remained consistent thereafter;

(8) Whether the witness was exposed to opinions, photographs, or any other information or influence that may have affected the independence of the witness in making the identification; and

(9) Whether any other aspect of the identification was shown to affect reliability.

(c) Identification Procedures. If an identification procedure was administered to the witness by law enforcement and the procedure is contested, the court must determine whether the identification procedure was unnecessarily suggestive or conducive to mistaken identification. If so, the eyewitness identification must be excluded unless the court, considering the factors in subsection (b) and this subsection (c), finds that there is not a substantial likelihood of misidentification.

(1) Photo Array or Lineup Procedures. To determine whether a photo array or lineup is unnecessarily suggestive or conducive to mistaken identification, the court should consider the following:

(A) Double Blind. Whether law enforcement used double blind procedures in organizing a lineup or photo array for the witness making the identification. If law enforcement did not use double blind procedures, the court should consider the degree to which the witness's identification was the product of another's verbal or physical cues.

(B) Instructions to Witness. Whether, at the beginning of the procedure, law enforcement provided instructions to the witness that

(i) the person who committed the crime may or may not be in the lineup or depicted in the photos;

(ii) it is as important to clear a person from suspicion as to identify a wrongdoer;

(iii) the person in the lineup or depicted in a photo may not appear exactly as he or she did on the date of the incident because features such as weight and head and facial hair may change; and

(iv) the investigation will continue regardless of whether an identification is made.

(C) Selecting Photos or Persons and Recording Procedures. Whether law enforcement selected persons or photos as follows:

(i) Law enforcement composed the photo array or lineup in a way to avoid making a suspect noticeably stand out, and it composed the photo array or lineup to include persons who match the witness's description of the perpetrator and who possess features and characteristics that are

reasonably similar to each other, such as gender, race, skin color, facial hair, age, and distinctive physical features;

(ii) Law enforcement composed the photo array or lineup to include the suspected perpetrator and at least five photo fillers or five additional persons;

(iii) Law enforcement presented individuals in the lineup or displayed photos in the array using the same or sufficiently similar process or formatting;

(iv) Law enforcement used computer generated arrays where possible; and

(v) Law enforcement recorded the lineup or photo array procedures.

(D) Documenting Witness Response. Whether law enforcement asked the witness how certain he or she was of any identification and documented all responses, including initial responses.

(E) Multiple Procedures or Witnesses. Whether or not law enforcement involved the witness in multiple identification procedures wherein the witness viewed the same suspect more than once and whether law enforcement conducted separate identification procedures for each witness, and the suspect was placed in different positions in each separate procedure.

(2) Showup Procedures. To determine whether a showup is unnecessarily suggestive or conducive to mistaken identification, the court should consider the following:

(A) Whether law enforcement documented the witness's description prior to the showup.

(B) Whether law enforcement conducted the showup at a neutral location as opposed to law enforcement headquarters or any other public safety building and whether the suspect was in a patrol car, handcuffed, or physically restrained by police officers.

(C) Whether law enforcement instructed the witness that the person may or may not be the suspect.

(D) Whether, if the showup was conducted with two or more witnesses, law enforcement took steps to ensure that the witnesses were not permitted to communicate with each other regarding the identification of the suspect.

(E) Whether the showup was reasonably necessary to establish probable cause.

(F) Whether law enforcement presented the same suspect to the witness more than once.

(G) Whether the suspect was required to wear clothing worn by the perpetrator or to conform his or her appearance in any way to the perpetrator.

(H) Whether the suspect was required to speak any words uttered by the perpetrator or perform any actions done by the perpetrator.

(I) Whether law enforcement suggested, by any words or actions, that the suspect is the perpetrator.

(J) Whether the witness demonstrated confidence in the identification immediately following the procedure and law enforcement recorded the confidence statement.

(3) Other Relevant Circumstances. In addition to the factors for the procedures described in parts (1) and (2) of this subsection (c), the court may evaluate an identification procedure using any other circumstance that the court determines is relevant.

(d) Admissibility of Photographs. Photographs used in an identification procedure may be admitted in evidence if:

(1) the prosecution has demonstrated a reasonable need for the use;

(2) the photographs are offered in a form that does not imply a prior criminal record; and

(3) the manner of their introduction does not call attention to their source.

(e) Expert Testimony. When the court admits eyewitness identification evidence, it may also receive related expert testimony upon request.

(f) Jury Instruction. When the court admits eyewitness identification evidence, the court may, and shall if requested, instruct the jury consistent with the factors in subsections (b) and (c) and other relevant considerations.

Committee Note: This rule ensures that when called upon, a trial court will perform a gatekeeping function and will exclude unreliable eyewitness identification evidence in a criminal case. Several organizations, including the Department of Justice and the ABA, have published best practices for eyewitness identification procedures when a witness is asked to identify a perpetrator who is a stranger to the witness.

Subsection (a) defines terms commonly used in the eyewitness identification process.

Subsection (b) addresses estimator variables (circumstances at the time of the crime). According to the National Research Council of the National Academies, the most-studied estimator variables include: weapon focus, stress and fear, race bias, exposure, duration, and retention. The literature talks about how stress, fear, and anxiety may affect memory storage and retrieval. The ABA recognizes that high and low levels of stress may harm performance in identifying suspects, while moderate levels may enhance memory performance. A stressed victim may encode information differently and be more affected by stress than a passerby, unless the passerby is unaware that a crime is taking place. In addition, the cross-race effect will depend on the circumstances; and the participation of law enforcement and others may influence a witness's perceptions and memory retrieval. Expert evidence may be necessary to elucidate these factors for the court, and where the evidence is admissible, expert evidence and/or an instruction may further elaborate on the factors for the jury.

Subsection (c)(1) reflects some of the best practices in the context of photo array and lineup procedures, including use of double blind procedures; providing instructions to the witness at the beginning of the procedure; displaying photos or presenting a lineup with individuals who generally fit the witness's description of the suspect and who are sufficiently similar so as not to suggest the suspect to the witness; documenting the procedures, including the witness's responses; and guarding against influencing the witness through use of multiple procedures or when multiple witnesses are involved.

> **Use of double blind procedures**. The literature, including the National Academies of Science report, supports that whenever practical, the person who conducts a lineup or organizes a photo array and all those present (except defense counsel) should be unaware of which person is the suspect through use of double blind procedures. Use of double blind procedures provides assurance that an administrator who is not involved in the investigation does not know what the suspect looks like and is therefore less likely to suggest or confirm that the perpetrator is in the lineup or the photo array. At times, double blind procedures may not be practical. In such cases, the administrator should adopt blinded procedures, such as a "folder shuffle," to prevent him or her from knowing which photo a witness is viewing at a given time and to ensure that he or she cannot see the order or arrangement of the photographs viewed by the witness. Blinded procedures may be necessary to use in smaller agencies with limited resources or in high profile cases where all officers are aware of the suspect's identity. As a practical matter, blinded procedures work only for photo arrays and are not recommended for use in lineups. Lineups must be conducted using double blind procedures.
>
> **Providing instructions to the witness**. The person conducting the lineup or photo array should not disclose or convey to the witness that a suspect is in custody. Rather, the person should read instructions to the witness that are neutral and detached and should allow the witness to ask questions about the instructions before the process begins. The witness should sign and date the instructions. Organizations have published instructions for use in lineup or photo array procedures that may be used by agencies. While a witness is viewing the photo array, the person conducting the procedure should not interrupt the witness or interject.

Displaying photos or presenting a lineup. In selecting fillers or individuals for the photo array or lineup procedure, at least five fillers—or non-suspects—should be used with the suspect photo. Fillers should generally fit the witness's description of the perpetrator as opposed to match a specific suspect's appearance. Fillers should not make the suspect noticeably stand out. Photos should be of similar size with similar background and formatting. They should be numbered sequentially or labeled in a manner that does not reveal identity or the source of the photo, and they should contain no other writing. More recent literature supports that where practical, agencies should employ a simultaneous procedure, which allows the witness to observe at one time all of the photos in an array for a single suspect.

Documenting witness responses. Law enforcement should clearly document by video or audio recording a witness's level of confidence verbatim at the time of an initial identification. New research shows that a witness's confidence at the time of an initial identification is a good indicator of accuracy. A recording will ensure that investigators and fact-finders fully understand a witness's level of confidence.

Multiple procedures and multiple witnesses. According to the literature, multiple identification procedures create a "commitment effect" in which the witness might recognize a lineup member or photo from a previous procedure, rather than from the crime scene. In addition, when multiple witnesses are involved, a procedure that ensures the suspect is not in the same position for each procedure guards against witnesses influencing one another.

Subsection (c)(2) addresses showup procedures. While several organizations discourage showup procedures as inherently suggestive, the procedures may be necessary to law enforcement in assessing eyewitness identification. In that regard, the International Association of Chiefs of Police (IACP) and other organizations recommend that witnesses should not be shown suspects while they are in suggestive settings such as a patrol car, handcuffs, or other physical restraints. Such settings can lead to a prejudicial inference by the witness. Notwithstanding the suggestive nature of showups, subsection (c)(2) addresses factors to consider in those circumstances. Once law enforcement has probable cause to arrest a suspect, however, a witness should not be allowed to participate in showup proceedings but should participate only in lineup or photo array procedures.

Subsection (c)(3) addresses other factors that may be relevant to the analysis. Those factors may include whether there was no unreasonable delay between the events in question and the identification procedures, among other things.

Subsection (d) addresses the use of photographs at trial that were used by law enforcement in identification procedures.

Subsections (e) and (f) are included because the National Academies of Science (NAS) report recommends both expert testimony and jury instructions due to the fact that many scientifically established aspects of eyewitness identification memory are counterintuitive and jurors will need assistance in understanding the factors that may affect the accuracy of an identification.

Sources: National Academies of Science, *Identifying the Culprit: Assessing Eyewitness Identification* (2014), available at https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification; U.S. D.O.J., *Eyewitness Identification: Procedures for Conducting Photo Arrays* (2017); ABA Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (2004); IACP National Law Enforcement Policy Center, *Eyewitness Identification: Model Policy* (2010).