

**IN THE UTAH COURT OF APPEALS**

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THE STATE OF UTAH,  
*Plaintiff/Appellee*

v.

JOSEPH CRESCENCIO GRANADOS,  
*Defendant/Appellant.*

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**BRIEF OF APPELLANT**

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An appeal from a judgment of conviction of attempted murder, a first degree felony; failure to stop or respond at the command or police, a third degree felony; criminal mischief: intentional damage, deface, or destroy property, a third degree felony; possession or use of a controlled substance, a class A misdemeanor; use or possession of drug paraphernalia, a class B misdemeanor; and possession of a dangerous weapon by a restricted, a second degree felony; in the Third District Court, Salt Lake County, Utah, the Honorable Paul B. Parker, presiding.

Appellant is incarcerated

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INTRODUCTION

Joseph Granados was convicted of attempted murder, possession of a dangerous weapon by a restricted person, and criminal mischief. (The Sentence, Judgment, Commitment is attached as Addendum A). These charges arose from a shooting that occurred around 4pm. Granados was also convicted of failure to stop at the command of a police officer, possession of a controlled substance, and possession of drug paraphernalia. Those charges related to an incident that occurred later in the evening. Although there was evidence connecting the car Granados was driving later in the evening to the earlier shooting, no witness identified him as the shooter. This Court should reverse because the evidence of identity was insufficient to sustain convictions for the charges related to the shooting.

Second, this Court should reverse all of the convictions because the judge decided to replace a juror over counsel's objection and without questioning the juror first. The trial court believed the juror was sleeping for portions of the trial.

### STATEMENT OF THE ISSUES

*Issue I:* Whether the evidence of identity was sufficient to sustain convictions for attempted murder, possession of a dangerous weapon, and criminal mischief – the charges related to the shooting.

*Standard of Review/Preservation:* This Court “review[s] the trial court’s denial of the motion for directed verdict for correctness.” *Salt Lake City v. Valdez-Sadler*, 2015 UT App 203, ¶ 6. This issue was preserved. R:1026-31 (the relevant portions of the transcript are attached as Addendum B).

*Issue II:* Whether the court erred when it dismissed a juror without first questioning the juror when the court believed the juror had fallen asleep during the trial.

*Standard of Review/Preservation:* Utah courts generally review challenges to a judge’s ruling regarding sleeping jurors for abuse of discretion. *See State v. Lesley*, 672 P.2d 79, 82 (Utah 1983); *State v. Pace*, 527 P.2d 658, 659 (Utah 1974). Counsel preserved this issue when he objected to dismissing the juror, explained that counsel had seen the juror in question taking notes and paying attention, and reminded the court that the defense had strategically selected the jury. R:789-92 (the relevant portions of the transcript are attached as Addendum

C). Additionally, the prosecution agreed that it would be appropriate to question the juror before dismissing her. R:789.

#### STATEMENT OF THE CASE AND THE FACTS

SM was driving home from work around 4pm on June 6, 2016, when he saw a maroon car swerving ahead of him on 4800 West. R:567-69; 668 (time of incident was 4:13pm). When the maroon car pulled into the right turn lane at around 70th South, SM passed the car on the left. R:571. Instead of turning right, the maroon car pulled up alongside SM. R:573. The driver of the maroon car showed SM that he had a gun. R:576. SM called 911 as the car followed him on Grizzly Way. R:577. The maroon car hit SM's car, forcing it onto a residential lawn. R:581. The driver of the maroon car then fired a gun at SM. R:581. There were eight bullet holes in the car and one in a nearby building. R:818. One shot grazed SM's neck, although he was not seriously injured. R:581; 435.

SM did not make an identification of the perpetrator at trial. SM did testify that the driver had tattoos on his arm. R:571. There was evidence that Granados had tattoos. R: 987. A woman who was standing on Grizzly Way during the incident did not see the driver or the license plate, but she noticed that the maroon car had sustained damage on the front passenger's side, and that it had a triangle decal in the window. R:589-90. Another witness made eye contact with the driver in the maroon car. R:602. At trial, she testified that the driver had a round face, dark eyes, dark short hair, and a mustache. R:604. This general description did not exclude Granados. State's Ex. 50c. She observed the driver

get out of his car to pick up the bumper, which had fallen off, and put it inside the car. R:606. When presented with a photo array the day after the shooting that included Granados's photo, she selected a different photo as resembling the offender. R:608-10; 1009. None of the State's witnesses identified Granados as the shooter.

The day before the shooting, a property crimes detective was looking for a red 2002 Chevy Malibu belonging to MA. R:627. He was also looking for Joseph Granados, who he believed had a previous relationship with MA. R:627. The detective located Granados in the Malibu at a McDonald's. R:629. He tried to get Granados to pull over, but Granados fled. R:632.

The police suspected the Malibu might have been involved in the shooting. R:725. The evening of the shooting, a detective looking for Granados spotted him in a Chevy Malibu with front-end damage near 3100 South and Bangerter around 6:15pm. R:708. Granados did not stop and the detective lost sight of him. R:719-20. A second officer followed Granados in a high-speed chase that lasted over twelve minutes. R:741; 748; 751.

The chase ended with the officer apprehending Granados after Granados briefly attempted to flee on foot. R:752. The officer searched Granados and found a glass pipe and methamphetamine. R:765.

Crime scene technicians processed the Malibu. R:831. It had sustained damage, it had a "Baby on Board!" decal on the back windshield, and there was a bumper in the backseat. R:779; State's Ex. 21, 24, 25. The technicians tested the

bumper for fingerprints. R:894. A partial palm print — the only evidence discovered on the bumper — excluded Granados. R:844-46.

The car floor was dirty. R:911; State's Ex. 25, 28, 31. A crime scene technician recovered from the floor a 34-caliber bullet and a 40-caliber bullet. R:836. She also recovered ten 40-caliber shell casings. R:837; 889.

A crime scene technician tested the bullets and shell casings for DNA. R:885. The test involved placing each bullet or casing, one at a time, in a buffer solution. R:884. The technician poured the buffer solution through a filter designed to catch cells. R:886-87. She then used the same buffer solution for the next bullet or casing, and ran it through the same filter. R:887-88; 890-91. The technician sent the filter to Sorenson Forensics. R:892.

A DNA analyst from Sorenson testified that the filter contained DNA from two contributors. R:956. Granados's DNA profile matched the major contributor, but the amount of his DNA in the bullet and casing mixture was small. R:971. The analyst explained that there would be no way to know which item of the ten casings and two bullets contained the DNA, only that the mixture of all of them contained DNA. R:968. She also explained that the test could not discern whether the DNA ended up on the bullets or casings from direct contact or through transfer from something else with DNA on it. R:967. She acknowledged a person who was touching a car would leave DNA in it. R:912-13. Sweat contains DNA — and there was testimony Granados was sweating, R:987; 775 — so a person sweating in a car would leave DNA. R:899; 912-13.

The analyst testified that she had never before pulled a full DNA profile from a spent shell casing. R:970. The technician similarly testified that in her seventeen years as a crime scene technician she had never before seen a full DNA profile pulled from a shell casing. R:914. The technician testified that heat damages DNA, but studies conflict on whether firing a gun would destroy any DNA on the shell casings. R:915.

The State charged Granados with multiple counts related to the shooting — attempted murder, multiple counts of felony discharge of a firearm, possession of a firearm by a restricted person, and criminal mischief for damaging SM’s car. R:1-5. The State also charged Granados with failure to stop at the command of a law officer, possession of a controlled substance, and possession of paraphernalia. R:1-5. The case proceeded to trial. R:475.

The parties selected eight jurors and one alternate. R:540. Juror 16 graduated from the University of Utah and retired after careers as a travel agent and elementary educator. R:487. She followed the news through Time Magazine and the Salt Lake Tribune. R:488.

The alternate juror was a high school graduate who worked as a project engineer for JWright Companies. R:489. He read “outdoor magazines like American Rifleman” and watched “Fox News.” R:489-90.

On the second day of trial,<sup>1</sup> the officer who apprehended Granados testified about the car chase and the State played a video from the officer's body camera depicting the chase, State's Ex. 56. R:739. During this portion of the trial, the court called for a break. R:742. When the jury was excused, the court said, "The reason I did that is Juror No. 16 keeps falling asleep. And yesterday the same thing, is the reason I took some breaks. And I'm a little concerned right in the middle of the presentation that usually would take someone's attention, she's noticeably falling asleep." R:743. Defense counsel said, "I got to say I'm getting tired of the videos too," and that he "hadn't noticed" the juror sleeping; he was initially open to the possibility of changing alternate jurors before realizing which juror was the subject of concern. R:743-44. The court said that it had the jurors take a break to stand up on the first day of trial because Juror 16 was sleeping. R:743. On the first day of trial, the judge had called for a "stand break" during cross-examination of an officer who investigated a scene near the shooting. R:666. At that point in the trial, the defense had been establishing a time line for the shooting and the subsequent car chase. R:661-66.

After the recess, the court stated that it had decided to dismiss Juror 16.

R:744. The court had heard from two staff members that Juror 16 was "sleeping

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<sup>1</sup> The first day of trial included jury selection and testimony from SM, R:564; three witnesses from the Grizzly Way neighborhood, R:584, 600, 635; the property crimes detective who saw Granados the day before the shooting, R:626; and an officer who investigated a scene near the shooting, R:647. On the second day of trial, a detective who followed and lost Granados testified and the officer who followed and apprehended Granados was testifying when the court decided to dismiss Juror 16. R:701; 724; 743.

for a significant period of time” and decided “she was obviously falling asleep here.” R:744.

Defense counsel reiterated that he had not noticed the juror sleeping, but that in his experience he had “seen jurors nodding off on occasion” in many other trials. R:745. He also argued that the videos were not a critical part of the case. R:745.

The court responded, “It happened yesterday. And again, talking to those people who were with me up on the stand, they saw her up to about five minutes asleep.” R:745.

Defense counsel objected to dismissing Juror 16. R:745. He argued that he had seen her taking notes and paying attention. R:789. And the defense had “strategically selected her.” R:791. Counsel requested that the court question the juror before dismissing her. R:789-92. The prosecutor agreed that “it would be appropriate to ask her” questions about the court’s observation that she was sleeping. R:789; 791-92.

The court decided to dismiss the juror without questioning her first. R:789. The court stated that he had seen her “look up, close her eyes, and then the head kind of nod forward, and it happened repeatedly.” R:790. The court “agree[d] that she was trying to be a diligent juror, but” the court and the two court staff saw the juror appear to be sleeping “multiple times during significant parts of the trial.” R:791. The court ruled that it did not “matter at this point

whether she knows that she missed it or not. The fact is that I observed her and my staff observed her missing significant parts of the trial.” R:791.

The jury convicted Granados of all charged counts. R:304-05. The parties had agreed that the court would decide the possession of a weapon by a restricted person separately. R:1146. Although there was no gun in evidence, the court found Granados guilty of possession of a weapon based on a prior conviction and “the jury having found the defendant was knowingly in possession of a firearm.” R:1146.

The court granted a motion to merge the discharge of a firearm counts with attempted murder. R:1145. The court sentenced Granados to three years to life for attempted murder, one to fifteen years for possession of a dangerous weapon, zero to five years for criminal mischief, zero to five years for failure to respond to a command of an officer, and credit for time served on the remaining misdemeanors. R:1186-87. The court ran all the felonies consecutively. R:1187.

Granados filed a timely notice of appeal. R:397.

#### SUMMARY OF THE ARGUMENT

This Court should reverse the counts related to the shooting — attempted murder, possession of a dangerous weapon, and criminal mischief — for insufficient evidence of identity. None of the witnesses identified Granados. The DNA evidence was more consistent with presence in the car than participation in the shooting. And additional evidence — fingerprints, an eyewitness photo array,

and the absence of any connection between Granados and the shooting victim — pointed to innocence.

Second, this Court should reverse all the counts because the trial court dismissed a juror without questioning her. As the defense explained, the juror was strategically selected, had been paying attention, and the court dismissed her for sleeping during a portion of the trial that was not critical. The error was prejudicial because there is a reasonable likelihood that a strategically selected juror would not have been as inclined to convict.

### ARGUMENT

#### **I. The evidence was insufficient to prove that Granados was involved in the shooting.**

The evidence of identity was insufficient for the crimes related to the shooting — attempted murder, criminal mischief, and possession of a dangerous weapon by a restricted person. This Court will reverse a conviction for insufficient evidence when, viewing “the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict . . . the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.” *State v. Shumway*, 2002 UT 124, ¶ 15. “[A] guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.” *Id.* ¶ 18 (alterations omitted) (internal quotation marks omitted). The Court “cannot take a speculative leap across a

remaining [evidentiary] gap in order to sustain a verdict.” *Id.*; *see also State v. Cristobal*, 2010 UT App 228, ¶ 7 (stating that a jury verdict must be based on reasonable inferences and not just “speculation and conjecture”). “Every element of the crime charged must be proven beyond a reasonable doubt.” *State v. Harman*, 767 P.2d 567, 568 (Utah Ct. App. 1989). “If the evidence does not support those elements, the verdict must fail.” *Id.*

A disputed element of all the crimes related to the shooting was identity. R:1116; 1119 (defense arguing in closing that counts related to shooting “require identification, and we don’t have it”). “It is well-settled that an essential element that the government must prove beyond a reasonable doubt is the identification of a defendant as the person who perpetrated the crime charged.” *State v. Cowlshaw*, 2017 UT App 181, ¶ 13 (internal quotation marks omitted).

Under Utah law, the identification of a driver can be proved by circumstantial rather than direct evidence. *See id.* In *State v. Milligan*, the defendant “contend[ed] that the evidence was insufficient” to prove he was driving without a license because the testifying officer “did not actually see defendant operating his van.” 727 P.2d 213, 215 (Utah 1986). However, the defendant told a police officer that he had been driving the vehicle, so the evidence was sufficient. *Id.*

The evidence of identity was likewise sufficient where the defendant was in the vehicle “immediately” after the crime and a “search of the area revealed no other persons involved.” *State v. Lawson*, 688 P.2d 479, 483 (Utah 1984); *see*

also *State v. Harris*, 2015 UT App 282, ¶ 11 (stating that the evidence was sufficient to show that the defendant committed various crimes in the course of burglarizing a store where he was the “only person observed in the vicinity of the store.”)

Cases from outside jurisdictions provide examples where evidence of a person’s connection to a car was insufficient to prove the person was driving the car at the time of the crime. For example, in *State v. Friday*, a Court of Appeals of Washington case, the defendant contended that “the State failed to prove beyond a reasonable doubt that he was the driver of the car underlying the changes on the date in question.” 184 Wash. App. 1037 at \*1 (Wash. Ct. App. 2014). An officer pulled over a white male with dark brown hair, but the officer never saw the man’s face because the car drove away. *Id.* The officer located the car, but not the driver, at the defendant’s home address and discovered that the defendant owned the car. *Id.* The defendant met the officer’s general description. *Id.* at \*3. The appellate court held that the “vague, general description” of the driver was “insufficient to establish beyond a reasonable doubt identity.” *Id.* at \*3.

In *Patterson v. State*, a driver in a maroon Honda Accord harassed another driver, who observed that he was “a male with a dark complexion” and wrote down the license plate number. 650 S.E.2d 770, 772 (Ga. Ct. App. 2007). The license plate number was registered to the defendant’s sister. *Id.* “This evidence

was insufficient for a rational trier of fact to find that [the defendant] was the driver beyond a reasonable doubt.” *Id.* at 774.

In *State v. Coffman*, the State presented evidence that the defendant’s girlfriend’s car had been used in a chase and the driver had fled on foot. 767 S.E.2d 704, at \*1 (N.C. Ct. App. 2014). The defendant’s wallet, including an identification, was in the front seat of the vehicle. *Id.* The Court of Appeals of North Carolina held that even if the evidence showed “defendant’s presence in the vehicle at some point in the past, it was insufficient to show that defendant was operating the vehicle during the specific time when the high-speed chase took place.” *Id.* at \*3.

In Granados’s case, the marshaled evidence shows that Granados had a previous relationship with the car’s owner, R:627, that he met the general description of the shooter, R:571, and that he was driving the car the day before the shooting and hours after the shooting — at both times, the police attempted to stop him and he fled. R:752. Additionally, Granados’s DNA was on one or more of the items recovered in the car he was driving during the chase — a 34-caliber bullet, a 40-caliber bullet, and ten 40-caliber shell casings. R:837; 889; 836.

This case is therefore more like the extra-jurisdictional cases where connection to the car and matching a general description were insufficient to establish identity beyond a reasonable doubt at the time of the crime. *See Patterson*, 650 S.E.2d at 772; *Coffman*, 767 S.E.2d at \*3; *Frieday*, 184 Wash.

App. 1037 at \*1-3. Granados's case is unlike *Milligan*, where the defendant made admissions. 727 P.2d at 215. And it is distinguishable from *Lawson*, where the defendant was connected to the vehicle in the immediate aftermath of the crime. 688 P.2d at 483.

The State's evidence, including the DNA evidence and the flight from the police, were insufficient to sustain a conviction. "When the evidence supports more than one possible conclusion, none more likely than the other, the choice of one possibility over another can be no more than speculation; while a reasonable inference arises when the facts can reasonably be interpreted to support a conclusion that one possibility is more probable than another." *Cristobal*, 2010 UT App 228, ¶ 16. "[F]light from the scene of the crime does not, in itself, prove his involvement but is a circumstance from which his involvement may be inferred." *Id.* ¶ 15. In Granados's case, flight was particularly weak evidence of guilt because Granados had also fled from the police the day before the shooting. R:632. Under the facts and circumstances of Granados's case, the jury could not infer that Granados was guilty of the shooting because he fled from the police again over two hours after the shooting.

Likewise, the DNA evidence was more consistent with mere presence in the car than it was with participation in the shooting. The State's DNA analyst tested multiple items from inside the car with the same filter, making it impossible to tell which item contained Granados's DNA. R:968. Some scientific studies suggest that the items directly related to the shooting, the spent casings, would

have been stripped of any DNA when they were fired. R:915. Consistent with those studies, the State's DNA analyst and DNA technician had never before recovered DNA from a spent casing. R:970; 914. Of the two remaining items, one was an unfired bullet of a different caliber from the gun used in the shooting. R: 836. It would be speculation to suggest that the DNA came from the shell casings as opposed to the unfired bullet of a different caliber, which was not involved in the shooting. *See Cristobal*, 2010 UT App 228, ¶ 16.

Furthermore, the DNA test could not discern whether the DNA ended up on the bullets or casings from direct contact or through transfer from something else with DNA on it. R:967. The evidence was uncontested that Granados was driving the car during a high-speed chase. R:987. The chase would have shifted items in the messy car. R:786. Additionally, Granados would have been breathing, sweating, and touching things in the car, all of which leave DNA. R:899-900; 912-13. It is therefore speculation based on an unlikely scenario that Granados's DNA was on the spent shell casing from loading and firing the gun, an activity that degrades DNA. R:915. It is much more likely that his DNA transferred to items that were already in the car. "[A] guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt." *Shumway*, 2002 UT 124, ¶ 18 (alterations omitted) (internal quotation marks omitted).

Additionally, the stronger circumstantial evidence pointed to innocence. An eyewitness at the time of the shooting observed the driver get out of his car to

pick up the bumper, which had fallen off, and put it inside the car. R:606. The car Granados was driving had a bumper in the backseat. R:779; State's Ex. 21, 24, 25. The State found a partial palm print on the bumper, but it was not Granados's. R:894; 844-46. This evidence suggested that someone else was driving the car, and picking up the bumper, at the time of the shooting.

Furthermore, an eyewitness who made eye contact with the shooter looked at a photo array the day after the shooting. R:602; 604. The photo array included Granados's photo, but the eyewitness selected only a different photo as resembling the offender. R:608-10; 1009.

Another piece of circumstantial evidence pointing to innocence was that Granados was completely unconnected to the shooting victim and had no reason to commit the crime. R:1105. The State could only remind the jury that it did not have to show a motive. R:1105. The prosecutor speculated that Granados could have mistaken the victim for someone else. R:1105. But there was no evidence that Granados was motivated to kill a third party.

In summary, the marshaled evidence raises only a speculative possibility of guilt. The reasonable inferences from the evidence point to innocence. This Court should therefore reverse and vacate the convictions related to the shooting.

**II. The court erred when it dismissed a juror suspected of sleeping without first questioning her.**

The court erred when it replaced a juror whom the defense had strategically selected. R:791. Utah Rule of Criminal Procedure 17(g) states, "If a

juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror.” The court erred in Granados’s case because it could not determine, without first questioning the juror, that the juror was sleeping to the point of disqualification from service.

Utah cases demonstrate that sleeping for brief periods does not disqualify a juror. In *State v. Mellor*, “[t]he trial court found that the juror to all outward appearances at several different times had gone to sleep, but only for two or three minutes, just a short time.” 272 P. 635, 639 (Utah 1928). The juror admitted he “dozed off several times.” *Id.* But he claimed he was ‘not unconscious,’ and . . . ‘heard and understood all that transpired in the courtroom during the trial.’” *Id.* The Utah Supreme Court held that although “the juror, at brief intervals, did doze off, or fell asleep, yet on the record [the appellate court] cannot say that the juror did not hear and fully comprehend the substance of the testimony of the witness.” *Id.*

In *State v. Pace*, “[t]wo onlookers said two of the jurors consciously went to sleep” and the judge observed that one “did doze for a second, twice.” 527 P.2d 658, 659 (Utah 1974). The Utah Supreme Court upheld the trial judge’s denial of a mistrial, noting that there was “nothing . . . reflecting that the juror could have been ensconced, so as to have stupefied the veniremen.” *Id.*; see also *United States v. Diaz*, 176 F.3d 52, 78 (2d Cir. 1999) (finding no harm where juror “perhaps had slept for a very brief moment, [but] was generally alert and attentive to the evidence”); *Samad v. United States*, 812 A.2d 226, 230 (D.C.

2002) (“To be sure, brief lapses in attention that are not prejudicial may be excused.”).

In Granados’s case, the court’s observation that the the juror dozed for periods of up to five minutes was not necessarily disqualifying. R:745. The court stated, “It happened yesterday. And again, talking to those people who were with me up on the stand, they saw her up to about five minutes asleep.” R:745. But the court also said that, when it happened the previous day, the judge had called for standing breaks. R:743; 666. Defense counsel noted, “I do know that in many of the trials that I’ve done, I’ve seen jurors nodding off on occasion.” R:745. The court was incorrect that briefly dozing off disqualified the juror.

Furthermore, the *Pace* court noted that it was significant when in the case the juror was observed sleeping. *Pace*, 527 P.2d at 659 n.2. As defense counsel in Granados’s case pointed out, the twelve-minute video of the police chase was not a critical part of the State’s case. R:745; 741; 748; 751; 743 (Defense counsel: “I got to say I’m getting tired of the videos, too, but . . .”). The first day of trial, the court had called for a standing break while the defense was cross-examining an officer to establish a time line for the shooting and the car chase. R:661-66. This was evidence that was uncontested and explored at other points in the trial. R:719 (detective saying the vehicle was spotted at 6:15pm); 567 (SM testifying the shooting happened around 4pm).

The court erred when it declined to question the juror. The defense requested that the court question the juror, and the prosecutor agreed that

questioning would be appropriate. R:789. This appears to be standard in Utah: in *Mellor*, “the juror himself testified that because of some work he had done during the previous night and because the room was close he ‘dozed off’” but “heard and understood all that transpired in the courtroom during the trial.” *Mellor*, 272 P. at 639. In *State v. Anderson*, the allegedly sleeping juror “filed an affidavit” before the court made a finding of fact. 251 P. 362, 364 (Utah 1926).

Other jurisdictions have more explicitly clarified the appropriate follow-up procedure for courts who suspect that a juror fell asleep. “The trial court should begin, for example, with a hearing to determine whether the juror had been asleep and, if so, whether the juror had missed essential portions of the trial.” *Golsun v. United States*, 592 A.2d 1054, 1057 (D.C. 1991) (alterations omitted) (internal quotation marks omitted). When a judge receives reliable information about a juror’s inattention, “the judge must take further steps to determine appropriate intervention. Typically the next step is to conduct a voir dire of the potentially inattentive juror, in an attempt to investigate whether the juror remains capable of fulfilling his or her obligation to render a verdict based on all of the evidence.” *Commonwealth v. McGhee*, 25 N.E.3d 251, 256 (Mass. 2015) (internal quotation marks omitted).

In Granados’s case, the court’s observations did not disqualify the juror automatically. Defense counsel “hadn’t noticed” the juror sleeping. R:743. Moreover, defense counsel did not want to dismiss the juror because he saw “her taking notes” and “trying to pay attention.” R:789. A Massachusetts trial “judge

pointed out that ‘some people, when they concentrate, they close their eyes.’” *Id.* at 255; accord *Pelham v. Page*, 6 Ark. 535, 538 (Ark. 1846) (“He may have appeared to have been asleep, when in truth he was not so.”); *Cont’l Cas. Co. v. Semple*, 112 S.W. 1122, 1123 (Ky. 1908) (“the juror himself swore that he was not asleep at any time during the trial, that he had a habit of closing his eyes when listening to others, and that he heard all that was said by both witnesses and lawyers”); *McClary v. State*, 75 Ind. 260, 265 (1881) (“the affidavit filed in support of this cause did not aver that the juror actually fell asleep, but only that he had his eyes closed, and appeared to be asleep”); *Dick v. Dick*, 58 P.2d 1125, 1126 (Kan. 1936) (“there was testimony that he was not asleep, but had simply relaxed and partly closed his eyes while listening to the testimony”).

Although the trial judge and two court staff believed they saw the juror fall asleep, R:791, it was error to dismiss the juror over defense counsel’s objection, R:745; 791, without questioning her first.

The court’s error was prejudicial. This Court will reverse where, “without the error there was a reasonable likelihood of a more favorable result for the defendant.” *State v. Knight*, 734 P.2d 913, 919 (Utah 1987) (emphasis omitted) (internal quotation marks omitted).

As an initial matter, there is a reasonable likelihood that questioning the juror would have alleviated the court’s concerns that she had missed significant portions of the trial. As argued above, the juror was not observed sleeping during critical portions of the trial, R:743, a juror can close her eyes and still pay

attention, *McGhee*, 25 N.E.3d at 255, and even briefly nodding off is not disqualifying. *Mellor*, 272 P. at 639.

Defense counsel explained that the defense had strategically selected the juror. R:789-92. Voir dire is “a very important part of trial procedure.” Wayne R. LaFave et al., 6 Criminal Procedure, § 22.3(a), at 71 (3rd ed. 2007). It is the process “by which both the defense and the prosecution try to eliminate . . . prospective jurors who appear sympathetic to the opposition or at least unsympathetic to their side.” *Id.* “Many attorneys believe that trials are frequently won or lost during this process.” *Id.* “The process by which the principal jurors and alternate jurors are chosen is crucial to the preservation of the right to an impartial jury. . . . The primary function of a peremptory challenge is to allow parties to strike prospective jurors whom they have good reason to believe might be biased but who are not so clearly and obviously partial that they could otherwise be excluded from the panel.” *Bruckshaw v. Frankford Hosp. of City of Philadelphia*, 58 A.3d 102, 112 (Pa. 2012). Additionally, “[a]s a strategic matter, counsel may decide, as the number of available peremptory challenges decreases, to accept jurors with unappealing characteristics or make compromises about who is an acceptable juror.” *Id.* “[T]he parties have little reason to save their peremptory challenges for the last alternate chosen because there is only a small chance of the last alternate juror deliberating with the jury.” *Id.*

For example, in this case Juror 16 was college educated. R:487. She had insight and experience dealing with people as a travel agent and had a career in education. R:487. She followed the news through Time Magazine and the Salt Lake Tribune. R:488.

The alternate juror did not have a college education. R:489. He read “outdoor magazines like American Rifleman” and “Fox News.” R:489-90. Fox News is known for coverage advocating tough-on-crime policies. *E.g.*, Nick Summers, *Fox News Coverage of the Trayvon Martin Case Criticized* (March 21, 2012), The Daily Beast, <https://www.thedailybeast.com/fox-news-coverage-of-the-trayvon-martin-case-criticized?ref=scroll> (“Fox has been known for its aggressive coverage of stories relating to . . . crime.”); *see also* Maurice Chammah, *American Sheriff* (May 5, 2016), The Atlantic, <https://www.theatlantic.com/politics/archive/2016/05/american-sheriff/481131/> (“David Clarke, the . . . pro-mass-incarceration, Fox News Favorite . . .”).

The court’s error here is similar to an error that requires counsel to use a peremptory challenge on a juror that should have been excused for cause. In both instances, the defense is unfairly disadvantaged in its selection of the jury. In the case of a wasted peremptory challenge, the Utah Supreme Court overruled precedent holding that it is presumptively prejudicial because a “party should not be compelled to waste” a peremptory challenge and the “juror which remained because the plaintiffs had no challenge to remove him may have been a hawk

amid seven doves and imposed his will upon them.” *Crawford v. Manning*, 542 P.2d 1091, 1093 (Utah 1975), *overruled by State v. Menzies*, 889 P.2d 393, 398 (Utah 1994) (“To prevail on a claim of error based on the failure to remove a juror for cause, a defendant must demonstrate prejudice, *viz.*, show that a member of the jury was partial or incompetent.”).

However, where counsel has already selected the jury and the defense objects that replacing a juror with the alternate juror would frustrate the defense’s strategic selection, a defendant can show a reasonable likelihood of a more favorable outcome without showing that a member of the jury panel should have been excluded for cause.

First, counsel and the defendant have had an opportunity to view the jurors during the presentation of evidence. In Grandos’s case, the defense had observed Juror 16 taking notes and wanted her to remain on the jury. R:789. The circumstances are different from a case where defense counsel is merely selecting which jurors to strike before the presentation of evidence.

Second, it would open the door to misconduct to adopt a *per se* rule that, absent proof of a juror’s actual bias or incompetence, it is never prejudicial to replace a juror with an alternate. The appellate courts cannot “ensure fair trial and protect the integrity of the jury” if they “impose the impossible burden of requiring a showing of prejudice” where the district court improperly replaced a competent juror with an alternate. *Bruckshaw*, 58 A.3d at 153. For example — although not a concern in Grandos’s case — such a rule would insulate the

replacement of jurors with alternates even if the replacement were racially motivated. *Cf. United States v. Nelson*, 102 F.3d 1344, 1350 (4th Cir. 1996) (“Nelson argues that the court’s standard for replacing juries should be heightened in the circumstances of this case because two black jurors were being replaced with two white jurors.”).

Instead of requiring a showing of actual bias or incompetence, this Court should reverse because, under the generally applicable standard for reversal, there is a reasonable likelihood that, absent the error, the outcome would have been more favorable to Granados. *Knight*, 734 P.2d at 919. And it should grant that, in most circumstances, a strategically selected jury will yield a more favorable result for a defendant than one that is selected over the defense’s objection after the presentation of evidence has begun.

Furthermore, the evidence related to the shooting was weak. Even if the evidence was minimally sufficient, it was not so convincing that any reasonable juror would convict. *See supra*, Issue I. No witness identified Granados as the shooter, R:608-10; 1009 (the only witness to make an identification did not select Granados’s photo from a photo array), he had no motivation to shoot the victim, R:1105, and his fingerprints were excluded in a test of the bumper a witness saw the shooter touch. R:844-46.

In conclusion, the court erred when it dismissed the juror without questioning her. The error was prejudicial because there is a reasonable

likelihood that, absent the court's error, the result would have been more favorable to Granados.

CONCLUSION

For the reasons argued in Issue I, Granados respectfully requests that this Court reverse and vacate for insufficient evidence his convictions of attempted murder, criminal mischief, and possession of a dangerous weapon by a restricted person.

For the reasons argued in Issue II, Granados respectfully requests that this Court reverse all his convictions and remand for a new trial.

SUBMITTED this 25<sup>th</sup> day of October 2018.

  
\_\_\_\_\_  
NATHALIE S. SKIBINE  
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 6,223 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted from the foregoing brief of defendant/appellant.

  
\_\_\_\_\_  
NATHALIE S. SKIBINE

CERTIFICATE OF DELIVERY

I, NATHALIE S. SKIBINE, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5<sup>th</sup> Floor, Salt Lake City, Utah 84114; and two copies to the Utah Attorney General's Office, 160 East 300 South, 6<sup>th</sup> Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at [courtofappeals@utcourts.gov](mailto:courtofappeals@utcourts.gov) and a copy emailed to the Utah Attorney General's Office at [criminalappeals@agutah.gov](mailto:criminalappeals@agutah.gov), pursuant to Utah Supreme Court Standing Order No. 11, this 25<sup>th</sup> day of October 2018.

  
\_\_\_\_\_  
NATHALIE S. SKIBINE

DELIVERED this \_\_\_\_\_ day of October 2018.

\_\_\_\_\_



## ADDENDUM A



The Order of the Court is stated below:

Dated: December 28, 2017  
04:40:47 PM

/s/ PAUL B PARKER  
District Court Judge



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

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 161906242 FS
JOSEPH CRESCENCIO GRANADOS,	:	Judge: PAUL B PARKER
Defendant.	:	Date: December 22, 2017
Custody: Salt Lake County Jail		

PRESENT

Clerk: shantec

Prosecutor: BRADFORD D COOLEY

ADAM B BLANCH

Defendant Present

The defendant is in the custody of the Salt Lake County Jail

Defendant's Attorney(s): DAVID P S MACK

NICK FALCONE

DEFENDANT INFORMATION

Date of birth: September 23, 1982

Sheriff Office#: 380860

Audio

Tape Number: S34 Tape Count: 9.02-9.48

CHARGES

1. ATTEMPTED MURDER - 1st Degree Felony  
    Plea: Not Guilty - Disposition: 10/20/2017 Guilty
2. FELONY DISCHARGE OF A FIREARM - 2nd Degree Felony  
    Plea: Guilty - Disposition: 12/22/2017 No Cause of Action
3. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony  
    Plea: Guilty - Disposition: 12/22/2017 No Cause of Action
4. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony  
    Plea: Guilty - Disposition: 12/22/2017 No Cause of Action
5. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony  
    Plea: Guilty - Disposition: 12/22/2017 No Cause of Action
6. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony

- Plea: Guilty - Disposition: 12/22/2017 No Cause of Action  
7. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony  
Plea: Guilty - Disposition: 12/22/2017 No Cause of Action  
8. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony  
Plea: Guilty - Disposition: 12/22/2017 No Cause of Action  
9. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony  
Plea: Guilty - Disposition: 12/22/2017 No Cause of Action  
10. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony  
Plea: Guilty - Disposition: 12/22/2017 No Cause of Action  
11. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony  
Plea: Guilty - Disposition: 12/22/2017 No Cause of Action  
12. FAIL TO STOP OR RESPOND AT COMMAND OF POLICE - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 10/20/2017 Guilty  
13. CRIMINAL MISCHIEF:INTENTIONAL DAMAGE,DEFACE,DESTROY PROPERTY - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 10/20/2017 Guilty  
14. POSSESSION OR USE OF A CONTROLLED SUBSTANCE - Class A Misdemeanor  
Plea: Not Guilty - Disposition: 10/20/2017 Guilty  
15. USE OR POSSESSION OF DRUG PARAPHERNALIA - Class B Misdemeanor  
Plea: Not Guilty - Disposition: 10/20/2017 Guilty  
16. POSSESSION OF A DNGR WEAP BY RESTRICTED - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 10/20/2017 Guilty

SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED MURDER a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than three years and which may be life in the Utah State Prison.

Based on the defendant's conviction of FAIL TO STOP OR RESPOND AT COMMAND OF POLICE a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of CRIMINAL MISCHIEF:INTENTIONAL DAMAGE,DEFACE,DESTROY PROPERTY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of POSSESSION OF A DNGR WEAP BY RESTRICTED a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Case No: 161906242 Date: Dec 22, 2017

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

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

To run consecutive. Counts 14 and 15 are consecutive with credit for time served and closed.

ALSO KNOWN AS (AKA) NOTE

JOSEPH PSYCHO  
CYKO  
GF PSYCHO  
J PSYCHO  
JOSEPH GRANADOS

SENTENCE JAIL

Based on the defendant's conviction of POSSESSION OR USE OF A CONTROLLED SUBSTANCE a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s)

Based on the defendant's conviction of USE OR POSSESSION OF DRUG PARAPHERNALIA a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s)

Credit is granted for 545 day(s) previously served.

Case No: 161906242 Date: Dec 22, 2017

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Restitution Amount: \$3526.95 Plus Interest  
Pay in behalf of: OFFICE FOR VICTIM OF CRIME

Restitution Amount: \$1200.00  
Pay in behalf of: KIMBERLY N

Restitution Amount: \$375.00  
Pay in behalf of: JOSE M

Defendant has a right to file a notice of appeal within 30 days of sentencing.

Motion to merge charges 2-11 into count 1 is granted.

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

Case No: 161906242 Date: Dec 22, 2017

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 161906242 by the method and on the date specified.

EMAIL: ADC ADC-court1@slco.org

EMAIL: ADC ADC-Transportation@slco.org

EMAIL: PRISON udc-records@utah.gov

12/28/2017

/s/ SHANTE COLLINS

Date: \_\_\_\_\_

\_\_\_\_\_

Deputy Court Clerk



## **ADDENDUM B**



1           **MS. VALDEZ:** I think so.

2           **MR. FALCONE:** And, Judge, I have something at 10 for  
3 competency on another case.

4           **MR. COOLEY:** I think Mr. Falcone can find some  
5 coverage for that.

6           **THE COURT:** You guys are stuck here at 9:00.

7           **MR. COOLEY:** We'll be here at 9:00.

8           **THE COURT:** We'll start promptly at 9:00. If you  
9 would be here at quarter to, and we'll be ready and we'll  
10 proceed.

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

12           (Jury exits the courtroom.)

13           **THE COURT:** Have a seat. Jury has now been excused,  
14 the door is not closed. I've got to go get the jury  
15 instructions anyway.

16           All right. Now the door is closed. Motions?

17           **MR. FALCONE:** Judge, we'd like to start off by asking  
18 the Court to direct a verdict in this case. Would you like to  
19 hear argument on that.

20           **THE COURT:** Yes.

21           **MR. FALCONE:** All right. So, Your Honor, there are  
22 several charges, and we need to address some of these and what  
23 the State has prevent -- presented as part -- part of their  
24 evidence in this case. So we have the attempted homicide Count  
25 1 of the information, and then we look at the continuing

1 counts, and we're going down to 13, a felony discharge of a  
2 firearm.

3           So I'd like to address those as being the most  
4 crucial for the Court's determination on how this case goes  
5 forward. There are two parts to this case. Part 1 is a  
6 shooting that happens in West -- in West Jordan. Okay? And  
7 then four hours later, right around there, there is a chase in  
8 --

9           **THE COURT:** Four hours later?

10           **MR. FALCONE:** Well, the first report of the shooting  
11 comes in around 4:00. And so West Valley starts communicating  
12 with this detective or he hears the calls coming in about seven  
13 o'clock, according to his testimony. So there is that several  
14 hour period that the shooting happens and then there's the  
15 chase.

16           So in the meantime, this vehicle is somewhere, that  
17 we don't know where it is. And what is the evidence we have at  
18 the scene of the shooting. The evidence we have at the scene  
19 of the shooting is that there were several witnesses there.  
20 Some of them saw the shooting happening. One of the witnesses  
21 says that she actually has a sight and she's looking at the  
22 person that is involved in the shooting, that's Ms. Henry.  
23 Ms. Henry says that. She also sees this individual get out of  
24 the car and actually take the bumper and put it in the back  
25 seat of the car, so it's being handled.

1           But when she testifies, she says she has a perfect  
2 memory, and then she presented with this photo lineup where she  
3 picks the wrong person. That's all the evidence we have from  
4 her in regards to identification.

5           Then we have the alleged victim in the matter, who  
6 also reports that he has no clear identification of the person  
7 that shot at him at his vehicle. And if we look at the  
8 majority of the shots fired, they're fired in the rear portion  
9 of the car. So as a part of the homicide, even the attempted  
10 homicide statute, there has to be intent to -- to kill, and  
11 that's an imperfect attempt kill, because it's an attempted  
12 homicide. But that intent has to be there, it has to be  
13 present.

14           So we can't really get there when we have, first of  
15 all, no identification. Now remember, there were several other  
16 people that see this thing happen. There are two witnesses  
17 that are standing with their teenage children. The police get  
18 one of these witnesses via 911 call. But she's never  
19 interviewed by the police at the time this all went down. So  
20 they're relying on the call, and then they talk to her or  
21 communicate with her at some other time, but they never  
22 communicate with her daughter who's old enough to definitely  
23 see what's going on, and actually have some input on the ID.

24           Then we have another person standing on her doorstep  
25 looking at what's going on with her daughter who's in and out,

1 possibly, or standing right behind her, also not and  
2 interviewed by the police and never given a statement. All of  
3 these witnesses cannot confirm Mr. Granados as being the person  
4 that shot at the car. Intent to kill, all the shots are  
5 happening in back of the car.

6 As a matter of fact, it appears that the one shot  
7 that actually hit the alleged victim in the side, it's a --  
8 it's a -- it looks like it's a stray, but never intended to  
9 actually hit him, otherwise you'd be firing directly at him.  
10 And once again, we have no idea who's doing that.

11 The State is making a lot of assumption in that  
12 several-hour period as to whether Mr. Granados is the shooter  
13 or not, just because he's in the vehicle at the time, that they  
14 chase him through West Valley. Additionally, they chased him  
15 the night before. He tried to get away and then they chased  
16 him before that. We have evidence. So he runs from the  
17 police. That doesn't make him a shooter in the West Valley  
18 City -- I mean, the West Jordan incident. There has to be more  
19 to connect him. The nexus has to be more clear, and it is not  
20 clear.

21 The Court actually ruled yesterday or gave  
22 instruction to the jury that identification has not been made  
23 in relationship to the shooting. And I believe that would  
24 still be the Court's position now. And if that is the case,  
25 then Counts 1 through 13 have to be dismissed because it's a

1 factual question of whether there's identification or not.

2           And there has not been identification of the person  
3 that was shooting out of his vehicle, and there's different  
4 variations of what everybody sees of how that shooting is  
5 happening, and Mr. Granados' gun's never found, obtained, so we  
6 have none of that evidence.

7           Evidence is mishandled continuously. Different  
8 people are in and out of the car, the car's transported, people  
9 don't know where the car is or in relationship to the  
10 investigation.

11           Okay. Now what do we have ID on? We do have ID 14  
12 through 20, and thus -- that's in regard to the chase and in  
13 regard to the detention and arrest of Mr. Granados after he is  
14 chased. So all these officers that testified about that, did  
15 identify Mr. Granados, because they found him, they got him.  
16 We saw the video. Okay. That's the chase.

17           So right now the defense, I think we're in good  
18 standing to make this motion, is asking the court to dismiss 1  
19 through 13 of the information based on no identification, the  
20 faulty evidence that was found, and absence of any other  
21 evidence that links Mr. Granados to the shooting. So I'll  
22 submit with that.

23           **THE COURT:** The motion will be denied. There has  
24 been quite substantial evidence to -- for which the jury could  
25 infer the defendant is the one who did this. So I think we

1 start with the identification issues. Of course there is the  
2 statement by the victim in this case that he saw a single  
3 Hispanic male with tattoos on his arm in the car and that was  
4 the person that fired the shots at him. There was the witness  
5 that was -- what was her name? Excuse me. Who was standing  
6 with her -- Ms. Wood who heard four shots, and then a little  
7 bit of a pause and heard more, saw a car pass. The car was a  
8 maroon car, and I guess I need to back up.

9           The victim identified it as a maroon kind of a  
10 mid-size car with -- that hit him in the rear. The inferences  
11 that would cause that damage to his car, Ms. Wood saw damage to  
12 the front of the car, saw the front passenger side kind of  
13 caved in and identified a white triangle in the back of the  
14 car, which when it was found by the police later in the chase,  
15 did, in fact, have that little triangle for the child on board.

16           There was an officer that saw a headlight set up that  
17 the other witness identified as falling off the car, that was  
18 Ms. Henry. The car when it was found was missing the  
19 headlight. She also identified the individual that stopped and  
20 picked up the bumper and then put it in the back of the car.  
21 That bumper was found in the car. Described the defendant as  
22 having a round face, dark eyes, short hair, dark hair, and  
23 although she did not pick him out, was not sure, and frankly,  
24 as I reviewed the lineup, is fairly remarkable for all the  
25 people being in there and having a facial features very

1 consistent with the defendant in this case.

2           The defendant was seen from the car. There was  
3 testimony that this was, I believe his wife's or his  
4 girlfriend's car that he had evaded the police the day before  
5 in the car, that he was a person who engaged within two hours,  
6 and I heard it was just shortly after 6:00 when they started  
7 that, led them in quite an extraordinary chase. The inference  
8 from that is that he is the one that fired the shots. I think  
9 there's more than enough to identify him.

10           As far as my comments they hadn't been able to  
11 identify him, that perhaps was too strong. I was reacting to a  
12 opinion and a statement by the officer calling him  
13 various -- or giving his opinions about him. I certainly -- if  
14 that's something that counsel will refer to in the -- in their  
15 closing arguments, I will have to instruct the jury further  
16 that they certainly may infer from -- any of the evidence, the  
17 identification for which they seek. I was simply objecting to  
18 a characterization given that evidence at that particular time.

19           I'd also note, as far as an attempt, that the -- the  
20 defendant is accused and the evidence was clear that the person  
21 who the jury may infer is the defendant, followed closely the  
22 victim's car, rammed the car in a matter that drove -- forced  
23 him off the road into another car and then up on across the  
24 curb on the sidewalk. The bullets went roughly from the  
25 location of where the defendant was into the vehicle, and they

1 were sufficiently, if his direction and -- and number that the  
2 jury could very well find that he intended to kill the victim  
3 when he shot at him, so the motion's denied.

4 **MR. MACK:** Okay.

5 **THE COURT:** Do you have other motions?

6 **MR. FALCONE:** Do you have any other motions, Dave?

7 Okay. We have no other motions.

8 **THE COURT:** All right. Let's talk about jury  
9 instruction then.

10 And I fixed the one as I indicated, adding the word  
11 "intent" on intentionally discharged the firearm for all of the  
12 discharge of a firearm charges.

13 **MR. COOLEY:** Your Honor, defense counsel and I  
14 discussed that. My position would be that with respect to the  
15 prong of the discharge statute, that I included in the proposed  
16 elements instructions, it becomes general intent. If you  
17 discharge a firearm in the direction of any person knowing or  
18 having reason to believe that any person may be in danger, you  
19 don't need to intentionally discharge the firearm. At that  
20 point I -- I think the statute, by leaving it out where it  
21 includes it in the other prongs, I believe that indicates that  
22 it's a general intent with respect to the mechanical side of  
23 things.

24 With respect to the act itself, I -- it doesn't say  
25 you have to intentionally discharge a firearm. You do have to

## ADDENDUM C



1 (Video playing)

2 Q. What road are you traveling on there?

3 A. We're northbound on Redwood Road. I believe we're  
4 approaching 500 South. Nope, that's on the end.

5 (Following is audio playing)

6 Echo 22, do we have [inaudible]

7 Q. **(BY MR. COOLEY)** During this period, what was the --  
8 what was your speed, do you recall?

9 A. Uh, my speed ranged from 45 to 60 miles -- 65 miles  
10 an hour is what I'm approximating.

11 Q. What -- what road are you crossing right now?

12 A. That is I-80, the I-80 overpass that we're passing  
13 and turning left westbound onto the on-ramp to 215 and I-80  
14 here.

15 Q. The narration that you are hearing in the background,  
16 was that another officer that's involved in this?

17 A. It is. On the radio?

18 Q. Yeah.

19 A. Yes, that's the No. 2 vehicle which is the vehicle  
20 behind me that's calling out the pursuit. That's Sergeant  
21 Gray.

22 Q. Okay.

23 **THE COURT:** Let's pause for a moment, if you can.  
24 Let's take about a 15-minute break. It looks like everyone is  
25 getting a little tired. Let's give you your morning break.

1 We'll take 15 minutes.

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

3 **THE COURT:** Have a seat, please.

4 You can just put that microphone -- you don't have to  
5 resume the stand.

6 The reason I did that is Juror No. 16 keeps falling  
7 asleep. And yesterday the same thing, is the reason I took  
8 some breaks. And I'm a little concerned right in the middle of  
9 the presentation that usually would take someone's attention,  
10 she's noticeably falling asleep.

11 **MR. MACK:** I got to say I'm getting tired of the  
12 videos too, but... Perhaps we can just agree that we have a  
13 new alternate rather than the last juror, assuming that  
14 everybody, everybody survives till --

15 **THE COURT:** Well, let's do this. You can talk about  
16 it. I just wanted to bring your attention now. And I'll keep  
17 trying to watch and take breaks. I did it yesterday to have  
18 them stand up and I'll continue to do it, but I just wanted to  
19 bring it to everyone's attention.

20 **MR. MACK:** Thank you. I hadn't noticed that  
21 honestly, but I will --

22 **THE COURT:** Well, it's probably your view. But I had  
23 my clerk tell me that yesterday and I watched her. And like I  
24 say, it's the reason I stopped and had them all stand up at one  
25 point yesterday. And like I say, today she just keeps closing

1 her eyes and her head rocks back and forth. She's clearly  
2 falling asleep.

3 **MR. MACK:** Is that -- I'm not sure who 16 is.

4 **THE COURT:** It's the older lady in the -- she has  
5 kind of white hair.

6 **MR. MACK:** Is she the one that asked for the people  
7 to speak up?

8 **THE COURT:** Yes.

9 **MR. MACK:** Okay.

10 **THE COURT:** Yes. All right. Let's take a break.

11 **MR. FALCONE:** Thank you, Judge.

12 (Recess taken by the court.)

13 **THE COURT:** For the record, let me tell you this.  
14 Again, the defendant is here. I am going to dismiss Juror  
15 No. 16. I'm going to do it at the end of the morning. Sitting  
16 here, I've sat there and thought about it. I've had input from  
17 both of my staff, Shane my clerk, as well as Shante, who has  
18 seen her sleeping for a significant period of time.

19 **MR. MACK:** Okay.

20 **THE COURT:** And she was obviously falling asleep  
21 here. I just don't know a way to survive that and have the  
22 trial go as it needs to go and have someone who is missing that  
23 amount of time.

24 **MR. MACK:** Judge, if I can make a record. We -- I  
25 haven't noticed this and I'm not saying those observations

1 aren't accurate, but I do know that in many of the trials that  
2 I've done, I've seen jurors nodding off on occasion. We  
3 would -- and I think -- and I don't know if this extends beyond  
4 today, but if it's just today --

5 **THE COURT:** Well --

6 **MR. MACK:** -- starting these videos, I don't know  
7 that's a crucial, critical thing --

8 **THE COURT:** An let me help you with that, because it  
9 happened yesterday. And again, talking to those people who  
10 were with me up on the stand, they saw her up to about five  
11 minutes asleep.

12 **MR. MACK:** Okay.

13 **THE COURT:** I saw her asleep yesterday as well. And  
14 that's the reason I had them stand yesterday because she was --  
15 she was asleep.

16 **MR. MACK:** Okay.

17 **THE COURT:** So it's not just one day. It's two days.  
18 And it's over a significant period of time.

19 **MR. MACK:** Okay. And just for the record, we would  
20 object to it. But is your plan then -- I'm sorry. You said  
21 after today's session?

22 **THE COURT:** Yes, what I thought, we have about  
23 another hour today. And so what I thought we'd do is conclude  
24 the trial. I'll have her remain and then I'll excuse her. I  
25 didn't want to stick her on the spot.

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**MR. MACK:** Yeah.

**THE COURT:** Okay.

**MR. MACK:** All right. Thank you.

**MR. COOLEY:** You said adjourn the trial. You mean  
adjourn for the day?

**THE COURT:** Adjourn for the day. Yeah. Okay.  
Anything else? Can we bring the jury?

**MR. MACK:** I think we're ready.

**MR. COOLEY:** Yeah.

**THE COURT:** All right.

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

Please be seated.

**THE COURT:** All right. Let's have the witness resume  
the stand. Or standing where he was, either one.

I guess I need to ask the jury these questions,  
though, as you get up and get prepared.

Did anyone talk to anyone or let anyone talk to you  
about the case? If so, raise your hand.

And I need that TV moved for just a minute. Would  
you pull it toward you, Officer.

Did anyone send or receive electronic communications  
about the case? If so, raise your hand.

Did anyone seek or obtain or get outside information  
from the internet or other courses? If so, raise your hand.

Did anyone talk to parties, witnesses, show your

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

2           **THE COURT:** If you would remain in the courtroom.  
3 Stay here.

4           **JUROR:** I will.

5           **THE COURT:** All right.

6           **MR. MACK:** Judge, can we approach?

7           **THE COURT:** Yes. Please be seated.

8           (Following is discussion held at sidebar.)

9           **MR. MACK:** So I just wanted to embellish the record a  
10 little bit, but I'm wondering, though -- well, I just want -- I  
11 don't want her to necessarily go because I see her taking  
12 notes. I see her trying to pay attention. And I wonder if  
13 maybe an admonishment or a question, even a question of her if  
14 she feels like she hasn't -- she's missed some parts or  
15 something before she's just dismissed.

16           **MR. COOLEY:** I think it would be appropriate to ask  
17 her -- I'm sure she knows that she's been drifting off to  
18 engage. She feels whether it changes anybody's mind --

19           **THE COURT:** I'm still going to dismiss her.

20 [inaudible]

21           **MR. MACK:** Okay.

22           **THE COURT:** [inaudible]

23           (End of sidebar discussion)

24           **THE COURT:** Ma'am, I am going to let you go from the  
25 jury. And I appreciate how hard you've tried and how diligent

1 you've been. I've seen that. Unfortunately, I've also watched  
2 you fall asleep a couple of times. And it is just so important  
3 that you see and hear all that occurs here. Rather than  
4 causing an error to be in this trial, I'm being a little more  
5 cautious and so I will relieve you of jury service. So you're  
6 done, but thank you very much for your efforts.

7 **JUROR:** Thank you.

8 **THE COURT:** All right.

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

10 **MR. MACK:** Judge, can we just at least make a  
11 inquiry? I think that needs to be done for the record.

12 **THE COURT:** Well --

13 **MR. MACK:** If she's -- I think it should also be  
14 pointed out when the Court asked her to remain back, she got up  
15 to leave with the rest of the jury and had to be told a couple  
16 of times by the juror seated next to her, no. He actually  
17 asked her to remain.

18 **THE COURT:** Well, let me tell you why I decided to go  
19 ahead and do it. You recall I brought that up before the  
20 break. At the break I timed it that way because she was -- she  
21 was falling asleep. And what I saw specifically is her look  
22 up, close her eyes, and then the head kind of nod forward, and  
23 it happened repeatedly. And finally, I was concerned about  
24 going any further because of what she was clearly missing.

25 The problem is I had that complaint from both of my

1 assistants, from my clerk and from Shante, both of whom watched  
2 her yesterday. In fact, I got a note about it yesterday that  
3 she was falling asleep. I tried to observe it and saw it  
4 myself. And again, I had to call and try to get them all up,  
5 to stand up and shake it off. I did that because -- for her.

6 This wasn't just one time where she just kind of  
7 dozed off for a minute. And I agree that she was trying to be  
8 a diligent juror, but all three of us saw it multiple times  
9 during significant parts of the trial. And it just got to be  
10 such a point that I cannot allow -- allow her to go forward.  
11 She has missed a significant amount. It doesn't matter at this  
12 point whether she knows that she missed it or not. The fact is  
13 that I observed her and my staff observed her missing  
14 significant parts of the trial. I just have to make the call  
15 on that. And that's the reason for my decision.

16 **MR. MACK:** I understand, Judge. If I could just add  
17 a little bit --

18 **THE COURT:** Go ahead.

19 **MR. MACK:** -- to our objection. Our objection  
20 previously was we did not necessarily -- we did not want to  
21 have her released. I mean, we strategically selected her. We  
22 wanted her to be on this jury.

23 And I would just note that at the bench conference,  
24 Mr. Cooley and I, before the juror was dismissed, suggested to  
25 the Court that you inquire of the juror whether or not she --

1 well, at least to ascertain how much she thought she maybe  
2 missed or how many times she maybe was asleep, if she was able  
3 to take notes or just to evaluate herself. That's all. I mean  
4 we made that request. I understand the Court's ruling, but  
5 that would be our objection.

6 **THE COURT:** All right. And thank you. And again,  
7 the reason as I didn't do that is because it hit the point that  
8 it was just obvious and that it was clear that she missed a  
9 significant amount. And frankly, it wasn't going to be very  
10 persuasive to me if she was aware that she missed, because she  
11 clearly missed it and because she was asleep.

12 I would note from the record, when I told her that it  
13 was because she was asleep, she just nodded in the affirmative  
14 and let it go at that. So anyway. We'll --

15 **MR. MACK:** If you see me sleeping this afternoon,  
16 will you just let me go -- tomorrow. Tomorrow.

17 **THE COURT:** I will have a crowded courtroom in an  
18 hour. So if you could take care of your things so they will  
19 not be disturbed. Again, I offer the use of the closet if  
20 anybody wants a briefcase or stack paper in there.

21 We'll be in recess and adjourned until 9:00 tomorrow  
22 morning.

23 **MR. FALCONE:** Thank you, Judge.

24 **MR. COOLEY:** Thank you.

25 (Court was adjourned at 11:55 a.m.)