1993

The City of Moab v. Michael B. Giolas : Brief of Appellant

Utah Court of Appeals

William L. Benge; Moab City Attorney; Attorney for Plaintiff/Appellee.
Steven Lee Payton; Attorney for Defendant/Appellant.

IN THE UTAH COURT OF APPEALS

THE CITY OF MOAB, Plaintiff/**APPELLEE**, vs. MICHAEL B. GIOLAS, Defendants/**APPELLANT**.	*	**BRIEF OF APPELLANT** [Utah R. App. P. Rule 29] ["Oral Argument" -- Priority (2)] Case No. 930741-CA

BRIEF OF APPELLANT

APPEAL FROM THE SEVENTH DISTRICT COURT
GRAND COUNTY, STATE OF UTAH
JUDGE, LYLE R. ANDERSON

930741

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JURISDICTIONAL STATEMENT

Appeal herein is from a Jury Trial, October 29, 1993 finding defendant guilty of "Assault," a Class B Misdemeanor.

JURISDICTION OF THE COURT OF APPEALS

Utah R. App. P. Rule 3 [Appeal as of right: how taken.]

Utah R. App. P. Rule 4 [Appeal as of right: when taken.]

U.C.A. 78-2a-3(2)(f) [Court of Appeals Jurisdiction [1993 Cumulative Supplement]

RELIEF REQUESTED

Reversal of judgment.

STATEMENT OF NATURE OF PROCEEDINGS

The case herein involves a charge of "Aassault" by the Moab City Attorney alleging that the defendant assaulted his then wife [at time of trial, ex-wife] and alleging specifically as set out in the Information as follows:

> COMES NOW William L. Benge, Moab City Attorney, and states on information and belief that the Defendant committed in the above named city and county, the crime(s) of:
>
> ASSAULT - DOMESTIC VIOLENCE in violation of Moab City Ordinance #92-06 (Section 76-5-102, UCA), in that the said Defendant, MICHAEL BRUCE GIOLAS, on the l0th day of April, A.D., 1993, at approximately 7:12 p.m., at 549 North Main, Moab, Grand County, State of Utah, did attempt with unlawful force or violence, to do bodily injury to Rebecca M. Giolas, a Class B Misdemeanor.
>
> DATED this 14 day of APRIL , A.D.. 1993.
>
> /S/SIGNED
> William L. Benge,
> Moab County Attorney

Defendant entered a **"NOT GUILTY"** plea to the charge and jury trial was held October 29, 1993 in the District Court of Grand County, Moab, UT. Jury found the defendant **"GUILTY"** of the offense; however, had to be sent out twice to agree upon a verdict, and indicated that they felt constrained by the law as they had been instructed, but made a specific request on their own that the punishment of the defendant be minimal.

STATEMENT OF ISSUES

POLICE REPORT ADMISSIBLITY Court error by refusing to allow defendant to introduce into evidence police reports of the incident?

BOOKING SHEET ADMISSIBILITY Did the court error by refusing to allow the defendant to introduce into evidence the booking sheet?

FALSE IMPRESSION -- PROSECUTION DUTY Did the prosecution allow false testimony to stand that affected the credibility of the witnesses and allow same to go uncorrected, thereby denying due process to the defendant?

DEFENDANTS THEORY OF CASE -- CROSS-EXAMINATION Was the defendant denied due process by virtue of the court refusing to allow the defendant to cross-examine the officer with regards to statements about alcohol in her report or allow the defendant to cross-examine regarding intoxylizer test showing no alcohol?

TIME & PLACE OF OFFENSE Did the court commit error by refusing to instruct the jury exactly as the Information was worded in not requiring that the jury find that the offense occurred at the specific time and place as stated in the Information?

CLOSING ARGUMENT When the prosecutor brought to the attention of the jury matters which they should not appropriately consider in the case, was the court in error for not specifically instructing the jury that the prosecutor was wrong and to disregard those things?

CUMULATIVE ERROR Does the sum total of errors in this case undermine the confidence in the verdict or the belief that the result may have been different had they not been committed?

STANDARD OF REVIEW

Standard of Review with regards to the points of error raised in the case are articulated for each point and set out as follows:

POLICE REPORT ADMISSIBILITY

"CLEAR ERROR"

State v. Bertul 664 P. 2d 1181 (UT 1983)

BOOKING SHEET ADMISSIBILITY

"CLEAR ERROR"

State v. Bertul 664 P. 2d 1181 (UT 1983)

FALSE IMPRESSION -- PROSECUTION DUTY

"REASONABLE LIKELIHOOD COULD HAVE AFFECTED JUDGMENT OF JURY"
Walker v. State 624 P. 2d 687 (UT 1981)

State v. Schnoor 845 P. 2d 947 (Utah App. 1993)

DEFENDANTS THEORY OF CASE -- CROSS-EXAMINATION

"HARMLESS ERROR BEYOND A REASONABLE DOUBT"

Olden v. Kentucky 488 US 227, 102 L Ed 2d 513, 109 S Ct. 480 (1988)

TIME & PLACE OF OFFENSE

"STANDARD OF REVIEW UNKNOWN; CONSTITUTIONAL GAURANTEE REQUIRES SPECIFICITY AND ABILITY TO PLEAD JEOPARDY FROM FACE OF INFORMATION"

Article I Section 12, Utah Constitution
[Rights of Accused Persons]

U.R.C.P. Rule 9 [Pleading Special Matters]

U.C.A. 76-8-501 "Definitions"

U.R.C.P. Rule 81(e) [Application In Criminal Proceedings]

Brigham City v Valencia 779 P.2d 1149 (UT App. 1989)

State v Anderson 797 P.2d 1114 (UT App. 1990)

State v Topham 41 Utah 39, 123 P. 888 (UT 1912)

State v Fisher 79 Utah 115, 8 P.2d 589 (UT1932)

Ballaine v District Court 107 Utah 247, 153 P. 2d 265 (UT 1944)

McNair v Hayward 666 P.2d 321 (UT 1983)

State v Wilson 105 Utah 516, 143 P.2d 907 (UT 1943)

State v Jessup 98 Utah 482, 100 P.2d 969 (UT 1940)

CLOSING ARGUMENT

"REASONABLE LIKELIHOOD THAT IN ABSENCE OF STATEMENTS THERE WOULD HAVE BEEN A MORE FAVORABLE RESULT"

State v. Cummins 194 Utah Adv. Rep. 48 (Utah App. 1992)

State v. Dibello 780 P. 2d 1221 (Utah 1989)

State v. Tillman 750 P. 2d 546 (Utah 1987)

CONSTITUTIONAL PROVISIONS STATUTES & RULES

Provisions upon which the defendant relies are set out in body of brief.

** TRANSCRIPT & RECORD REFERENCES [FACTS]

Facts in this case are police department was called to a domestic disturbance at the Days Inn Motel in Moab, Utah. Factual assertions are identified herein by transcript and line. **** IT SHOULD BE NOTED THAT THE RELEVENT PAGES OF THE TRANSCRIPT AND RECORD ARE ENCLOSED IN THE ADDENDUM HERETO AND HAVE BEEN MARKED FOR THE CONVENIENCE OF THE COURT TO QUICKLY LOCATE IN ONE PLACE ALL REFERENCES TO TRANSCRIPT OR RECORD RELEVENT TO APPELLANTS ARGUMENT.**

Officer Becky Mallon arrived at the Motel and interrogated complaining witness, Rebecca Giolas [at the time of trial, defendants ex-wife]. She indicated that parties had returned to the Day's Inn parking lot and two of them had been drinking and that the defendant had been drinking heavily. Ms. Giolas indicated that the reason she knew this was because she had been drinking with defendant, and that **these events occurred between 6:30 and 7:30 p.m. in the parking lot.** She asserts that she was assaulted by the defendant. Police were called. Upon the arrival of Officer Mallon, she indicated she could smell the odor of alcohol on the defendants breath and his person. She talked to the complaining witness. Defendant was subsequently placed under arrest by Officer Mallon for "Intoxication" and "Domestic Assault."

He was transported to the Grand County Jail, at which time a breathalyzer test was taken by Trooper Dennis Lund, which showed 0.000, and that there was no alcohol present. A number of reports made by Officer Mallon indicated intoxication or drinking by defendant. At time of trial the only witnesses to testify were Officer Mallon and defendants ex-wife, and they both insisted that he had been drinking, and that there was alcohol. Defendant was prohibited from introducing into evidence the reports to refute such testimony, which affected credibility and was not allowed to cross-examine in terms of the alcohol allegations in reports. After the verdict was returned, prosecutor did stipulate that such reports existed and that it would show no alcohol.

Hereafter, the facts are simply set out by category, **transcript and line, or record**, as follows:

(A) POLICE REPORT ADMISSIBILITY

Testimony of Rebecca Giolas as to defendants drinking and intoxication:

TRANSCRIPT	LINE
T65	L23-25
T66	L1-4
T67	L8-18
T79	L16-25
T80	L1-25
T81	L1-17
T111	L14-18

Testimony of Officer Mallon as to defendants drinking and intoxication:

T122	L10-18
T123	L10-13
T128	L13-17
T129	L21-25
T130	L1-13; 23-25
T131	L9-10; 20-25
T140	L14-25
T142	L1-25
T144	L7-21

Court ruling with regards to non-admissiblity to police reports by defendant:

T131	L20-25
T132	L1-19
T134	L1-16
T135	L7-18
T136	L10-25
T137	L1-25
T138	L1-25
T157	L6-24
T158	L1-20
T159	L11-25
T160	L1-25
T161	L1-25
T162	L1-23

(B) BOOKING SHEET ADMISSIBILITY

Court ruling that defendant could not examine officer about alcohol in her booking statement or police reports.

TRANSCRIPT	LINE
T131	L20-25
T132	L1-2
T140	L14-25
T141	L1-7
T146	L2-25
T147	L1-7
T159	L11-25
T160	L1-25
T161	L1-25
T162	L1-25

SEALED MATERIALS RECORD ON APPEAL.

(D) DEFENSE THEORY OF CASE -- CROSS-EXAMINATION

Police reports establishing no alcohol present: **SEALED MATERIALS RECORD ON APPEAL.**

Defendants theory of the case based upon charge in the information as filed stating specific time and specific place.

Record Page: 4, 9, 10, 18, 19, 22, 26, 28.

TRANSCRIPT	LINE
T157	L6-24
T158	L1-25
T159	L11-25
T160	L1-25
T161	L1-25
T162	L1-25
T168	L13-25
T169	L1-11
T170	L16-21
T171	L10-22
T172	L2-24
T173	L10-25
T175	L1-4; 16-22
T176	L11-18
T177	L14-25
T178	L1-7; 20-25
T179	L1-19
T180	L6-15

(E) TIME & PLACE OF OFFENSE

Record and transcript evidence as to defendants reliance on specific time and place as alleged in the Information and refusal of court to charge jury in the same language as the Information.

Record Page: 4, 9, 10, 18, 19, 22, 26, 28.

TRANSCRIPT	LINE
T79	L16-25
T80	L1-25
T81	L1-17
T168	L13-25
T169	L1-11
T170	L16-21
T171	L10-22
T172	L2-24
T173	L10-25
T174	L11-25
T175	L1-4; 16-22
T176	L11-18
T177	L14-25
T178	L20-25
T179	L1-19
T180	L6-15

(F) CLOSING ARGUMENT

Prosecution improper closing argument and defendant objection thereto.

TRANSCRIPT	LINE
T193	L16-17
T208	L11-24

ADDENDUM

SECTION	DESCRIPTION
I	Selected Pages From Trial Transcript [10/29/93]
II	Selected Pages from Record On Appeal
III	Selected Jury Instructions Given At Trial
IV	Copies of Selected Cases As Follows:
	State v Topham 41 Utah 39, 123 P. 888 (UT 1912)
	State v. Bertul 664 P. 2d 1181 (UT 1983)
	Walker v. State 624 P. 2d 687 (UT 1981)
	State v. Schnoor 845 P. 2d 947 (Utah App. 1993)
	Olden v. Kentucky 488 US 227, 102 L Ed 2d 513, 109 S Ct. 480 (1988)
	State v. Palmer 860 P. 2d 339 (Utah App. 1993)
V	Documents received per Judge Anderson for purpose of Appellate Review. Not admitted or received into evidence. **[Photocopies provided to both counsel prior to being sealed by court.]**

SUMMARY OF ARGUMENT

Trial court denied the defendant the right to introduce into evidence police reports despite clear holding from Utah Court of Appeals that a defendant is allowed to due so. Denial by the court of said right, coupled with limitation of cross-examination of defendant to refer to instances of alcohol in the reports was an error that would substantially undermine the verdict given that there were only two witnesses and that the evidence was inconclusive as to any assault. These errors, coupled with the fact the court refused to instruct the jury exactly as the information read as to the specific time and place of offense that they needed to find, and the prosecutor's referring to what the jurors see every day in newspaper articles about domestic violence and assaults involving husbands assaulting wives, warrants reversal of the judgment.

DETAIL OF ARGUMENT

THERE EXISTED MULTIPLE ERRORS OF LAW IN THE CONDUCT OF THE TRIAL; ANY ONE OF WHICH JUSTIFIES REVERSAL AND THE CUMULATIVE EFFECT OF WHICH REQUIRES REVERSAL OF JUDGMENT.

ARGUMENT

THERE EXISTED MULTIPLE ERRORS OF LAW IN THE CONDUCT OF THE TRIAL; ANY ONE OF WHICH JUSTIFIES REVERSAL AND THE CUMULATIVE EFFECT OF WHICH REQUIRES REVERSAL OF JUDGMENT.

(A) POLICE REPORT ADMISSIBILITY

State v. Bertul 664 P. 2d 1181 (UT 1983)

" . . . @ 1185-86 . . . [8,9] After a careful and scholarly analysis of many cases under the business records exception involving the admissibility of police records, *United States v. Smith,* 521 F.2d 957 (D.C.Cir. 1975), synthesized the rule, to which we adhere, that police reports of crimes should ordinarily be admitted when offered by the defendant in a criminal case to support his defense. When offered by the prosecution, however, they should ordinarily be excluded, except when offered to prove simple routine matters which are based on first-hand knowledge of the maker of the report and do not involve conclusions, and when the "circumstances of their preparation indicate their trustworthiness. . . ."(Emphasis Added)

" . . . @ 1186 . . . Since the booking sheet was offered by the defendant, we conclude that the trial court erred in excluding the booking sheet in the instant case even though it contained what might be considered a conclusion. . . ."

Commentary

The totality of the evidence in the trial consisted of two witnesses offered by the prosecution, they being the ex-wife of the defendant and the arresting officer. Both of those witnesses testified that defendant had been drinking, there was an odor of alcohol about his breath and person, and asserted were that he was "intoxicated" at the time of the incident. Defendant sought to introduce three (3) reports into evidence citing the above-referenced case to the court, those reports being as follows:

1) Arresting officer's report of the incident obtained from the prosecutor's office in response to discovery. [State v. Bertul 664 P. 2d 1181 (UT 1983)]

2) Booking sheet containing "probable cause" statement that the officer filled out at the time the defendant was booked into jail.

County of Riverside v. McLaughlin 500 US --, 114 L Ed 2d 49, 111 S.Ct..-- (1991)

Kitrich Powell v. Nevada 516 US -- ,128 L Ed 2d 1, 114 S.Ct. -- (1994)

3) Report of intoxilizer test and operation checklist.

[Taken by UHP Trooper, Dennis Lund]

[State v. Bertul 664 P. 2d 1181 (UT 1983)]

The court ruled all were **NOT** admissible because they were hearsay and furthermore that the defendant would have to establish foundation under the rules of evidence. The prosecutor at the conclusion of the trial, acknowledged on the record that the breathalyzer test would show "0.000" even though both witnesses testified defendant had been drinking. The failure of the court in not allowing these reports to be admitted and also the courts refusal to allow defense counsel to examine the arresting officer about statements contained in her reports relating to alcohol was clear error. Court furthermore would not allow defendant to examine arresting officer about statements in the "probable cause statement" referring to alcohol and would not allow any reference by defendant to the intoxilyzer test record results.

Upon conclusion of trial, and after verdict, the court indicated to the jury that such test existed but that it felt they would be confused by that particular item. Given that there is clear case law, that the defendant has the right to introduce police reports into evidence, the court was clearly in error for not allowing the admission of the reports, examination of the officer about statements regarding alcohol contained in those reports, and admission of booking sheet. Defendant cited to the court State v. Bertul, supra; however, the court remained unpursuaded.

(B) BOOKING SHEET ADMISSIBILITY

State v. Bertul 664 P. 2d 1181 (UT 1983)

" . . . @ 1185-86 . . . [8,9] After a careful and scholarly anaysis of many cases under the business records exception involving the admissibility of police records, *United States v. Smith,* 521 F.2d 957 (D.C.Cir. 1975), synthesized the rule, to which we adhere, that police reports of crimes should ordinarily be admitted when offered by the defendant in a criminal case to support his defense. When offered by the prosecution, however, they should ordinarily be excluded, except when offered to prove simple routine matters which are based on first-hand knowledge of the maker of the report and do not involve conclusions, and when the "circumstances of their preparation indicate their trustworthiness. . . ."

" . . . @ 1186 . . . Since the booking sheet was offered by the defendant, we conclude that the trial court erred in excluding the booking sheet in the instant case even though it contained what might be considered a conclusion. . . ." (Emphasis Added)

Commentary

Court ruled that the defendant could not cross-examine the arresting officer even about the "probable cause statement" made out at the time the defendant was booked into jail insofar as there were statements related to alcohol, nor was the defendant allowed to introduce the "booking sheet" into evidence. Even if the court was not persuaded by *Bertul*, supra, regarding admission of police reports, clearly the admission of the "booking sheet" was something that the defendant should have been allowed to introduce into evidence, particularly since the Utah Supreme Court in Burtul held that it was error not to admit it at the defendant's request.

In this case, where the booking sheet contained information which was clearly contrary to testimony of the witnesses, which affected the credibility of both witnesses, and literally could have made the difference between acquittal and conviction, it was error not to admit it into evidence at defendants request. It is furthermore significant that jury had to be called back twice given its inability to agree. Finally, the jury felt compelled to volunteer that they felt constrained by the law as they had been instructed but that any penalty imposed should be minimal because they were sympathetic to the defendant.

(C) FALSE IMPRESSION [PROSECUTION DUTY]

Walker v. State 624 P. 2d 687 (UT 1981)

" . . . @ pg 691 . . . [5] The false impression which the prosecution knowingly fostered in the present case constitutes prosecutorial misconduct which seriously interferred with the trial court's truth seeking function. We believe this to be analogous to the prosecution's knowing use of false testimony and therefore subject to the same standard of materiality used in those cases.

[6,7] Applying this standard to the present case, we believe there exists a reasonable likelihood the false impression fostered by the prosecutor could have affected the judgment of the jury. . . ."

" . . . @ pg 691-92 Therefore, the prosecution's actions have deprived the defendant of a fair trial and constitute a denial of due process. As we explained in *State v. Jarrell*, "In a criminal trial it is essential that evidence which tends to exonerate the defendant be aired as fully as that which tends to implicate him." In the present case this has not occurred and the defendant is entitled to have that error rectified. . . ." (Emphasis Added)

State v. Schnoor 845 P. 2d 947 (Utah App. 1993)

" . . . @ pg 949 . . . [1] A state may not knowingly use false evidence to obtain a conviction, even where the false evidence goes only to the credibility of the witness. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959); *Giglio v. United States,* 405 U.S. 150, 153, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972). "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue,* 360 U.S. at 269, 79 S. Ct. at 1177. . . ."(Emphasis Added)

Commentary

Prosecutor in this case really did not have an opportunity to say a lot because the court was extremely aggressive toward defendants counsel. The written transcript does not do justice to the courts overbearing tenor and tone of voice toward defense counsel, a fact which was not lost upon the jury, and which apart from any other errors would warrant reversal for the manner in which the court conducted the proceedings.

> Bunnell v Industrial Commission of Utah 740 P.2d 1331 (UT 1987)
>
> " . . . @ pg 1333 . . . Our review of the record persuades us that the manner in which the administrative law judge conducted this hearing was sufficiently unfair as to constitute a denial of plaintiffs constitutional right to a fair hearing.
>
> [T]he record reflects an atmosphere in which plaintiff's witnesses were inhibited and intimidated by the judge's conduct and felt defensive and hesitant to testify; the judge interferred with plaintiff's counsel's ability to make a record and argue the evidence; and the judge gave the appearance of having decided the case without even considering the medical records. . . ."
>
> " . . . @ pg 1334 . . . We also comment with concern on the atmosphere created by administrative law judge. Although the record cannot fully capture the demeanor of the administrative law judge, it does capture his comments and the verbal reactions of the witnesses to him . . .
>
> The administrative law judge was also intolerant of counsel's argument on behalf of plaintiff. . . ."(Emphasis Added)

Anderson v Industrial Com'n of Utah 696 P.2d 1219 (UT 1985)

" . . . @ pg 1221 . . . One of the fundamental principles of due process is that all parties to a case are entitled to an unbiased, impartial judge." A fair trial in a fair tribunal is a basic requirement of due process.
In re *Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Fairness requires not only an absence of actual bias, but endeavors to prevent even the possibility of unfairness.

This principle applies with as much force to administrative proceedings as it does to judicial trials. *Gibson v Berryhill,* 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973); *Vali Convalescent & Care Institution v. Industrial Commission,* Utah, 649 P.2d 33, 37 (1982)...

We therefore set aside the Commission's order and remand this case for submission of the issue to another administrative law judge.

Reversed and remanded. . . ."(Emphasis Added)

The prosecution, however, had a duty to acknowledge the existence of the reports and that they in fact contradicted both witnesses. By presenting witnesses and testimony when the prosecution knew that in its own files was evidence contrary to that testimony, the prosecution effectively conveyed a "false impression" to the jury and the court. Duty of the prosecution is that of "fairness to all parties."

Berger v United States 295 U.S. 78, 79 L. Ed 1314 (1935)

> " . . . @ 1321 . . . The United States Attorney is representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense that servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. . . ."

The arresting officer indicated that the defendant had not been arrested for intoxication when in fact the report clearly shows to the contrary. The prosecution took advantage of a situation at a time when it had a higher duty to the law to speak up given that all documents and reports came from the prosecutors own files in response to discovery.

(D) DEFENSE THEORY OF CASE -- CROSS EXAMINATION

Olden v. Kentucky 488 US 227, 102 L Ed 2d 513, 109 S Ct. 480 (1988)

" . . . @ pg 514 . . . (b) [A] reasonable jury might have received a significantly different impression of the witness' credibility had the accused's counsel been permitted to pursue the proposed line of cross-examination . . . ."

" . . . @ pg 514 . . . (2) [T]he violation was not harmless error beyond a reasonable doubt, where (a) the woman's testimony was essential, indeed crucial, to the prosecution's case. . . ."

" . . . @ pg 516 . . . 3. An accused's right to be confronted with the witnesses against the accused, under the Federal Constitution's Sixth Amendment, as incorporated in the Fourteenth Amendment, includes the right to conduct reasonable cross-examination. . . ."

" . . . @ pg 517 . . . [T]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. . . ."

" . . . @ pg 519 . . . Petitioner appealed, asserting, inter alia, that the trial court's refusual to allow him to impeach Matthews' testimony by introducing evidence supporting a motive to lie deprived him of his Sixth Amendment right to confront witnesses against him. . . ."

" . . . @ pg 519 . . . Sixth Amendment right "to be confronted with the Witnesses against him." That right, incorporated in the Fourteenth Amendment and therefore available in state proceedings, *Pointer v Texas,* 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065 (1965), includes the right to conduct reasonable cross-examination. *Davis v Alaska*, 415 US 308, 315-316, 39 L Ed 2d 347, 94 S Ct 1105 (1974).

In *Davis v Alaska,* we observed that, subject to "the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation . . ., the cross-examiner has traditionally been allowed to impeach, i. e., discredit, the witness." Id., at 316, 39 L Ed 2d 347, 94 S Ct 1105. We emphasized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id., at 316-317, 39 L Ed 2d 347, 94 S Ct 1105 citing *Greene v McElroy,* 360 US 474, 496, 3 L Ed 2d 1377, 79 S Ct 1400 (1959). Recently, in *Delaware v Van Arsdall*, 475 US 673, 89 L Ed 2d 674, 106 S Ct 1431 (1986), we reaffirmed *Davis*, and held that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose' to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' "475 US, at 680, 89 L Ed 2d 674, 106 S Ct 1431, quoting *Davis,* supra, at 318, 39 L Ed 2d 347, 94 S Ct 1105. . . ."

" . . . @ pg 520 . . . It is plain to us that "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." *Delaware v Van Arsdall,* supra, at 680, 89 L Ed 2d 674, 106 S Ct 1431. . . "

" . . . @ pg 520 . . . While a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as "harassment,
prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant," *Delaware v Van Arsdall,* supra, at 679, 89 L Ed 2d 674, 106 S Ct 1431, the limitation here was beyond reason. . . ."

" . . . @ pg 520 . . . [1d, 5] In *Delaware v Van Arsdall* supra, we held that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman v California*, 386 US 18 [17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065 (1967)] harmless-error analysis." Id., at 684, 89 L Ed 2d 674, 106 S Ct 1431. Thus we stated:

> "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.
>
> [488 US 233]
>
> Whether such an error is harmless in a a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Ibid. . . ."

Commentary

Trial court repeatedly denied the defendant opportunity to cross-examine the arresting officer on issues in the reports as they related to testimony that defendant had consumed alcohol and/or was intoxicated. This issue was critical and crucial to the credibility of both the arresting officer and the complaining witness for reason of the existence of the intoxylier report showing that there was no alcohol present when tested at the Grand County Jail less than two (2) hours **after arrest** and time of the alleged incident. Such restriction by the court on the right of cross-examination by the defendant denied due process and is subject to the "beyond a reasonable doubt" harmless error standard of review.

In this case credibility of both witnesses was critical to the case. Furthermore, there was a lack of any clear physical evidence of assault by testimony of complaining witness, and her testimony and the arresting officer's testimony were at odds. It is also significant in the case that the defendants "theory of the case" [cross-examination] was built around the charge in the information as filed and **alleged time [7:12 p.m.]** and **place [549 North Main, Moab].**

Defendant had a right to rely upon charge as stated in the information and shape his theory of the case around same. Cross-examination shaped the defendant's defense theory of the case and the court's intereferance with same violated due process. In this case, on this basis alone, reversal is warranted for errors of constitutional proportion given the "beyond a reasonable doubt" standard of review.

(E) TIME & PLACE OF OFFENSE

Article I Section 12, Utah Constitution
[Rights of Accused Persons]

"In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof. . . ."(Emphasis Added)

U.R.C.P. Rule 9 [Pleading Special Matters]

" . . . (f) Time and Place. For purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter . . . ."(Emphasis Added)

U.C.A. 76-8-501 "Definitions"

" . . . (2) "Material" means capable of affecting the course or outcome of the proceeding. A statement-is not material if it is retracted in the course of the official proceeding in which it was made before it became manifest that the falsification was or would be exposed and before it substantially affected the proceeding. Whether a statement is material is a question of law to be determined by the court. . . ." (Emphasis Added)

U.R.C.P. Rule 81(e) [Application In Criminal Proceedings]

" . . . (e) These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement. . . ."(Emphasis Added)

Brigham City v Valencia 779 P.2d 1149 (UT App. 1989)

" . . . @ pg 1150 . . . [T]he rules of civil procedure govern in criminal proceedings where not inconsistent with applicable rule or statute.
Utah R.Civ.P. 8l(e). ."

State v Anderson 797 P.2d 1114 (UT App. 1990)

" . . . @ pg 1116 . . . Utah Rule of Civil Procedure 81(e), which serves generally to unify civil and criminal procedure in Utah except where a statute or rule provides otherwise for criminal cases. . . ." (Emphasis Added)

State v Topham 41 Utah 39, 123 P. 888 (UT 1912)

" . . . @ pg 889 . . . The doctrine is fundamental, and, as stated by the Supreme Court of the United States in *Rosen v. United States,* 161 U.S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606, that "the constitutional right of a defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense. . . ."

" . . . @ pg 889 . . . [I]t is essential to the validity of an indictment that it contain averments of the facts which constitute the offense it charges so certain and specific that upon conviction or acquittal thereon it, and the judgment upon it, will constitute a complete defense to a second prosecution of the defendant for the same offense. . . ."

" . . . @ pg 889 . . . [A]s every man is presumed to be innocent until proved to be guilty, he must be presumed also to be ignorant of what is intended to be proved against him, except as he is informed by the indictment or information. . . ."

" . . . @ pg 889 . . . [3] Does the information meet these requirements? If it does, it is good; If not, it is bad and will not support the judgment. . . ."

" . . . @ pg 890 . . . The physical acts done towards the commission of the offense should be stated in the information or indictment, so that the court may see whether or not the law has been violated, and so that the accused may know to what he must make answer. . . ."

" . . . @ pg 892 . . . Where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment should charge the offense in the same generic terms as in the definition; but it must state the species -- it must descend to particulars. . . ."

" . . . @ pg 894 . . . [5,6] Firstly, an Information wanting in essentials cannot be helped or aided by evidence, and its sufficiency in such regard cannot be determined by what the state proved or failed to prove. If anything is established and set at rest in the law, it is that defects in substance of an information or indictment are not cured by evidence or verdict. . . ."

" . . . @ pg 894 . . . [P]leadings are the juridical means of investing a court with jurisdiction of a subject matter to adjudicate it, and, for res adjudicata, that matter must be described with reasonable certainty and particularity. . . ."

" . . . @ pg 897 . . . An Information or Indictment when assailed as to substance must stand or fall by its own structure. It is not a technical, but a sound and fundamental, rule in the law of criminal procedure that the accused be apprised, not by the evidence adduced, but, at the outset, by the indictment or information, with reasonable certainty of the exact nature of the accusation against him. This rule cannot be bent to meet exigencies of a particular case, nor the class or grade of the person accused. The Constitution and the statute prescribe the rules by which the sufficiency of an information may be determined, and they apply to all alike. . . ."(Emphasis Added)

State v Fisher 79 Utah 115, 8 P.2d 589 (UT1932)

" . . . @ pg 591 . . . [T]he sufficiency of insufficiency of an information must be tested by its allegations and not by the evidence introduced at the
trial . . . ."

Ballaine v District Court 107 Utah 247, 153 P. 2d 265 (UT 1944)

" . . . @ pg 267 . . . In *State v Fisher,* 79 Utah 115, 8 P.2d 589, in passing upon the sufficiency of an information, this Court declared that the sufficiency of the information must be tested by its allegations, not by evidence introduced at the trial. . . ."

McNair v Hayward 666 P.2d 321 (UT 1983)

" . . . @ pg 326 . . . [T]ime is always an essential element of a crime
in the sense that due process requires that an accused be given sufficiently precise notification of the date of the alleged crime that he can prepare his defense. . . . "

State v Wilson 105 Utah 516, 143 P.2d 907 (UT 1943)

" . . . @ pg 907 . . . There must, however, be some facts then supplied to identify the victim, to enable the defendant to prepare his defense, and to identify the crime, for the protection of defendant, in case defendant is acquitted or placed in jeopardy and again charged with the same offense. . . ."

State v Jessup 98 Utah 482, 100 P.2d 969 (UT 1940)

" . . . @ pg 971 . . . It is elemental that one accused is entitled to notice of the particular offense with which he is charged, that he may properly prepare his defense. Such notice is fatally defective if it merely specifies generally the kind of an offense committed. . . ."

" . . . The function of a bill of particulars is not that of compelling the defense to aid the prosecution in stating a cause of action. The burden of stating such a cause rests upon the shoulders of the prosecution, and until it is stated to the extent required by our simple form of criminal pleading, the question of whether or not a bill of particulars is prerequisite to further action on behalf of the accused, has not arisen. . . ."

Commentary

Time and place is always a material factor. In the Information charging the defendant there was a specific, exact time and place alleged that the offense occurred. That time and place became significant for reason that defendant is presumed to only know that with which he is charged by the Information. Time and place go to credibility issues surrounding alleged alcohol use by defendant. For the court to refuse to include the time and place as contained in the charge in jury instructions and furthermore refusal of the court to advise the jury exactly as the defendant had been charged in the information was an error. The jury could have found that no assault occurred at the **TIME AND PLACE AS ALLEGED IN THE INFORMATION** and therefore acquitted the defendant entirely of the charge on that basis alone. Court made specific inquiry of the defendant if the jury "must" and counsel in response to the courts inquiry pointed out that the jury "could" and that there was no reason to refuse to instruct the jury as the defendant had been charged. Court indicated it would only include the time and place if the prosecution agreed, which invitation the prosecution declined, even though it in fact had drafted the charge.

(F) CLOSING ARGUMENT

State v. Cummins 194 Utah Adv. Rep. 48 (Utah App. 1992)

> " . . . @ pg 49 . . . This court will reverse on the basis of prosecutorial misconduct only if defendant has shown that the actions or remarks of [prosecuting] counsel call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result . . . .

State v. Peters, 796 P.2d 708, 712 (Utah App. 1990) (quoting *State v. Gardner*, 789 P.2d 273, 287 (Utah 1989), cert. denied, 494 U.S. 1090, 110 S. Ct. 1837 (1990)). In determining whether a given statement constitutes prosecutorial misconduct, the statement must be viewed in light of the totality of the evidence presented at trial. Further, because the trial court is in the best position to determine the impact of a statement upon the proceedings, its rulings or whether the prosecutor's conduct merits a mistrial will not be overturned absent an abuse of discretion. *Gardner*, 789 P.2d at 287. . . ."

State v. Dibello 780 P. 2d 1221 (Utah 1989)

" . . . @ pg 1225 . . . Counsel for both sides have considerable latitude in their closing arguments. They have the right to fully discuss from their perspectives the evidence and all inferences and deductions it supports. *State v. Lafferty*, 749 P.2d 1239, 1255 (Utah 1988); *State v. Valdez,* 30 Utah 2d 54, 60, 513 P.2d 422, 426 (1973). Nonetheless, counsel exceeds the bounds of this discretion and commits error if he or she calls to the jury's attention material that the jury would not be justified in considering in reaching its verdict. *E.g., State v. Troy,* 688 P. 2d 483, 486 (Utah 1984); *Valdez,* 30 Utah 2d at 60, 513 P. 2d at 426. . . ."

State v. Tillman 750 P. 2d 546 (Utah 1987)

" . . . @ pg 556 . . . [W]e concede that the prosecutor resorted to unwise and unnecessary hyperbole in his comments, but we are unable to identify any prejudicial reference to improper factors for jury deliberation. . . ."

State v. Humphrey 793 P. 2d 918 (Utah App. 1990)

" . . . @ pg 925 . . . [7] The Utah Supreme Court has established a two-part test to determine whether a prosecutor's remarks warrant reversal: (l) did the remarks call to the attention of the jurors matters which they could not properly consider in determining their verdict, and (2) was the error substantial and prejudicial such that there is a reasonable likelihood that without the error the result would have been more favorable for the defendant *State v. Hopkins*, 782 P.2d 475, 478 (Uth 1989); *Gardner* 789 P.2d at 287; *State v. Tillman,* 750 P. 2d 546, 555 (Utah 1987). . . ."

Commentary

Prosecution in closing argument drew objection from the defense when it began to make emotional appeals to the jury about the amount of domestic violence and spouse abuse currently occurring. In response to objection, court admonished prosecutor; however, there clearly existed a duty to know the law and refrain from same argument and draw attention to matters which they should not properly consider. Clearly, grand statements about domestic violence were improper for the jury to consider and never should have been raised in closing argument.

(G) CUMULATIVE ERRORS

State v Palmer 860 P. 2d 339 (Utah App. 1993)

" . . . @ pg 350 . . . [17] In summary, we conclude there were numerous errors in the trial of this case.

Whether these errors can be classified as cumulatively harmful turns
on whether the errors undermine our confidence in the verdict. See *State v. Dunn,* 850 P.2d 1201, 1208 09 (Utah 1993).

While any one of these errors would in itself be harmless, their cumulative effect is not. The testimony in the ease basically consisted of E.N.'s assertions and descriptions of sexual encounters and defendant's denial of those encounters. This case turned primarily on the jury's assessment of the credibility of E.N. versus the credibility of defendant. Because of the nature of the evidence of guilt and the number of serious errors, we find the errors cumulatively harmful and cannot say we have confidence in the verdict.

In light of the numerous errors in the prosecution of this case, our confidence in the verdict is undermined. Thus, we reverse defendants conviction. . . ."(Emphasis Added)

Commentary

Even if alone any one error would not justify reversal, it has previously been held that cumulative errors may undermine a verdict and justify reversal thereof. In this case, there were multiple errors in the case they being articulated and set out as follows:

1) **POLICE REPORT ADMISSIBILITY** Failure of the court to allow the defendant to introduce police reports and despite the fact that there exists clear case authority in Utah of the right of the defendant to do so. Such reports were not only exculpatory of the defendant, but also affected the credibility of the witnesses and were consistent with defendants theory of the case.

2) **FALSE IMPRESSION** Prosecutor in this case, was aware of the existence of the reports, and that there were items contained in them directly contradictory to the testimony of the arresting officer as well as the complaining witness. This amounts to allowing false testimony to stand and thereby created a false impression when there existed a duty to correct and a higher duty to the system of justice.

3) **CROSS EXAMINATION** Defendant was denied a right to adequately cross-examine witnesses and furthermore to develop his theory of the case which the United States Supreme Court has held is a denial of due process, particularly when cross-examination is restricted and given the circumstances herein of denial by the trial court of right to introduce police reports.

4) **TIME & PLACE** Refusal of the court to instruct the jury exactly as the charge had been drafted and charged in the Information, and to which the defendant had plead **NOT GUILTY**, including therein the time, place, and location of the offense as had been set out.

5) **CLOSING ARGUMENT** The prosecution bringing to the juries attention matters which it should not properly have considered was prejudicial, particularly when there was existing duty for prosecution to know the law and stay within the bounds of same.

Any one of the errors alone would justify reversal, and the cumulative effect of these clearly justify reversal herein.

(H) CONCLUSION

Failure of the court to allow the police reports to be admitted into evidence upon the defendan't motion was critical in the case and could have made the difference between conviction and acquital, particularly where the jury had to be sent out twice to confer and where it indicated that it felt it was bound by the law "as they had been instructed." Furthermore, the court's limitation of the defendnants cross-examination on issues involving alcohol in the arresting officers report and existence of and intoxylizer report of "no alcohol found" went to credibility.

Prosecution took advantage of the court's ruling and the defendants inability to talk about the report of no alcohol and allowed testimony of drinking and intoxication to stand "unrefuted" despite the prosecutions knowledge of police reports to the contrary.

Time and place of the offense were critical because the defendant had entered a plea of **NOT GUILTY** to a specific Information, alleging a specific offense, at a specific place, and at a specific time of day; therefore, he had a right to expect that the jury would be instructed or given the allegation out of the information exactly as charged without omitting any aspects thereof.

Finally, in closing argument, when the prosecution made argument regarding the amount of domestic violence occurring these days, it was clearly inappropriate, and given the limited testimony and evidence in this case, without such comments it could have made the difference in the jury's mind between conviction and acquital; however, it was impossible for the court to un-ring the bell. The cumulative effect of the errors in the case are such that there cannot be complete confidence in this verdict; accordingly, the conviction herein should be reversed.

DATED this 15 day of JULY (1994), 1994.

Steven Lee Payton
Attorney for Defendant/**APPELLANT**

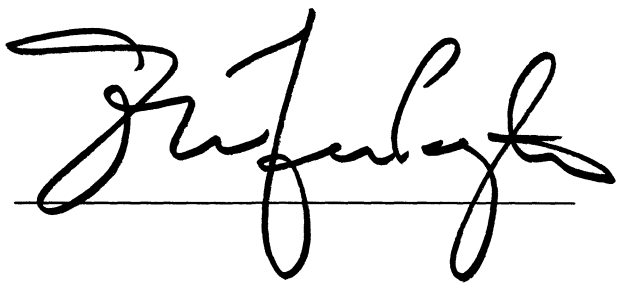
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **APPELLANT BRIEF** was mailed via United States Mail, first class, postage prepaid, unless otherwise indicated differently below on the 1st day of July (OBR), 1994, to the following:

Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, UT 84102
CERTIFIED MAIL #P311-875-323
[ORIGINAL & 8 COPIES]

Attn: William L. Benge, Esq.
Moab City Attorney
94 East Grand Avenue
P.O. Box 699
Moab, UT 84532
CERTIFIED MAIL #P311-875-321
[4 COPIES]

Michael B. Giolas
12676 South 3260 West
Riverton, UT 84065
(U.S. CERTIFICATE OF MAILING)
[2 COPIES]



Authority

CJA Rule 4-504 "Written Orders, Judgments & Decrees"

U.R.Cr.P Rule 3 "Service & Filing of Papers";

U.R.C.P. Rule 5 "Service and Filing of Pleadings and Other Papers"

Utah R. App. P. Rule 21 "Filing and Service"

ADDENDUM

SECTION	DESCRIPTION
I	Selected Pages From Trial Transcript [10/29/93]
II	Selected Pages from Record On Appeal
III	Selected Jury Instructions Given At Trial
IV	Copies of Selected Cases As Follows:
	State v Topham 41 Utah 39, 123 P. 888 (UT 1912)
	State v. Bertul 664 P. 2d 1181 (UT 1983)
	Walker v. State 624 P. 2d 687 (UT 1981)
	State v. Schnoor 845 P. 2d 947 (Utah App. 1993)
	Olden v. Kentucky 488 US 227, 102 L Ed 2d 513, 109 S Ct. 480 (1988)
	State v. Palmer 860 P. 2d 339 (Utah App. 1993)
V	Documents received per Judge Anderson for purpose of Appellate Review. Not admitted or received into evidence. **[Photocopies provided to both counsel prior to being sealed by court.]**

IN THE DISTRICT COURT OF THE SEVENTH DISTRICT COURT

IN AND FOR GRAND COUNTY

STATE OF UTAH

SEVENTH DISTRICT COURT
Grand County

FILED MAR 14 1994

* * * * *

THE CITY OF MOAB, -

Plaintiff, - JURY TRIAL

vs. - Case No. 9317-97

MICHAEL B. GIOLAS, -

Defendant. -

* * - * *

BE IT REMEMBERED that on the 29th day of October, 1993, commencing at the hour of 9:30 a.m., the Jury Trial in the above-entitled matter was held at the above-entitled Court, Moab, Utah. This Hearing was electronically recorded.

ORIGINAL

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APPEARANCES

For the Plaintiff:	WILLIAM L. BENGE Moab City Attorney 94 East Grand Avenue Moab, Utah 84532
For the Defendant:	STEVEN LEE PAYTON Attorney at Law 431 South 300 East #40 Salt Lake City, UT 84111
Judge:	LYLE R. ANDERSON

* * * *

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going to be uncomfortable making that decision if the evidence requires it? You've all indicated -- No one has indicated having a close relationship with Mr. Benge. Is there anyone you want me to inquire of in particular about their relationship?

MR. PAYTON: I don't remember particularly, other than just general conversation with Mr. Benge when I came in, Your Honor.

THE COURT: Okay. Any other questions, Mr. Payton?

MR. PAYTON: Your Honor, in this case we anticipate and expect that there will be quite a bit of discussion about alcohol and what effect it did or did not have upon the incident in question. I wonder if the Court could inquire if there are any jurors who have any particular strong feelings about the use of alcohol, period, since it is central to this case.

THE COURT: Well, this is -- this is not a case, members of the jury, where -- where someone is charged with having used alcohol to excess or having used alcohol and driven a vehicle while in an intoxicated state, and -- but apparently there will be some evidence that some alcohol was involved in some way. Different people have different views about -- about the wisdom of using alcohol.

All of you understand that it's perfectly legal as long as you're twenty-one in this state to use alcohol. Is there anyone here who has strong feelings that -- that -- that alcohol is something that people should not use, and if they do use it they deserve what they get? Okay. Anything else about that, Mr. Payton?

MR. PAYTON: No, Your Honor.

THE COURT: Okay.

MR. PAYTON: One other question. Are there any jurors here who believe that police officers may never make mistakes? One of the issues in this case will involve credibility of witnesses and potentially that a mistake was made.

THE COURT: Okay. That's a fair question also. Members of the jury, this is a case where as you know four police officers may testify. You will have the opportunity to weigh their testimony against the testimony of -- well, you'll have the opportunity to weigh their testimony and -- and it may be contradicted by other testimony. The Defendant may take a different -- may describe a different set of affairs.

Now, it's perfectly permissible for you to take into consideration all the things that I may list for you later on that bear on credibility of witnesses. You can take into consideration what interest a person

MR. BENGE: No, Your Honor.

MR. PAYTON: No, Your Honor.

THE COURT: Okay. The Clerk will now read the names of those of you who will serve on the Jury in this case. If the Clerk reads your name, please don't leave.

COURT CLERK: Obid Hamblin, Bill Buchanan, Lloyd Peirson, Joseph Bybee.

THE COURT: That's it. That's the four of you. We -- We -- Those whose names were read will constitute the Jury in this case. At this time we will excuse the rest of you. That includes those of you here and those of you out in the audience. We appreciate you coming, but you are free to leave at this time. You may remain in the audience if you want to be a spectator, feel free to do that, we welcome the interest of our citizens. Thank you for coming this morning. Please make sure you remember to stop downstairs at the Clerk's Office and get your check for coming today.

SPEAKER: I have a question. Now, are we, the people that were not selected, are we finished with this or we don't have --

THE COURT: You are finished. You're finished today.

to -- to refresh your recollection about things. Please don't use them to try and coerce another juror to believe what you think the evidence said simply because you took notes and the other juror didn't take notes. Some -- Some people learn better if they take notes and some people learn better if they don't take notes. It's -- It's -- It's a difference between people. I went all the way through college without taking any meaningful notes whatsoever in school. Now that I'm a Judge, I find myself taking notes all the time, and I don't what happened to me that made me so I feel like I have to take so many notes, but take notes for your own benefit. They will be kept safe for you during any recesses, and they will ultimately be destroyed at the conclusion of the case, so we will now have the Clerk read the charges against the Defendant and announce his plea.

COURT CLERK: The City of Moab vs. Michael Bruce Giolas come to know William L. Benge, Moab City Attorney, and State's own Information and belief that the Defendant committed in the above named city and county the crime of Assault in violation of Moab City Ordinance No. 92-06 Section 76-5-102 Utah Code Annotated in that the said Defendant, Michael Bruce Giolas, on the 10th day of April, 1993 in Moab, Grand

County, State of Utah, did attempt with unlawful force or violence to do bodily injury to Rebecca M. Giolas, dated the 14th day of April, 1993 and signed by William L. Benge, Moab City Attorney.

THE COURT: The charges against the -- And did you announce the plea of not guilty?

COURT CLERK: I'm sorry. And to the Information the Defendant has entered a plea of not guilty.

THE COURT: The -- The Information is read just to inform you of the nature of the charges against the Defendant. It is not evidence and it should not be considered by you to be any evidence of the Defendant's guilt. We will now permit each of the sides to make an opening statement.

MR. PAYTON: Your Honor, there is a preliminary matter we'd like to address. The Defense in this case would like to invoke the Exclusionary Rule with regards to witnesses. I likewise would indicate that apparently the -- Ms. Giolas a.k.a. Evans has come with a friend. I'm concerned about discussion between them if the friend is going to be a witness or discussion outside the courtroom about the case.

Likewise, the admonition that if they're witnesses that they not participate, and I notice that Officer

Mallon has been with her, and of course the United States Supreme Court has ruled that the Court may even prohibit a witness who is in the course of testifying from discussing the matter with either Attorney until that is completed. We would like to invoke that Exclusion Rule and ask for admonitions for discussions at least between those three that I'm concerned about.

MR. BENGE: First of all, the friend who may or may not be here is certainly not on my designated list of witnesses and I do not intend to call the same. The witnesses that I have called have already voluntarily excluded themselves with the exception of Ms. Rebecca Evans and Officer Becky Mallon, who is my *Investigating Officer.*

THE COURT: All right. You are entitled to have one Officer with you representing the State, and you're designating Ms. -- Officer Mallon as that?

MR. BENGE: Yes, Your Honor.

THE COURT: Do you object to Ms. Giolas or Ms. Evans being excluded? I think --

MR. BENGE: Well, she will be my first witness.

THE COURT: All right. So it's probably irrelevant anyway.

MR. PAYTON: And I suppose after she testifies

tell anything, not to get into trouble. We are going to present testimony from Rebecca Evans as to what I've told you. We're going to present testimony from Officer Mallon as to what she observed. We probably -- We may or may not introduce one of the other officers depending on time constraints as her testimony may be (inaudible). I want you to listen to what they have to say, listen, of course, to what the Defense has to say, and I'm sure you'll do a good job. Thank you.

MR. PAYTON: Gentlemen of the Jury, my name is Steven Lee Payton. You will hear a story today which is substantially in dispute. You will, in fact, hear, as Mr. Benge has indicated, testimony that Mr. and Mrs. Giolas were driving down the street. You will hear testimony that he attempted to keep her from jumping out of the jeep as she had attempted to do on other occasions. You will hear testimony from Mrs. Giolas that her assertion was that she was struck.

You will likewise hear testimony that she will be adamant that this was as a result of the fact that Mr. Giolas had been drinking, that he had been drinking heavily, that he was drunk. She will admit to the fact that her version -- and the testimony she will give we anticipate will be that forty-five minutes before Officer Mallon arrived that they had been drinking

heavily. You will then hear Officer Mallon testify that she believed that the Defendant was intoxicated, that after a conference with other officers that she arrested him for Public Intoxication and for Assault.

Officer Mallon will likewise testify that that's what it indicates in her report. However, you will hear testimony and hear evidence that upon taking the Defendant to the Grand County Jail that Officer Mallon who was adamant as well as Mrs. Giolas was adamant that the Defendant had been drinking and drunk, that for some reason a Highway Patrol Officer at the Grand County Jail ran a breathalyzer test on Mr. Giolas. The results of that test were 000.

Officer Mallon will then indicate that she changed her position, she did not cite him for Public Intox after she had been so adamant that he was intoxicated, she could smell alcohol upon him and other matters. We don't have an explanation, but nobody asserts that the test given by a third independent party is not accurate.

You will hear testimony in this case from Ms. Giolas, now Ms. Evans, that she has testified to these facts in a prior hearing in connection with seeking a protective order, that she testified to those facts that in her own words that the case was dismissed for

insufficient evidence. You will hear testimony from Ms. Mallon that the reason -- and her motivation in this case is the fact that she is involved in a custody fight with another ex-husband over her son, and therefore she has brought and continues to maintain that this incident happened with Mr. Giolas.

Finally, you will hear from Ms. Giolas and from Officer Mallon that Mr. Giolas that night indicated there was nothing wrong with him, he had not been drinking, that Mrs. Giolas was the one who had been drinking and that she had also been using anti-depressant medication prescribed by her psychiatrist and that she became emotional and irrational when that took place.

He at all times will indicate that he'd never been drinking, but nobody listened to him and it resulted in this charge. That is the testimony you will hear here today. It is in dispute. Some of it -- Much of it is indisputable, particularly the scientific evidence in this case. We would ask upon the conclusion, if the evidence is as I have represented it to you, that you find Mr. Giolas not guilty of the crime of Assault.

THE COURT: Members of the Jury, the statements of Counsel in their opening statements are

not to be considered by you as evidence. You'll have to determine whether the evidence actually proves what they have stated to you that it would as the evidence itself comes in. The opening statements are merely intended as a kind of a road map to you to help you understand where they're coming from and what they hope to be able to prove as the evidence comes in. Mr. Benge, you may call your first witness.

MR. BENGE: Call Ms. Evans.

COURT CLERK: Do you solemnly swear that the testimony you are about to give in the matter pending before the Court will be the truth, the whole truth and nothing but the truth, so help you God?

MS. EVANS: I do.

DIRECT EXAMINATION

By MR. BENGE:

Q State your name for the Court, please.

A Rebecca M. Evans.

Q Are you employed, Ms. Evans?

A Yes.

Q How?

A I am a Secretary for the Director of Special Education in the Alpine School District.

Q Ms. Evans, were you known prior as Rebecca Giolas?

A Yes.

Q And were you married at one time to the Defendant, Michael Giolas?

A Yes.

Q When were you married?

A We were married August 1st, 1992.

Q Did you subsequently become divorced from Mr. Giolas?

A Yes.

Q When?

A July 6th, 1993 -- or it was finalized July 9th.

Q Ms. Evans, calling your attention to the 10th day of April of this year, I ask you if you were in Moab on that day?

A Yes.

Q Were you with Mr. Giolas on that day?

A Yes.

Q For what purpose were you in Moab?

A We came down to go jeeping with a bunch of friends that we met down here.

Q When did you come down?

A The 8th of April. It was a Thursday.

Q Where were you staying?

A Days Inn.

and we left.

MR. PAYTON: Excuse me.

THE COURT: Ms. Evans, when there's an objection by either party the witness needs to stop answering the question until such time as I can make a ruling.

THE WITNESS: Okay.

MR. PAYTON: The question was where had you been jeep -- where had you -- The question posed to her was where had you been jeeping, and her answer is non-responsive about the night before and whether being drunk.

THE COURT: All right. Ms. Evans, confine your response to where you had been jeeping.

THE WITNESS: Okay. The Park. We went up through the Park.

Q (By MR. BENGE) Arches National Park or Canyonlands?

A Yes. Yes.

Q Do you recall what time you headed back or came back to Moab?

A I believe it was around 4:00 o'clock.

Q During this day of jeeping had you been drinking?

A I drank a half a beer about 6:00 o'clock

that evening.

Q Before you headed back into town?

A No. No. No drinking took place until we returned to the motel out in the parking lot.

Q Okay. And you had what?

A A half a beer.

Q And did you have anything else?

A There was some kind of Schnopp's, somebody was passing a bottle around, and I had taken two swallows of that also.

Q On that day had you taken any kind of medication?

A None.

Q On the prior day did you take any kind of medication?

A None.

Q Were you prescribed any kind of medication at that particular time, Rebecca?

A I had been prescribed a prescription drug called Zoloft, which is anti-depressant, and I had -- the last time I took that was a week prior to going down there, because the Psychiatrist --

MR. PAYTON: Objection. I think the question -- Excuse me. I think she's answered the question at this point.

THE COURT: Yeah. Just confine yourself to answering the question.

THE WITNESS: Okay.

THE COURT: That's an answer to the question.

Q (By MR. BENGE) When was the last time you had taken that particular drug?

A One week prior to April 8th.

Q Now, you stated that this -- the drinks that you had were in the parking lot after you returned from jeeping?

A Yes.

Q Who all -- Was Mr. Giolas present?

A Yes.

Q And your friends?

A Yes.

Q Did Mr. Giolas have anything to drink that day to your knowledge?

A Very much.

Q Now, calling your attention to some time after that, were you with Mr. Giolas again in the jeep?

A Yes.

Q And what was the purpose of that?

A There was a certain trail that these -- those -- the really expensive jeeps, like forty thousand dollars, I don't know, and they were going to

getting out of the jeep, how many times did Mr. Giolas hit you?

A Three.

Q And were all of them with the back of the hand or a fist or an open hand, or how would you -- would you describe each particular blow and its effect on you if any?

A The first blow was a semi closed fist, the second blow was a little bit less, because he only had one hand. He was trying to drive and hitting me with the other hand. And the third was hard also.

Q Did you sustain any injuries as a result of those hits?

A I just had a red face.

Q Did these individuals take you back to your motel?

A Yes.

Q Did you ask them to alert any law enforcement authorities?

A No.

Q Why?

A I didn't want them to -- I didn't want Mike to get them. I felt like Mike would get them. I didn't want to get them involved.

MR. PAYTON: Objection, Your Honor. She

A I was in the hallway.

Q And where was the Defendant, Mr. Giolas?

A On the other side of the door with his ear up against the door telling her how crazy I was.

Q What then happened?

A Some friends came up the hall and they took me into their room and they kept me there. I phoned home, which is Lehi, and family members came down and got me.

Q You ultimately -- Strike that -- Did you ultimately make a written statement for the police?

A Yes. I did.

MR. BENGE: That's all I have of Ms. Evans.

THE COURT: You may cross examine, Mr. Payton.

CROSS EXAMINATION

By MR. PAYTON:

Q Ms. Evans, what time do you allege that the assaults in question occurred?

A When he hit me -- When I allege he hit me?

Q Yes, ma'am.

A Approximately 6:30 or 7:00 o'clock. I'm not real sure. Between 6:30 and 7:30.

Q Well, you said at 6:00 o'clock you had been drinking; is that correct?

A Uh huh.

Q So we know that at 6:00 o'clock you were in the parking lot of the motel?
A Yes.
Q You said you had a half a beer?
A Correct.
Q And you had some Schnopp's at that time; is that right?
A Yes.
Q Did you indicate -- You say Mike had been drinking?
A Yes.
Q And he had been drinking heavily?
A He had been drinking. He had drank heavily while we were there. Yes.
Q Let's confine our time period to April 10th just prior to this assault, okay.
A Okay.
Q Did you tell the police that he had been drinking heavily?
A I told the police that he had been drinking.
Q Did you volunteer that?
A Yes.
Q Did you indicate that you were drinking with him so you know that he was?
A Yes.

Q Did Officer Mallon on April 10th discuss his drinking with you?
A She asked me if Mike had been drinking and I said yes.
Q And the reason you knew is because you had been drinking with him?
A I sat right there, shared the same bottle.
Q Did you indicate that as recently as forty-five minutes prior to Officer Mallon's arrival that he'd been drinking heavily?
A I'm sorry, would you state the question again?
Q Have you at any time ever made a statement that approximately forty-five minutes before all hell broke loose that he'd been sitting there drinking with you?
A Yes.
Q When did you first -- Were you aware that there was an intoxilyzer test given to Mr. Giolas on April 10th?
A I didn't realize that until we went on to the ex-parte protective order hearing in Provo.
Q And that was April 22nd; was it not?
A Yes.
Q About twelve days after this incident?

received it from Mr. Benge, Your Honor, so he has a copy.

THE COURT: It makes no difference to me, Mr. Payton. Everyone seems to agree that it's the letter.

Q (By MR. PAYTON) Did you make the statement that the only thing visible -- this would have been April 10th -- on your body were his suck marks all over his neck where he had sucked on your neck the day before?

A Yes. That was the only visible flesh showing.

Q And you hated hickeys because they look trashy?

A Right.

Q And so by your own statement those were the only visible marks on you as evidence that you had been struck?

A That you could see.

Q That you could see. I take it then you take issue with Officer Mallon's report that those were attributable to an assault on April 10?

A The suck marks?

Q Yes.

A They arose from April 9th.

Q Betty McElroy you're familiar with?

Q And then you proceeded to make statements what you would do with regards to these proceedings; did you not?

A No. I didn't talk to Mike at all, nothing, we left.

Q After those proceedings, you proceeded to file affidavits in your custody case of witnesses that you never ever have offered --

MR. BENGE: Objection, Your Honor. Irrelevant.

MR. PAYTON: I didn't --

THE COURT: Now we're getting too far away, Mr. Payton. I'm going to cut you off. Sustained.

Q (By MR. PAYTON) The fact is in this case Mr. Giolas did not strike you; correct?

A Mr. Giolas did strike me.

Q He had not been drinking had he?

A He was drinking. Yes. I drank with him.

MR. PAYTON: No further questions.

THE COURT: Re-Direct, Mr. Benge?

RE-DIRECT EXAMINATION

By MR. BENGE:

Q Just one matter that came out on Cross Examination, Ms. Evans. You stated that Mike was also taking the Zoloft medicine?

nothing but the truth, so help you God?

DIRECT EXAMINATION

By MR. BENGE:

Q State your name for the Court, please.

A Becky Mallon.

Q How are you employed?

A I'm a Police Officer for Moab City.

Q How long have you been in that capacity?

A Five years.

Q And do you have any previous law enforcement experience?

A Almost a year for the Grand County Sheriff's Office prior to that.

Q And in what capacity were you with the Grand County Sheriff's Office?

A A Deputy Sheriff.

Q Officer Mallon, calling your attention to the 10th day of April of this year, I'd ask you if you were on duty?

A Yes. I was.

Q And in what capacity were you on duty on that day?

MR. PAYTON: Objection. I think he said April 8th. The allegation is April 10th.

MR. BENGE: I thought I said April 10th.

hallway.

Q After she ran out of the room into the hallway, what happened?

A I think as she was leaving the room another Officer arrived, Sergeant Lindquist, and -- No. I'm sorry. I don't think he got there yet. Rebecca stood out in the hallway, I went out with her, asked Mike to remain in the room, pulled the door shut behind me, but kept my foot in the door so the door didn't lock and I could get back in and speak with Mr. Giolas, and I talked to Rebecca out in the hall.

Q And what was the nature of your conversation with Rebecca in the hall?

A I asked her what had happened prior to my arrival there.

Q And what did she tell you?

A She described the same incident that she's described this morning on the stand, that he had hit her a couple of times in the jeep as they were going on the jeep trail or going up to a trail, she had jumped out of the jeep and some citizens who were on the street had offered her help and brought her back to the motel.

Q After talking to Rebecca Evans, then Giolas, what did you then do or what did happen?

A Ms. Evans went down the hall with some friends to another room and I believe I went down there with her and spoke to her, left some witness statements with her, then I went back into the motel room and I told Mr. Giolas that he was under arrest for domestic violence assault.

Q Did you make any observations about Mr. Giolas at that time or prior or subsequent?

A He was angry. He made a great effort to be polite to me. He is -- He had an odor of alcohol on his breath, but he wasn't unsteady on his feet. He -- He -- There were open bottles in the room, but I -- and I could detect that he had been drinking. Mrs. Giolas also had a slight odor of alcohol on her breath. Mr. Giolas was obviously to me angry at his wife, but he -- he would visibly calm himself and try to be polite to me.

Q Was he consistently polite to you throughout the process?

A No.

Q Did you ultimately place him -- place him in any form of restraint pursuant to your arrest?

A I did. I placed handcuffs on him there in the motel room.

Q And was he cooperative with that?

(WHEREAS, A DISCUSSION WAS HELD BETWEEN THE JUDGE AND BOTH COUNSEL).

THE COURT: The objection is sustained.

MR. BENGE: I have no further questions.

THE COURT: You may Cross Examine, Mr. Payton.

CROSS EXAMINATION

By MR. PAYTON:

Q Officer Mallon, have you reviewed your report in this case?

A Yes, sir.

Q All of your reports?

A I believe there's only one report.

Q When doing a report you -- your intention is to include everything that may have a relevance or bearing on the case; is that correct?

A Yes, sir.

Q You have indicated today -- And, by the way, do you have your report with you?

A No. I don't.

Q Is it present here in Court?

A It's on the bench. Yes.

Q Could we -- Is it someplace where we could retrieve it so you could look at it?

A It's a file folder sitting right there on the front bench.

Q You have testified today that there was an odor of alcohol on Ms. Evans, then Mrs. Giolas. That particular bit of information appears nowhere in your report does it?

A No. It doesn't.

Q And so for the first time today the Defense is discovering that there was alcohol on her breath as well; is that correct?

A I don't know when you discovered that, sir.

Q But in any case, you didn't put that information in your report?

A No. I didn't.

Q Mr. Giolas that night told you that he was not the one that was drinking, that she had been drinking; is that correct?

A I believe he told me she had been drinking. Yes.

Q So the issue of whether or not she had consumed alcohol was, in fact, an issue when you arrested him; was it not?

A No. It wasn't an issue.

Q But he told you she'd been drinking and now you concede there was an odor of alcohol on her breath and you didn't put that in your report?

THE COURT: That's been asked and answered,

Counsel. Don't argue with the witness, just go ahead and ask the next question.

Q (By MR. PAYTON) You felt that alcohol was important with regards to this incident; did you not?

A No. I did not.

Q Well, in your report you go to great lengths to indicate that there were numerous liquor bottles on tables and dressers that were full, open, partially consumed and some empty; is that what you put in your report?

A There's one sentence there that says that. Yes, sir.

Q You also go on to indicate not just that there was an odor, but there was a strong odor of alcohol on Mr. Giolas' breath and his person; do you not?

A Yes. I did say that.

Q You were present when Ms. Evans testified today?

A Yes.

Q And she indicated to you that Mr. Giolas was saying that -- Correction. You heard her testify today that Mr. Giolas was telling you don't pay attention to her because she was irrational, she'd been drinking, and that she had emotional problems or mental problems

I think is what you said?

A Yes.

Q That, likewise, is not noted in your report; is it?

A I believe it is.

Q Did you fill out a probable cause statement for purposes of detaining Mr. Giolas in jail?

A Yes. I did.

Q Do you have that with you at the bench -- Correction, at your seat there?

A Yes. Yes. I do.

Q In your testimony you indicate that he was arrested solely for assault; is that what you said today?

A That was what he was charged with. Yes, sir.

Q But when Mr. Benge asked you, you said you arrested him solely for assault; is that correct?

A I advised him at the motel room, I believe is what I said, that he was under arrest for assault.

Q In your report, however, your probable cause statement for holding him in jail, you indicate he was placed under arrest for domestic assault and intoxication; do you not?

A It says that. I believe the charges at the

top say only assault.

Q But in your report you have stated that you arrested him also for intoxication; is that correct?

A No, sir, that's not correct. That's not my report, that's the probable cause statement.

Q I believe you have subscribed at the end of this your signature and that this statement is made under oath by you in its entirety; have you not?

A Yes, sir. I signed that.

Q And you don't make any qualification therein, you say that he was placed under arrest for domestic assault conjunction and intoxication?

A It says that in a sentence below, yes, sir. The list of charges on top says only assault.

Q Okay. So you had every intention of charging him with intoxication; did you not?

A No. I did not.

Q But you arrested him for that --

A I --

Q -- based upon your observations of him?

A I began an investigation based on the odor of breath on -- odor of alcohol on his breath.

Q And you arrested him -- Excuse me -- And you arrested him for intoxication?

A No. I did not.

Q But that's not what this probable cause statement says; correct?

MR. BENGE: Your Honor, asked and answered.

THE COURT: Yes. Sustained.

MR. PAYTON: I'll move on.

Q You believed him to be intoxicated; did you not? I think a yes or no would help.

A No, sir.

Q You did not believe he was intoxicated?

A I believed he had been drinking.

Q Okay. How did it come about -- Well, let me strike that -- Did you ever discuss an intoxilyzer result with Ms. Evans on April 10?

A No. I didn't.

Q Have you at any time ever discussed the results of the intoxilyzer test?

A No. I have not. With Ms. Evans?

Q Yes.

A No. I haven't.

Q In your report that you have sworn to you do, in fact, include therein that when Mr. Giolas submitted to an intoxilyzer test at the Sheriff's Office that the --

MR. BENGE: Your Honor, I'm going to object before, anticipating what might be coming in, as

bringing in the evidence without asking a question something that would be hearsay.

MR. PAYTON: State vs. Bertul, however, the Utah Supreme Court, one of Mr. Yengich's cases, indicated that a police report may not come into evidence unless the Defendant wants to introduce something from it, that he has that right, but the prosecution may not or the parties must --

THE COURT: We've discussed this in chambers, Mr. -- Mr. Payton. Do you want to give me the citations of the cases that you rely on?

MR. PAYTON: State vs. Bertul is -- that citation I would have to find, but the other case of Walker is 624 P2d 687, and State vs. Snorr, 945 P2d 947. The Walker case is Utah Supreme Court 1981, the Snorr case is the Utah Court of Appeals 1993. The Walker case would be the more relevant. State vs. Bertul I do not have the cite here, but Defense may introduce police reports, Prosecution may not.

THE COURT: All right. Members of the Jury, we're going to take a little recess for me to consider a legal question concerning the admissibility of evidence. Don't -- Don't you concern yourselves with that, except that I'm going to excuse you while I consider that question. In fact, we'll take a -- we'll

MR. PAYTON: What Bertul says is that the prosecution can only introduce the information in the police report if it's done by stipulation of the parties, but the defense has the right to introduce the information from the police report on it's own. However, that doesn't mean a report comes into evidence, but the defense only has that privilege, not the prosecution.

THE COURT: Well, I think what that means, and, of course, I can't really comment -- I can't be sure without reading the case, but I'm aware that police reports could be introduced into evidence only at the request of the defense. The prosecution -- The most the prosecution will be able to do is if they are using them as past recollection recorded, get then read into the record and not introduced in full.

MR. PAYTON: I think the Walker case is probably closer to this issue, because --

THE COURT: All right. Well, I've read the Walker case.

MR. PAYTON: The matter of --

THE COURT: I've read Walker and Snorr, and what those cases say is that the -- they cover two questions. The first is the prosecution's obligation to disclose evidence that is favorable to the defense,

and if it doesn't do that, then -- then I think in Walker there was a writ of corum novus that was granted.

And in -- And both of them talk about the prosecution not being permitted to knowingly introduce false testimony, but I don't think that, and I would -- I would -- I would enforce that, but I don't think it -- that -- that an intoxilyzer result of 0.00 at some point after these events occurred necessarily makes the testimony of Ms. Evans false, because it may be that there's -- that it would be -- there would be a perfectly logical physical explanation or chemical explanation for why the Defendant may have consumed alcohol at some earlier point that day and still have had a negative breathalyzer or intoxilyzer, or that he may have had an odor of alcohol on his breath at the time that the Officer confronted him and still come up with a 0.00 intoxilyzer.

MR. PAYTON: May I point something out to the Court in the Walker case?

THE COURT: Sure. Sure.

MR. PAYTON: One of the problems in Walker was that the police had made disclosures to Mr. Austin, who they name, and then when he argued the case he argued that there was no evidence to support the defendant's

contention, and that was the issue that the Supreme Court went off on, that that was a fraud on the Court and a fraud on the defendant, because the prosecution knew that what the defendant was asserting was consistent with the evidence that they knew about, and they said that the prosecution could not come in and argue that, that wasn't true or there was no evidence to support that, when they, in fact, knew that there was evidence.

THE COURT: Well, but I don't think -- Mr. Payton, you can't use that rule to get around the Rules of Evidence. The Rules of Evidence apply to the prosecution and the defense. You must have known this issue was going to come up, you know what the rules are to get in a breathalyzer, at least in a DUI case, and you haven't even met that standard. You have -- You have relied instead on the fact that the prosecution is supposed to let any evidence come in, admissible or not, if it's -- if it's harmful to their case, and I don't think that can be the rule of law.

MR. PAYTON: Well, I think at this juncture I'm only interested in questioning the Officer about what is and is not contained within her report, and I don't think I've reached the issue of -- it very well may come in in some other way, but I'm simply saying

that the issue here is what, in fact, she has included within her report.

THE COURT: But even Officer's statements contained in a report, if they are hearsay or otherwise inadmissible, are not admissible simply because they are in an Officer's report.

MR. PAYTON: Well, I think --

THE COURT: I can't believe that that's -- that would be -- that would be the state of the law, so I'm going to rule that this is inadmissible. I'm going to -- The defense must meet the same evidentiary standards as the prosecution. The testimony that you're seeking to introduce is hearsay, even assuming that what would be admissible in a DUI prosecution would be admissible here, which may not be true at all.

In a DUI case you would have to have the testing officer testify and have the intoxilyzer affidavit, and that's the sufficient basis for refusing to admit this evidence, and that is the basis for my decision, but if I were to go beyond that, I would still have a question about the potential for confusion.

How is the Jury to be expected to weigh a negative intoxilyzer reading at some point after the drinking allegedly occurred against the testimony of

the Officer and of Ms. Evans without someone to relate those to? How is alcohol burned off? How is it absorbed? What quantities do you have to take before you'll get some reading out of the breathalyzer? And this is a -- this is a collateral issue. It bears on the credibility of a complaining witness in what I consider to be a marginal way considering the evidence today. The -- The -- I think the potential for delay and confusion outweighs the probative value.

Now, this is something -- I may still permit a restriction on what Mr. Benge is entitled to argue, but this is really something that you raised, Mr. Payton, in your opening statement, and -- and I don't think that it has ever been a part of Mr. Benge's case that the Defendant was intoxicated or not. I don't think that -- He didn't argue that in his opening, he didn't mention that in his opening statement, and I don't think he intends to argue to the Jury that that has anything to do with the guilt or innocence of the Defendant.

If he does, if he tries to argue that the Defendant was intoxicated, then I'm going to cut him off. But -- But on this collateral issue I think the potential for confusion and delay outweighs the probative value, so I'm going to --

MR. PAYTON: Your Honor, could I -- Excuse me.

THE COURT: You want to point out another basis?

MR. PAYTON: I wanted to clear up one thing. State vs. Starns is a criminal case that the Utah Supreme Court has indicated that we have never really required defendants in criminal cases to take exception, and I think in one of your earlier rulings you cited to State vs. Barnes, which seems to be in conflict, but the Court has twice mentioned things that were raised in opening statement that I made.

I just want to point out that this whole issue of drinking and alcohol was raised by Mr. Benge through his first witness, Ms. Giolas, and that was the first affirmative evidence, because the Court instructed the Jury that opening statement is not evidence, but he has injected -- I don't mean him personally, but I'm saying the prosecution has injected this whole issue of alcohol through Ms. Giolas. He was the first to raise it.

THE COURT: Well, let's be clear about that, Mr. Payton. I think that -- I may be wrong. I may be wrong about this, but I think when you talk about it in your opening statement then Mr. Benge is entitled to ask about that on Direct, at least sufficiently to

defend himself against the argument that he's trying to hide something.

You brought -- I think -- I think when we talk about who opened the door on this, it was you that opened the door. I may be wrong about that, and if I'm wrong, I'm happy to be reversed, but that's my ruling, you opened the door on this. All right. So the ruling is that the objection is sustained. Mr. Bailiff, you can bring the Jury back in.

BAILIFF: The Jury can come back in now.

THE COURT: The record will show that the Jury is -- has returned. Mr. -- Mr. Payton, you may proceed with your questioning.

Q (By MR. PAYTON) Officer Mallon, at some point you decided that the Defendant would not, in fact, be charged with the offense of intoxication; is that correct?

A That's correct.

Q And why did you make a decision that the Defendant not be charged with intoxication after having initially arrested him for that?

A I don't believe I said I initially arrested him for that.

Q Well, I think we've established that your report says at least at one place --

MR. BENGE: Your Honor, asked and answered.

THE COURT: Let's not go into that again, Mr. Payton. She did state her probable -- there is -- she's admitted that there is a sentence in her probable cause statement that says that, and she says that the charges at the top were not -- did not include intoxication, so let's --

Q (By MR. PAYTON) I direct your attention then to the first page of your actual report, not your PC, probable cause statement, but your actual report.

MR. PAYTON: May I approach, Your Honor?

THE COURT: Yes.

Q (By MR. PAYTON) Fourth paragraph.

A Uh huh.

Q I won't ask you to read it out loud, just to refresh your recollection.

A Read it out loud?

Q No. Do not read it out loud.

A Okay.

Q And you have your report in front of you now; do you not?

A Yes. I do.

Q Okay. After having initially made a decision that Mr. Giolas was intoxicated, you decided not to cite him for that. Why was that?

A I did not make an initial decision that he was intoxicated.

Q Okay. You didn't charge him with intoxication; correct?

A Correct.

Q Why?

A I didn't believe he was intoxicated.

Q But you maintain you smelled alcohol?

A Yes. I did.

Q And you've heard Ms. Evans say that he had been drinking heavily and she believed him to be intoxicated; correct?

A I heard her say he'd been drinking heavily.

Q Did she at any time indicate to you her opinion was he was intoxicated?

A I don't recall.

Q You don't recall or she didn't tell you -- didn't say that?

A I don't recall.

Q Did she want him charged with intoxication?

A I have no idea.

Q So you do not believe in this case that his conduct was attributable to excessive use of alcohol?

A Initially I wondered about that. Eventually, after speaking with him and speaking with

her, no, I do not.

Q Did you have some indication that, in fact, he had not been drinking?

MR. BENGE: I'll object, Your Honor. That's calling for hearsay.

MR. PAYTON: Well, I don't think as it's asked it does. I asked if she had some indication that he had not been drinking.

THE COURT: Well, if you can answer it --

MR. PAYTON: That calls for a yes or no.

THE COURT: If you can answer it from your personal knowledge and your own observations, not what people had said to you, you can answer that question.

THE WITNESS: No. I did not.

Q (By MR. PAYTON) You don't have any information that he may not have been drinking?

MR. BENGE: I'll object to that, Your Honor. That is calling for hearsay.

THE COURT: Well, same -- same restriction. Answer the question with the same restriction.

THE WITNESS: No. I did not.

Q (By MR. PAYTON) Have you since acquired any -- anything to lead you to believe that he had not been drinking?

MR. BENGE: Same objection, Your Honor.

MR. PAYTON: That it's hearsay?

MR. BENGE: Yes.

MR. PAYTON: I --

THE COURT: With the same restriction, anything of your own personal observation, what you actually saw yourself?

THE WITNESS: From my personal observation I believe he had been drinking.

Q (By MR. PAYTON) Well, your report is based on personal information; is it not?

A Yes. It is, and also some information that was given to me that I can't testify to.

Q I'm sorry, beg pardon?

A Other information from other officers would be contained in their reports.

Q Now, Officer, you filled out a probable cause statement under oath; correct?

A Correct.

Q And based on that information you wanted Mr. Giolas to be held without bail; correct?

A Correct.

Q Did somebody initiate a test of him for intoxication? I'd ask --

MR. BENGE: Objection, Your Honor.

MR. PAYTON: She can indicate yes or no if she

has a foundation and knowledge.

THE COURT: Well, given my ruling, what possible purpose could there be for this, Mr. -- Mr. Payton?

MR. PAYTON: Just her basis for knowledge. Rule of Evidence says I concede that she must have some basis, but the question was does --

THE COURT: Well, if she were going to testify based on the test, then it would be hearsay anyway, so the objection is sustained.

MR. PAYTON: I don't believe we're to that point, Your Honor, but I accept the ruling.

THE COURT: Well, there's --

MR. PAYTON: I think my question to her was does it -- does she have personal knowledge that at some point there was a test conducted on the Defendant for intoxication.

THE COURT: All right. And my ruling is that it's going to be -- that it's irrelevant, because if you can't get the test result in, you can't get -- what point is there in knowing that the test was done?

Q (By MR. PAYTON) Did you initiate a -- Did you request that a test be run on the Defendant?

MR. BENGE: Objection, Your Honor.

THE COURT: Sustained. Mr. Payton, move on.

Don't keep trying this.

Q (By MR. PAYTON) Officer Mallon, what's the basis for the information in your probable cause statement that you signed under oath? Paragraph -- Do you have it in front of you?

A Yes. I do.

Q Go down to paragraph six, please.

A And what was the question?

Q What is the basis for the information that you have set out in paragraph six? Do you have personal information that caused you to make those statements in paragraph six of your probable cause statement?

A No. I do not have personal information.

Q So you don't know that of your personal information?

A The first sentence, yes, sir, I do. I was the one that took that action, I placed him under arrest.

Q You didn't take the action in the second sentence?

A No, sir. I did not.

Q Did you do something to initiate or cause that action to be taken?

A No, sir. I did not.

MR. BENGE: Objection, Your Honor, still trying to elicit the same kind of hearsay.

MR. PAYTON: I don't know what the --

THE COURT: Mr. Payton, please move on. Don't keep trying -- If I'm wrong about my ruling, I'll be wrong, I don't mind that, but don't try and get it in another way, just move on please.

Q (By MR. PAYTON) Are you familiar with the custody dispute case involving Ms. Evans and her first husband?

A No. I'm not.

Q Are you aware -- Let me rephrase that -- Has she ever discussed with you inclusion -- inclusion of your name in an affidavit executed by her in that case?

A No. She hasn't.

Q Have you been designated as a witness by her in her custody case?

A Not to my knowledge.

Q But you haven't examined the file in that case; correct?

A No. I haven't.

MR. PAYTON: May I approach?

THE COURT: Are you going to have her look at something from another case?

MR. PAYTON: I am.

and I haven't moved to do that. That's what the problem is we continually run into. He's assuming I'm going to introduce something into evidence that I haven't moved to do.

THE COURT: All right. You're right. I am a little bit premature on that. If you want to show something to her, fine, go ahead and show something to her.

Q (By MR. PAYTON) I don't ask you to read this out loud, just read it to yourself, okay.

A Yes, sir. Yes, sir.

Q Before you have seen those things today, has that ever been brought to your attention with regards to your name and inclusion therein?

A No. It hasn't.

Q Did Ms. Evans ever indicate to you that Mr. Giolas is an adverse witness against her in her custody fight with her first husband?

A No. She didn't.

Q You have test -- You have set out in your report that there were red marks on her; is that correct?

A That's correct.

Q And you have heard her testimony today that -- Correction, yes -- that the marks were

attributable to her husband sucking on her neck the night before. Have you heard that testimony?

A I heard her say that that's where the marks on her neck came from. The ones on her face did not come from there I don't believe.

Q Well, did you -- were you present when I asked her if there were any other marks and she said other than her face being red no, that there were no other marks on her?

A Other than her face being red.

Q That there were no other marks on her?

A Yes. I remember her saying that.

Q I'm sorry, if we talk together the tape will not take it down. Were you present in Court when she testified that other than the three marks she indicated from her husband sucking on her neck the night before, that there were no other marks other than her face being red?

A Yes. I was present.

Q And is your testimony in contradiction with her, that you're saying there were other marks?

A No. I'm saying that there were marks on her neck and there were red marks on her face.

Q Okay. But your testimony is at odds with hers if you were present, wouldn't you say?

A No. I don't believe it is.

MR. BENGE: Asked and answered, Your Honor.

THE COURT: Asked -- Sustained.

Q (By MR. PAYTON) Did you make the request that other officers present make a report?

A No. I didn't.

Q Did your Sergeant make a report?

A I believe he did. Yes.

Q Have you reviewed his report?

A No. I haven't.

Q Have you reviewed any other reports other than your own in this case?

A No. I haven't.

Q Are they contained in the file in front of you that was brought to you?

A I -- All I have in front of me is my report, sir.

Q And those are the only reports you've reviewed today in connection with this case?

A Yes. They are.

Q And you have not looked at any other officer's report?

A No. I have not.

Q Since this incident you have not looked at any other officer's report?

and that we would rely on the errors to this point.

I would likewise ask, since this arose in the case of -- it was your case -- Monticello vs. --

THE COURT: City of Monticello vs. Christensen.

MR. PAYTON: The City of Monticello vs. Christensen, there was some suggestion in that case that they didn't have the -- a record or something to look at, not that they come into evidence, but I would like to have the -- Mr. Benge examine the discovery material supplied to me and have them placed in a separate sealed envelope so that the legal issue before you at least of the Appellate Court would have the benefit of those reports in terms of information supplied by the prosecution and whether or not it should or should not come in. I say with the disclaimer that they're not introduced in evidence, but they're there so that they will be before the Appellate Court in a separate --

THE COURT: Why don't we do it a little easier, Mr. Payton. You tell me what you think the reports would show and get Mr. Benge to concede that if the reports were admissible that's what they would show.

MR. PAYTON: And that's what I was --

THE COURT: Rather than -- Rather than clutter up the file with things that are not admitted but are proffered.

MR. PAYTON: I simply do that because that's a procedure I might indicate in Federal Court that they normally -- you put it in a separate envelope and mark it so that the Appellate Court may examine it. In this case, even if Mr. Benge were agree, the actual wording and the fact that these things are under oath would not be before the Appellate Court, and it's something that I think that they would really need to take a look at in terms of the documents.

I don't want to be in the position of saying I didn't allow the trial court to do that and then get up to the Appellate Court and say we want to supplement the record here, and I'd be happy to -- I don't know if we need to do it now or do it later, but there are the materials submitted to me by Mr. Benge because they came from his file, and he is uniquely in control of the original documents.

MR. BENGE: Your Honor, certainly if these are items that were offered and not received, I think that the putting them in the sealed envelope or whatever would be certainly appropriate, but here these are things that Mr. Payton has merely alluded to from the

podium, he's showed them to witnesses, but they've never been even offered, and -- and sure they came from my file, in fact, I got the request for discovery of them last -- last night by fax, and I did make them available to Mr. Payton, but I --

MR. PAYTON: I'm sorry, this is the other stuff.

MR. BENGE: Well, I just don't see what -- what would be the purpose of that.

MR. PAYTON: We --

THE COURT: The only thing I know of that you have -- you've been cut off from offering, Mr. Payton, is the result of the intoxilyzer.

MR. PAYTON: I think --

THE COURT: And I think Mr. Benge would stipulate --

MR. BENGE: I would.

THE COURT: -- that there was an intoxilyzer given and that the result was --

MR. BENGE: Zero, zero.

THE COURT: -- Zero -- Zero, zero, zero. If -- And that it was given at -- I don't know whether you can give us a time as to when that was given, Mr. Benge.

MR. BENGE: I'd be willing to stipulate that

the time that it was --

MR. PAYTON: It started at 9:15.

MR. BENGE: Twenty-one fifteen -- Test started 2130.

MR. PAYTON: But the -- No.

MR. BENGE: First observed 2115, test -- time test started 2130.

MR. PAYTON: And the time of the arrest, according to Officer Mallon's report, is 1945, which would be 7:45, forty-five minutes.

THE COURT: An hour and forty-five minutes.

MR. PAYTON: No. That would be a half hour -- No, correction, you're right.

MR. BENGE: And the first time she was dispatched to the scene was 1912.

THE COURT: Okay. So --

MR. PAYTON: I -- I --

THE COURT: So let's stipulate that the test -- if we had gone into the question of the intoxilyzer, then -- which I have ruled to be inadmissible -- the evidence would show that the -- that Officer Mallon was dispatched at 1912, that is 7:12 p.m., and that a breathalyzer was -- that a breathalyzer -- first observance for a breathalyzer was at 9:15 p.m. and that the test was conducted at 9:30

p.m.

MR. PAYTON: Part of it -- And I don't have any problem with stipulating to that. I, however, would not want it to be construed as a waiver, because part of the -- the matter of the reports that Officer Mallon makes a disclaimer of whether or not he was arrested for a number of offenses, and I think, number one, the probable cause statement is significant, because it's controlled by a Supreme Court decision that says that he's got to be released within forty-eight hours of that time unless he's reviewed by a magistrate, but I think her probable cause statement as well as the report is significant because of the exchange, and as I indicate the things that the Court said I would not be able to go into.

THE COURT: Well, you never offered either the probable cause statement or the police report, Mr. Payton.

MR. PAYTON: When I was examining her about her report, the Court cut me off, and I said --

THE COURT: I just did not permit you to ask for hearsay, that's all.

MR. PAYTON: I think that that's what I'm saying is the issue, that it's in her report, and therefore does -- is it -- does it come in under Bertul

if she's put it in her report if the defense wants it in.

THE COURT: All right. So your contention is that under Bertul all police reports would come in regardless of the Rules of Evidence?

MR. PAYTON: If the Defendant wants the report in, the report comes in.

THE COURT: If offered by the -- That's your position.

MR. PAYTON: Correct.

THE COURT: Well, all right then, and you -- you -- you proffer that you would have offered that if I hadn't cut you off; is that right?

MR. PAYTON: And I'm asking to put it in a separate -- her probable cause --

THE COURT: All right. Then --

MR. PAYTON: And the report in a separate envelope so that it can be reviewed by an Appellate Court should it get that far.

THE COURT: All right. They will be a part of the record as -- as Exhibits that may have been tendered but were not and were never received.

MR. BENGE: Thank you, Your Honor.

THE COURT: Do you want to give those to me now, Mr. Payton?

BAILIFF: All rise please. The Seventh District Court is now in session.

THE COURT: The record will show that the Court is in session outside of the presence of the Jury. I have given Counsel copies of the instructions I propose to give, as well as, in Mr. Benge's case, copies of the instructions that he requested with marks on them indicating where I've deviated. Mr. Benge, you've had an opportunity to review the proposed instructions?

MR. BENGE: Yes. No exceptions, Your Honor.

THE COURT: Mr. Payton?

MR. PAYTON: Yes, Your Honor. I don't know if you want to -- how you wish to do this. The -- The initial charge the language is not consistent with the information as originally charged, so the way the original information and the only one that we've ever been provided reads is that in violation of Moab City Ordinance, as the Court has it with the section, in that the said Defendant, Michael Giolas, on the 10th day of April A.D. 1983 at approximately 7:12 p.m. at 549 North Main, Moab, Grand County, State of Utah did attempt with unlawful force or violence to do bodily injury to Rebecca M. Giolas, a Class B Misdemeanor. And I think that -- that the charge has to be

consistent with the way it is in the information, because that's what we have relied upon.

THE COURT: Well, the -- the specific hour and minute and the specific address within the City of the offense is not -- is not an element of the offense, it's information that helps you to know what it is they're talking about, and are you going to assert that in the element section I should -- I'd have to put in that they -- that the Jury would have to find that it occurred at that precise time and place?

MR. PAYTON: That's correct, and I -- let me indicate for the Court I have no reason to believe that it would be different from the charge as set out by the State, regardless of whether or not it is or is not, State vs. Eugene Myers was a 1953 case from the Utah Supreme Court in which it indicated that the State -- in that case it made the difference between a conviction for misdemeanor and a felony in terms of the value of property, but the Court said that the -- it was a State case.

I keep getting confused here between State and Moab City, but the case I'm referring to, State vs. Eugene Myers, the value of the property asserted was over $250.00, but was proved to be less than that, and the Court said that the prosecution couldn't rely upon

something as they had plead it and then come in and amend it later where it meant the difference between conviction and not.

State vs. Topham -- T-O-P-H-A-M -- is a case from the Supreme Court that said a defendant is only presumed to be -- know with what he's charged by virtue of the Information, and I'm simply saying that where they have alleged this specific time and a specific location --

THE COURT: Mr. Payton, what is the prejudice that you suffered by the Jury being instructed with regard to this being -- taking place on a day in the City? What prejudice do you suffer?

MR. PAYTON: You mean a time and a place?

THE COURT: Right.

MR. PAYTON: Because the day is in there. Because the Jury can reasonably find, based upon our argument, that there was no indication if the time was 7:45 or based on the time when the Officer was there that there was no assault that took place at the time that's alleged in the Information.

THE COURT: Is that the only reason?

MR. PAYTON: That the time and place? Correct. That's --

THE COURT: The only reason that you assert

prejudice is that if a specific time were given then you could argue with the Jury that if they don't find that it happened at that precise time they should find the Defendant not guilty?

MR. PAYTON: Time and place, because that's the --

THE COURT: Right. Right.

MR. PAYTON: We have never been indicated to the contrary.

THE COURT: Right. Precise time. If they didn't -- don't find that it happened at that precise place at that precise time, then they should find the Defendant not guilty?

MR. PAYTON: Not that they should, but that they can. They certainly can.

THE COURT: Is that the only reason -- that's the only prejudice that you assert?

MR. PAYTON: It is.

THE COURT: All right. That's not --

MR. PAYTON: And that --

THE COURT: That's not an efficient assertion of prejudice.

MR. PAYTON: Let me indicate then with regard --

THE COURT: Wait just a second.

MR. PAYTON: Go ahead.

THE COURT: Now, Mr. Benge, do you -- do you want me to put that back in? I wish that you'd leave it out of your informations entirely.

MR. BENGE: Yeah. I agree, Your Honor, and that's -- that's --

THE COURT: It causes needless confusion.

MR. BENGE: I agree that it shouldn't have been in there.

THE COURT: If --

MR. BENGE: I agree.

THE COURT: But if you want me to put it back here in the charge thing, I'm certainly not going to put it in elements --

MR. BENGE: I certainly don't.

MR. PAYTON: And my -- And let me be clear. We relied upon that up and to this point to then come in and when the jury instructions come out saying we're going to omit it, the Defendant certainly doesn't -- I mean if the Court rule I -- but, of course, a trial strategy and there is at least one Supreme Court case that has specifically held that the courts do recognize that the defense may have a theory of the case, and that is a legitimate --

THE COURT: Well, that might -- that might

help you a little bit, Mr. Payton, if you had submitted your own instructions that said -- that included this as an element of the offense. Now, I -- the only thing I would consider doing is since we are quoting from the Information, putting it in Instruction No. 1, but I'm certainly not going to put it in the elements offense, because it isn't an element of the offense under our law. Certainly an approximate date is enough.

MR. BENGE: Yes, Your Honor.

MR. PAYTON: Can I insert in the record the cases Olden vs. Kentucky? It is 488 US 227 1988. The United States Supreme Court has acknowledged and held reversible error --

THE COURT: Mr. -- Mr. Payton, let's not waste anymore time on this.

MR. PAYTON: Okay.

THE COURT: You don't need to read cases to me. Mr. Benge, if you want me -- if you -- just for the sake of eliminating a possible claim of error, if you wanted me to put this back in on page one I'd do that.

MR. BENGE: I'd rather you leave it the way it is, Your Honor.

THE COURT: All right. Okay. Your exception is noted and overruled, Mr. Payton. Next exception.

MR. PAYTON: I don't know how we've numbered these, so I don't -- if --

THE COURT: Well, let's take them one --

MR. PAYTON: That's why I was saying the difficult --

THE COURT: I haven't put numbers on them. Take page one as number one and number two as page two and so on.

MR. BENGE: So the cover -- the first sheet is one?

THE COURT: The cover is number one. Yes.

MR. BENGE: Okay. Thank you.

THE COURT: From number three I'm going to strike members of the jury, that's duplicative.

MR. PAYTON: I'm sorry, for number three members --

THE COURT: Where it says members of the jury. That's -- I've already said that once.

MR. PAYTON: Okay. My exception goes to one, no -- no exception to two, which is statement of charge and not a statement of fact, three, duties of Judge and Jury no exception, four, Defendant's plea not guilty no exception, number five, definition of offense and elements of offense, we take exception. Again, going back to the original charge, as has always been the

case, the charge was at the time and place specific that the Defendant did attempt with unlawful force or violence to do bodily injury to Rebecca M. Giolas, a Class B Misdemeanor.

With regards to number five, I think the only thing appropriate there is number B, attempt with unlawful force or violence to do bodily injury to Rebecca M. Giolas. The other matters there were not alleged in the Information and they have never been set out as something that the City intended to rely upon in terms of proving the offense. That's for starters, because --

THE COURT: Well, give me everything, Mr. Payton.

MR. PAYTON: Okay. A we think is improper, B I've indicated, C is improper. The Defendant did on about April 10, 1993 -- I think that included should be the time of the offense at 7:12 and the place of the offense, since those have been set out and were alleged in the Information.

THE COURT: That's overruled for the same reason stated earlier.

MR. PAYTON: Okay. Then those are the exceptions to number five.

THE COURT: You haven't alleged any prejudice

on the time and place aspect of this that qualifies as a kind of prejudice that the Court can recognize. Mr. Benge, what's your response with regard to the argument that we should not have an instruction with regard to acts or threats, only with regard to attempts?

MR. BENGE: Your Honor, I -- it seems that the Court is compelled to instruct with the -- with regard to the law as to all of the elements of the offense, and that's what -- that's what I requested and that's what the Court is doing.

MR. PAYTON: And I simply submit that as I attempted the Court said they didn't want the citation, so I won't give the citation, but our theory of the case is we certainly have a right to rely on the Information where they have never alleged acts or threats, they've alleged an attempt with unlawful force, and that's all that was alleged in the Information.

THE COURT: Well, then two things, Mr. Payton, in ruling on that. The first is that assault is, because of the three different ways it can be committed, has always been a very difficult thing to plead in a short concise way, and -- and it in most cases I think it puts -- it's an adequate notice just to cite the section.

You have allowed evidence to come in showing acts, attempts and threats without any objection that it goes outside what was alleged in the -- in the Information, and you have not submitted jury instructions proposing to instruct only with regard to attempt. There has been evidence of acts, attempts and threats, and so I'm going to overrule your objection and -- and instruct on all three aspects of that. Mr. Benge might decide he wants to rework his wording of the assault charge, but I think you've had adequate notice. You haven't told me really of any prejudice that you've suffered by result of being instructed on all three.

MR. PAYTON: I think that I did, Your Honor. I indicated that we relied upon the charge as set out in the Information and that under the Olden vs. Kentucky case that the United States Supreme Court it said that the defense is entitled to have a legitimate theory of defense.

THE COURT: Then why did you not object to all this testimony about threats and acts?

MR. PAYTON: Because as a matter of law when it goes to the charge whether I did or didn't all they've charged is attempt, and that's all that's charged in the Information.

THE COURT: All right. Would you have had other witnesses here to testify if act, attempt and threat had all been charged?

MR. PAYTON: I'm not -- Well, it's -- I'm not sure I would or wouldn't, but since they didn't charge it, I think it becomes an academic discussion, because we --

THE COURT: Well, I'm asking a question, Mr. Payton. Can you answer it? Can you tell me what other witnesses you would have had here if it had been?

MR. PAYTON: Had they -- Had they charged those things, other witnesses very possibly could have. Having not charged those things, I didn't believe in terms of the law.

THE COURT: Would you tell me what witnesses those would be?

MR. PAYTON: There were other parties that were traveling with -- Well, I guess what the Court wants us to say is that --

THE COURT: You need to tell me specifically what the prejudice is that you suffer. What would you have done if the information had been charged differently?

MR. PAYTON: And I suppose what I'm saying is it wasn't, Your Honor, so we'll -- we'll live with the

ruling as the Court has set it out.

THE COURT: Well, okay, so you're not going -- you're not going to state anything that you would have done differently if it had been charged more completely; right?

MR. PAYTON: If the Information had been charged differently, I would have tried the case differently, yes, but it --

THE COURT: Tell me how you would have tried it.

MR. PAYTON: But it was not. That's what I'm saying. It has not been.

THE COURT: You tell me that you would have tried it differently. Tell me how you would have tried it differently.

MR. PAYTON: Because if they're going to allege -- They have only alleged attempt. State vs. Topham says that all we know is what they allege in the Information. If -- And if, for example, possession of controlled substance says you must knowingly and intentionally. If the State does not allege both of those and it turns out later when they go through the whole case you say so what they didn't allege in the conjunctive that a person knowingly and intentionally, and therefore there is no violation. If you look at

this, I don't have --

THE COURT: In that case, I would rule the same way I'm ruling today, that the Defendant was placed on adequate notice.

MR. PAYTON: Okay.

THE COURT: But you haven't told me how you would -- how you would have tried the case differently. You haven't told me specifically what you would have done differently if the charge had been charged differently.

MR. PAYTON: And I think at this juncture the Court is asking me on instantaneous momentary question to go back and rethink a theory of a case that has been pending here for the better part of six months, and I'm saying I can't do it.

THE COURT: Well, I think you had -- An additional ground is that you had adequate notice by the service of the State's proposed instructions before trial began that they were going to assert all three theories and you made no objection at that tine about that, so I'm going to overrule your objection. Let's have your next exception.

MR. PAYTON: Number six. As far as any allegation, the second paragraph there, there's no self defense claim in this case, and that appears to be a

your Foreperson, and must be returned by you into Court. Your verdict in this case must be guilty of Assault as charged in the Information, or not guilty as your deliberations may result. This being a criminal case, it requires a unanimous concurrence of all the Jurors to find a verdict. Dated this 29th day of October, 1993, Lyle R. Anderson, District Court Judge.

I will give you these instructions when you retire to deliberate together with two verdict forms. One of them says we find the -- we the Jurors in the above case find the Defendant guilty of Assault. The other says we the Jurors in the above case find the Defendant not guilty of Assault. And you will return only one of these at the conclusion of your deliberations with the instructions that I will give to you. All right. Mr. Benge, you may make your argument.

MR. BENGE: Thank you, Your Honor, Counsel. Gentlemen, I appreciate your attentiveness and your patience while you got up and down and in and out and back and forth, and you got to see firsthand the way the judicial process operates, and that's kind of a rare privilege for most citizens.

The Judge has told you what your duty is here today. You're to weigh what was told to you from that

Also, Counsel would have you believe that the victim said that when she quits her medication the roof caves in. Again, it's your recollection that's important, but I believe she said that's the reason she was taking the medication, because she felt like the roof was caving in from this relationship.

Everybody has a job to do to make this Country run, and in the case of the judicial branch or the law enforcement branch, the Legislature makes laws, and in this case it makes laws that make assault a crime, and we see everyday in the paper articles about domestic violence, assaults involving husbands assaulting wives.

MR. PAYTON: Objection. That's improper. He can not make emotional appeals with regards to an issue of public interest and it's contrary to the law.

THE COURT: Well, that's kind of a close question. I'll sustain that, Mr. Benge, scale back your argument there a little bit so that -- Members of the Jury, you're here to decide this case. You don't need to make a grand statement about -- about domestic violence as a problem in our society. You decide this case based on its facts. You don't have to make any grand statements with your verdict, and you shouldn't. Mr. Benge, go ahead.

MR. BENGE: You don't have to make any grand

MR. PAYTON: No.

THE COURT: I guess we'll be in recess then pending the return of the Jury.

COURT CLERK: All rise.

(WHEREAS, THIS HEARING WENT OFF THE RECORD).

BAILIFF: The Seventh District Court is back in session. Be seated.

THE COURT: All right. Mr. Bailiff, you've indicated that the Jury has informed you that they have reached a verdict?

BAILIFF: Yes.

THE COURT: The record will show that Counsel for the City is present, Counsel for the Defendant and the Defendant are present. Please escort the Jury into the courtroom. It looks like, Mr. Peirson, you were the -- you were the Foreman of the Jury?

MR. PEIRSON: Yes, sir.

THE COURT: All right. Have the Clerk read the verdict. You've reached a verdict then, Mr. Peirson?

MR. PEIRSON: Yes. We were unanimous.

THE COURT: All right. We'll have the Clerk read the verdict.

COURT CLERK: In the case of City of Moab vs. Michael Bruce Giolas, we the Jurors in the above case

find the Defendant guilty of Assault, signed by Mr. Peirson, Foreman, dated this date.

THE COURT: All right. Mr. Payton, do you desire that I poll the Jury?

MR. PAYTON: We so desire, Your Honor.

THE COURT: All right. Members of the Jury, the Defendant is entitled to know that this was a unanimous verdict and so that it is the verdict of each member of the Jury. I am going to ask each of you to -- one at a time to tell me whether this is your verdict. Mr. Hamblin, is this your verdict?

MR. HAMBLIN: Yes.

THE COURT: Mr. -- Let's see, the next one -- Mr. Buchanan, is this your verdict?

MR. BUCHANAN: Yes.

THE COURT: Mr. Peirson, is this your verdict?

MR. PEIRSON: Yes.

THE COURT: Mr. Bybee, is this your verdict?

MR. BYBEE: Yes, but I felt we didn't deliberate as long as I would have liked, but I suppose it is.

THE COURT: Well, would --

MR. PAYTON: If there's any question, our position is that they be sent back to confer further even though they've announced the verdict.

THE COURT: I think with that -- with that statement, Mr. Bybee, I'll -- I will excuse the Jury to deliberate further, and don't get mad at him, folks, it's his right to say that, and -- and deliberate with open minds about it. Mr. Bailiff, will you take the Jury into your charge under the same oath that you earlier took?

BAILIFF: Yes.

THE COURT: All right. Go ahead, go with the Bailiff Mr. -- members of the Jury. Court will be in recess pending the second return of the Jury.

(WHEREAS, THIS HEARING WENT OFF THE RECORD).

BAILIFF: Seventh District Court is now in session. Please be seated.

THE COURT: Mr. Bailiff, you indicate that the Jury has once again reached a verdict?

BAILIFF: Yes, Your Honor.

THE COURT: All right. Would you escort them into the courtroom, please?

BAILIFF: Yes.

THE COURT: Mr. Peirson, are you still the Foreman?

MR. PEIRSON: I guess.

THE COURT: All right. The Jury has reached a verdict?

MR. PEIRSON: We have reached a verdict.

THE COURT: All right. We'll have the --

MR. PEIRSON: And it is unanimous this time.

THE COURT: All right, good. We'll have the Clerk read the verdict.

COURT CLERK: City of Moab vs. Michael Bruce Giolas, we the Jurors in the above case find the Defendant guilty of Assault, signed by the Foreman, Lloyd Peirson, dated this date.

THE COURT: All right. Mr. Payton, do you want them polled again?

MR. PAYTON: Definitely.

THE COURT: Mr. Hamblin, is this your verdict?

MR. HAMBLIN: Yes.

THE COURT: Mr. Bybee, is this your verdict?

MR. BYBEE: Yes.

THE COURT: Mr. Peirson, is this your verdict?

MR. PEIRSON: Yes.

THE COURT: And, Mr. Buchanan, is this your verdict?

MR. BUCHANAN: Yes.

THE COURT: It appears that the verdict is unanimous. The Court will authorize its entry by the Clerk. Mr. Benge, what do you say with regard to sentencing?

and, of course, I'll listen to Mr. Benge, the Prosecutor, and certainly to the Defendant and his Counsel as to what they think I should do, but your work is done and you're welcome to stay or you can be excused.

MR. PEIRSON: Can we make a statement?

THE COURT: You may, Mr. Peirson.

MR. PEIRSON: I think the Jury feels that any punishment of this gentleman ought to be minimal. We have sympathy for him, but the letter of the law being such, we felt we had to come out with a guilty.

THE COURT: Okay. Well --

MR. PAYTON: Put your hand down.

MR. GIOLAS: Your Honor --

MR. PAYTON: Put your hand down.

MR. GIOLAS: I just don't -- I don't have anything against these gentlemen. I realize that you had to do what you had to do and that was part of your job as being called to what you had to do and there is absolutely no -- no hard feelings or anything like that at all, and I just wanted you guys to know that. You're put in a heck of a spot and that's what you have to do, that's what you have to do. I just wanted you guys to know that.

THE COURT: One of the things that jurors

often wonder is what about the evidence that they got a hint of but they didn't hear, and in this case you got a hint that there was evidence that the Defendant had been tested and came out negative on a breathalyzer, and one of the reasons why I excluded that evidence and didn't -- and instructed you not to consider it is that it was a period of three hours, perhaps as much as three hours, and certainly two hours from the time that he supposedly had something to drink and when the breathalyzer test was given, and I didn't know how you would be able to weigh -- how you would be able to relate a breathalyzer result at 9:30 in the evening back to things that happened at 6:00 or 7:00 o'clock in the afternoon. I don't know whether that mattered to you.

I always worry when I exclude evidence that jurors get worried that I'm trying to hide something from them. I just try to limit to what is admissible under the Rules, and that generally is reliable evidence. Anyway, you're excused and thank you for your service.

MR. BENGE: Thank you.

THE COURT: I did want to give the victim a chance to speak if she wanted to before sentence was imposed.

CERTIFICATE

STATE OF UTAH *
* ss.
County of Salt Lake *

I, MINDY L. NELSON, do hereby certify that the foregoing pages, numbered 1 through 225, contain a true and accurate transcript of the electronically recorded proceedings held in connection with The City of Moab vs. Michael B. Giolas held on October 29, 1993 at 9:30 a.m., and was transcribed by me to the best of my ability from the cassette tapes fur..ished to me.

Dated this 13th day of January, 1994.

Mindy L. Nelson, Transcriber

I, RENEE L. STACY, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public for the State of Utah, do hereby certify that the foregoing transcript prepared by Mindy L. Nelson was transcribed under my supervision and direction.

Renee L. Stacy, CSR, RPR

My commission expires:

11-9-95

Notary Public
RENEE L. STACY
2242 E. Commerce Rd
Layton, Utah 84040
My Commission Expires
November 9, 1995
State of Utah

IN THE SEVENTH DISTRICT COURT
IN AND FOR GRAND COUNTY, STATE OF UTAH

THE CITY OF MOAB,	:	
Plaintiff and Appellee,	:	
	:	**CLERK'S CERTIFICATE**
vs	:	
	:	District Court Case No. 9317-97
MICHAEL BRUCE GIOLAS,	:	
Defendant and Appellant.	:	**Court of Appeals Nos. 930741-CA**

I, BARBARA PROCARIONE, Clerk of the Seventh Judicial District Court, in and for Grand County, State of Utah, do hereby certify that the hereunto attached papers are all of the original documents on file in my office as such Clerk of the Court. Said papers constitute all of the documents to be transmitted to the Court of Appeals in the above-entitled criminal action.

I further certify that the papers contained in said file are by me this day transmitted to the Court of Appeals together with the Exhibits and original Transcripts of those certain proceedings as were requested by the attorney for the Appellant.

WITNESS MY HAND AND SEAL of the Seventh District Court at my office in Moab, Grand County, State of Utah, this **11th** day of **MARCH, 1994.**

BARBARA PROCARIONE, CLERK

BY: Sue Batchelder

Sue Batchelder
Assistant Clerk of Court

SEVENTH DISTRICT COURT
Grand County, Utah

FILED APR 15 1993

IN THE SEVENTH DISTRICT COURT

In and For Grand County, State of Utah

THE CITY OF MOAB, Plaintiff, VS MICHAEL BRUCE GIOLAS, 13148 S. 3600 West Riverton, Utah 84065 DOB: 4/22/66 Defendant.	)	INFORMATION NO. 9317-97

COMES NOW William L. Benge, Moab City Attorney, and states on information and belief that the Defendant committed in the above named city and county, the crime(s) of:

ASSAULT - DOMESTIC VIOLENCE in violation of Moab City Ordinance #92-06 (Section 76-5-102, UCA), in that the said Defendant, **MICHAEL BRUCE GIOLAS**, on the 10th day of April, A.D., 1993, at approximately 7:12 p.m., at 549 North Main, Moab, Grand County, State of Utah, did attempt with unlawful force or violence, to do bodily injury to Rebecca M. Giolas, a Class B Misdemeanor.

DATED this 14 day of April, A.D., 1993.

William L. Benge,
Moab City Attorney

STEVEN LEE PAYTON (#2554)
Attorney for Defendant
431 South 300 East, Suite 40
Salt Lake City, UT 84111-3298
Telephone: (801) 363-7070

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

IN AND FOR GRAND COUNTY

STATE OF UTAH

MOAB CITY, Plaintiff, vs. MICHAEL B. GIOLAS, Defendant.	CERTIFICATE OF MAILING Case No. 9317-97 Citation No. 013383 (MCPD) "Assault" (Judge, Lyle R. Anderson)

DOCUMENTS MAILED

(1) Appearance of Counsel;

(2) Request For Discovery;
(3) Demand For Names of Witnesses;
(4) Demand For Place, Date, & Time of Commission of Alleged Offense;
(5) Demand For Copy of Information;
(6) Demand For Copy of City Ordinance;

(7) *Notice To Court
[U.R.Cr.P. Rule 16 "Discovery"]

Rebecca D. Stanton
"Becky"
LEGAL ASSISTANT

Steven Lee Payton
LAWYER
431 SOUTH 300 EAST, SUITE 40
SALT LAKE CITY, UTAH 84111-3298
TELEPHONE (801) 363-7070

(5)

CERTIFICATION OF MAILING

I hereby certify that a true and correct copy of the foregoing documents as stated herein were mailed via United States Mail, first class, postage prepaid on the 14th day of May, 1993, to the following:

Moab City Prosecutor
P.O. Box 699
Moab, UT 84532
Certified Mail #P879-458-826

Seventh District Court
115 West 200 South
Moab, UT 84532
Certified Mail #P879-458-827

Michael B. Giolas
(U.S. Certificate of Mailing)

Steven Lee Payton

Authority

Judicial Council Rules of Judicial Administration
CJA Rule 4-504 "Written Orders, Judgments & Decrees"

U.R.Cr.P. Rule 3 "Service & Filing of Papers"

U.R.C.P. Rule 5 "Service and Filing of Pleadings and Other Papers"

Utah R. App. P. Rule 21 "Filing and Service"

Rebecca D. Stanton
"Becky"
LEGAL ASSISTANT

Steven Lee Payton
LAWYER
431 SOUTH 300 EAST, SUITE 40
SALT LAKE CITY, UTAH 84111-3298
TELEPHONE (801) 363-7070

STEVEN LEE PAYTON (#2554)
Attorney for Defendant
431 South 300 East, Suite 40
Salt Lake City, UT 84111-3298
Telephone: (801) 363-7070

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

IN AND FOR GRAND COUNTY

STATE OF UTAH

MOAB CITY, Plaintiff, vs. MICHAEL B. GIOLAS, Defendant.	DEMAND FOR PLACE, DATE, & TIME OF COMMISSION OF ALLEGED OFFENSE Case No. 9317-97 Citation No. 013383 (MCPD) "Assault" (Judge, Lyle R. Anderson)

Authority

U.C.A. 77-14-1 "Time & Place of Alleged Offense"

Defendant hereby makes written demand that within ten (10) days hereof prosecution specify in writing and mail to defendants counsel the following:

(a) Place of alleged offense;

(b) Date alleged offense occurred;

(c) Specific time it is alleged the offense was committed.

DATED this 10th day of May, 1993.

Steven Lee Payton
Attorney for Defendant

STEVEN LEE PAYTON (#2554)
Attorney for Defendant
431 South 300 East, Suite 40
Salt Lake City, UT 84111-3298
Telephone: (801) 363-7070

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

IN AND FOR GRAND COUNTY

STATE OF UTAH

MOAB CITY,

Plaintiff,

vs.

MICHAEL B. GIOLAS,

Defendant.

DEMAND FOR COPY OF INFORMATION

Case No. 9317-97
Citation No. 013383 (MCPD)
"Assault"
(Judge, Lyle R. Anderson)

Authority

U.R.Cr.P. Rule 4 "Prosecution of Public Offenses"

U.R.Cr.P. 5 "Information and Indictment"

U.R.Cr.P. Rule 7(4)(a),(5) "Proceedings Before Magistrate"

U.R.Cr.P. Rule 9 "Joinder of Offenses and Defendants"

U.R.Cr.P. Rule 10 "Arraignment" [Information Before Plea]

U.R.Cr.P. Rule 10(b) "Arraignment" [Additional Time In Which To Plead]

Defendant by and through his Attorney of Record, hereby demands that he be provided, by the prosecution, with copy of formal Information in the above-referenced case.

DATED this 10th day of May, 1993.

Steven Lee Payton
Attorney for Defendant

Rebecca D. Stanton
"Becky"
LEGAL ASSISTANT

Steven Lee Payton
LAWYER
431 SOUTH 300 EAST, SUITE 40
SALT LAKE CITY, UTAH 84111-3298
TELEPHONE (801) 363-7070

William L. Benge
Moab City Attorney
Bar Number 282
94 East Grand Avenue
P. O. Box 699
Moab, Utah 84532

IN THE SEVENTH DISTRICT COURT

IN AND FOR GRAND COUNTY, STATE OF UTAH

THE CITY OF MOAB,	)	
	)	Criminal No. 9317-97
Plaintiff,	)	
	)	CERTIFICATE OF COMPLIANCE
vs	)	TO DEFENDANT'S
	)	REQUEST FOR DISCOVERY
MICHAEL B. GIOLAS,	)	
	)	
Defendant.	)	

COMES NOW William L. Benge, Moab City Attorney, and certifies to the Court that on this 20th day of May, A.D., 1993, he has complied with Defendant's Request For Discovery dated the 6th day of May, A.D., 1993.

William L. Benge,
Moab City Attorney

(22)

SEVENTH DISTRICT COURT
Grand County, Utah

FILED MAY 24 1993

William L. Benge
Moab City Attorney
Bar Number 282
94 East Grand Avenue
P. O. Box 699
Moab, Utah 84532

IN THE SEVENTH DISTRICT COURT

IN AND FOR GRAND COUNTY, STATE OF UTAH

THE CITY OF MOAB, Plaintiff, vs MICHAEL B. GIOLAS, Defendant.	)	Criminal No. 9317-97 CERTIFICATE OF COMPLIANCE

In response to Defendant's demand for place, date and time of commission of alleged offense, the undersigned hereby certifies that a true and correct copy of the Information filed in this matter against said Defendant which sets forth said information, has been provided to Defendant.

DATED this 20 day of May, A.D., 1993.

William L. Benge,
Moab City Attorney

(26)

William L. Benge
Moab City Attorney
Bar Number 282
94 East Grand Avenue
P. O. Box 699
Moab, Utah 84532

IN THE SEVENTH DISTRICT COURT

IN AND FOR GRAND COUNTY, STATE OF UTAH

THE CITY OF MOAB,	)	
	)	Criminal No. 9317-97
Plaintiff,	)	
	)	CERTIFICATE OF
vs	)	COMPLIANCE
	)	
MICHAEL B. GIOLAS,	)	
	)	
Defendant.	)	

In response to Defendant's demand for copy of Information, the undersigned hereby certifies that a true and correct copy of the Information charging said Defendant has been provided to Defendant.

DATED this 20 day of May, A.D., 1993.

William L. Benge,
Moab City Attorney

(28)

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY STATE OF UTAH

THE CITY OF MOAB, Plaintiff, **vs** **MICHAEL BRUCE GIOLAS,** Defendant.	**JURY INSTRUCTIONS** Case No. 9317-97 Judge Lyle R. Anderson

MEMBERS OF THE JURY:

The defendant, Michael Bruce Giolas is accused by an Information filed in this court by the Moab City Attorney of having committed the following crime:

> ASSAULT, in violation of Moab City Ordinance #92-06 (Section 76-5-102, Utah Code Annotated) in that the said defendant, Michael Bruce Giolas, on the 10th day of April, 1993, in Moab, Grand County, State of Utah, did attempt with unlawful force or violence to do bodily injury to Rebecca M. Giolas.

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DEFENDANT'S PLEA OF NOT GUILTY PUTS BURDEN ON STATE/CITY

The defendant has entered a plea of not guilty to the charge of assault.

This casts upon the State/City the burden of proving beyond a reasonable doubt all of the elements of the offense.

No. 5

DEFINITION OF OFFENSE AND ELEMENTS OF OFFENSE

Before you can convict the defendant of the offense of assault, you must find from the evidence, beyond a reasonable doubt, all of the following numbered elements of that offense.

1) That defendant either

a) acted, with unlawful force or violence, to do bodily injury to another, or

b) attempted, with unlawful force or violence, to do bodily injury to another, or

c) threatened, with a show of immediate unlawful force or violence, to do bodily injury to another; and

2) That defendant did so on or about April 10, 1993.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence has failed to so establish one or more of said elements then you should find the defendant not guilty.

No. 9

JURY TO DETERMINE WEIGHT OF
EVIDENCE, CREDIBILITY OF WITNESSES AND FACTS

You are the sole judges of the weight of the evidence, the credibility of the witnesses and the facts. In considering the testimony of a witness you may consider his appearance and demeanor, his apparent frankness and candor, or the want of it, his opportunity to observe, his ability to understand and his capacity to remember. You may consider the interest, if any is shown, which any witness may have in the result of the trial, and also any bias he may have, or any motive or probable motive which any witness may have to testify for or against either party.

If you believe any witness has wilfully testified falsely as to any material fact in the case, you are at liberty to disregard the whole of the testimony of such witness, except as he may have been corroborated by other credible witnesses or credible evidence. You are not bound to believe all that the witnesses may have testified to nor are you bound to believe any witness; you may believe one witness as against many, or many as against one. In the light of the above observations, it is your privilege to judge the weight to be given to the testimony of the witnesses and to determine what the facts are.

No. 16

JURY TO APPOINT FOREPERSON CONCURRENCE OF ALL JURORS
FOREPERSON SIGNS VERDICT

When you retire to deliberate, you should appoint one of your number as foreperson. Your verdict must be in writing, signed by your foreperson and must be returned by you into court.

Your verdict in this case must be:

Guilty of assault as charged in the Information or not guilty as your deliberations may result.

This being a criminal case it requires a unanimous concurrence of all the jurors to find a verdict.

DATED this 29th day of October, 1993.

Lyle R. Anderson, District Court Judge

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303, 199 P.2d 542 (1948) (advertisement for sale of property was sufficient to put other cotenants on notice of adverse possession).

[8] In this case, the district court's findings show that it was not until 1976 that Lewis "brought home" to Mary his adverse possession. For several years after purchasing the Paragonah property, Lewis only farmed the land and paid taxes on it. In May of 1974 Mary requested that they fix up the family home together. Lewis' response was essentially, "Not right at this time." This was, at best, an equivocal act of exclusion. Then, in May of 1976 Lewis told Mary that he had purchased the property at a tax sale and that it was his alone. In August of 1977, this suit was brought. On these facts Lewis did not adversely possess the property under either the general seven-year or the special four-year requirement of § 78–12–7.1.

In affirming the first four district court rulings, we also necessarily affirm the fifth: that Lewis and Alene Prothero own, as joint tenants, an undivided one-fourth interest in the Paragonah property as tenants in common with the other heirs. At best Alene has a joint interest in Lewis' pro rata share as a cotenant.

Affirmed. Costs to respondent.

HALL, C.J., and OAKS, HOWE and DURHAM, JJ., concur.

STATE of Utah, Plaintiff and Respondent,

v.

Chris Alfred **BERTUL**, Defendant and Appellant.

No. 17153.

Supreme Court of Utah.

May 3, 1983.

Defendant was convicted in the Third District Court, Salt Lake County, Christine M. Durham, J., of burglary and he appealed. The Supreme Court, Stewart, J., held that the trial court's exclusion of a police "booking sheet" from evidence, proffered by defendant to support his defense of intoxication, was not prejudicial error where intoxication would not have served as a defense to the charge, and (2) the evidence did not entitle defendant to a charge on the lesser included offense of criminal trespass.

Affirmed.

1. Criminal Law ⇐429(1)

Booking sheet, on which booking officer wrote a number indicating arrestee's degree of intoxication based on conclusion of "searching officer," who verbally communicated his conclusion to booking officer, was admissible as business record when offered by defendant. Rules of Evid., Rule 63(13).

2. Criminal Law ⇐436

Business record may be admitted irrespective of type of organization from which it emanates. Rules of Evid., Rule 63(13).

3. Criminal Law ⇐444

For evidence to be admissible as business record, foundation must be laid, generally including: the record must be made in regular course of business or of entity which keeps record; record must have been made at time of, or in close proximity to, occurrence of act, condition or event recorded; evidence must support conclusion that after recordation document was kept under circumstances that would preserve its integrity; sources of information from which entry was made and circumstances in preparation of document were such as to indicate its truthworthiness; and generally requisite foundation can be made by custodian of records. Rules of Evid., Rule 63(13).

4. Criminal Law ⇐429(1)

Whether police records are admissible depends on nature of records and purpose

for which they are offered and police records of routine matters are admissible Rules of Evid , Rule 63(13)

5 **Criminal Law** ⇐**429(1)**

Even fingerprint records of defendant are admissible as business records if proper foundation is laid Rules of Evid , Rule 63(13)

6 **Criminal Law** ⇐**429(1)**

Police records containing nonroutine information as to which memory, perception, or motivation of reporter may raise serious questions of reliability are inadmissible Rules of Evid , Rule 63(13)

7 **Criminal Law** ⇐**429(1)**

Witnesses' statements recorded by officers are not made in regular course of witness' business and do not have indicia of reliability associated with routine and regularly recorded entries upon which reliance is placed by organization and are thus not admissible under business records exception to hearsay rule Rules of Evid , Rule 63(13)

8 **Criminal Law** ⇐**429(1)**

Police reports of crime should ordinarily be admitted when offered by defendant in criminal case to support his defense however, when offered by prosecution they should ordinarily be excluded, except when offered to prove several routine matters which are based on first-hand knowledge of maker of report and do not involve conclusions, and when circumstances of their preparation indicate their trustworthiness Rules of Evid , Rule 63(13)

9 **Criminal Law** ⇐**429(1)**

As with business records, investigative reports of governmental officials containing opinions not based on first-hand knowledge are not admissible Rules of Evid Rule 63(15)

10 **Criminal Law** ⇐**53**

Defense of intoxication was not intended to justify criminal act by someone whose behavior controls were lessened or somewhat diminished by voluntary intoxication and it is not defense to crime that one does things one might not otherwise have done because of influence of alcohol

11 **Criminal Law** ⇐**55**

Voluntary intoxication of sufficient degree may destroy person's ability to form necessary specific intent to commit particular crime requiring specific intent

12. **Criminal Law** ⇐**1170(1)**

In prosecution for burglary, erroneous exclusion of police booking sheet indicating that defendant was intoxicated was not prejudicial, since such intoxication would not have served as defense to burglary charge

13 **Criminal Law** ⇐**795(2)**

In prosecution for burglary, evidence did not entitle defendant to instruction on lesser included offense of criminal trespass

---

G Fred Metos, Ronald J Yengich, Salt Lake City, for defendant and appellant

David L Wilkinson, Craig L Barlow, Salt Lake City, *for plaintiff and respondent*

STEWART Justice

Defendant appeals from a burglary conviction He raises two points (1) whether the trial court erred in excluding from evidence a document called a police "booking sheet" which was proffered by the defendant to support his asserted defense of intoxication, and (2) whether the trial court erred in refusing to instruct on the crime of criminal trespass as a lesser-included offense of the crime of burglary

The defendant was convicted of burglarizing the Westminster Pharmacy in Salt Lake County in the early morning hours of October 14, 1979 He was seen leaving the pharmacy by a witness who identified him at trial When arrested, the defendant was in possession of drugs taken from the pharmacy

At trial the defendant relied on a defense of voluntary intoxication He did not dispute his participation in the crime Rather, he contended that he had consumed an inordinate amount of alcoholic beverages the night of the crime, was subject to blackouts

when drinking, and had blacked out the night of the burglary and remembered nothing of it The testimony of the officer who made the arrest, Officer English, was that the defendant had obviously been drinking but did not appear intoxicated During cross examination of Officer English, the defendant proffered what appeared to be a copy of the "booking sheet," which apparently was filled out at the Salt Lake County jail when the defendant was booked at 6 30 a m the day of the burglary The burglary was committed approximately three hours prior to the arrest Defendant's apparent purpose in offering the booking sheet was to substantiate his claim of intoxication The trial court ruled that the document was inadmissible hearsay

In making out a booking sheet, the booking officer writes in a number indicating the arrestee's degree of intoxication The number is based on the conclusion of the "searching officer" who verbally communicates his conclusion to the booking officer A "1" indicates that the searching officer concluded that he believed that the arrestee, at the time of booking, was so intoxicated that he could not be booked A '2' indicates obvious intoxication, and a "3' indicates that the arrested person had been drinking The booking sheet offered by defendant was marked with the number 2"

[1] The booking sheet and the code number on it were clearly hearsay, they were out-of-court statements offered to prove the truth of the information contained on the sheet Thus, they were inadmissible unless they fell within one of the exceptions to the hearsay rule Defendant contends that the booking sheet falls within the business record exception and within the exception for past recollection recorded Because we conclude that the booking sheet should have been admitted as a business record," we do not address the exception to the hearsay rule for past recollection recorded

[2] Rule 63(13) of the Utah Rules of Evidence provides for the admissibility of business entries "and the like"[1] We have construed that rule and predecessor rules governing the business record exception broadly *In Joseph v W H Groves Latter Day Saints Hospital,* 7 Utah 2d 39, 318 P 2d 330 (1957), we laid down the rule that an opinion in a hospital record, in that case a doctor's diagnosis, was admissible as a business record exception[2] *See also In re Richards' Estate,* 5 Utah 2d 106, 297 P 2d 542 (1956) We have also held that the essential test in establishing the applicability of the exception is *the reliability of the document,* not the nature of the enterprise from which the records are taken A business record may be admitted irrespective of the type of organization from which it emanates "It is the type of evidence which will be excluded by the hearsay rule, not the type of organization (i e , private or public) that is important" *Barney v Cox,* Utah, 588 P 2d 696, 698 (1978) In *Barney* we expressly held that the business records exception applies to governmental entities

In the instant case, the custodian of the police records in question did not testify Initially, the trial court excluded the evidence because there was no evidence either of its authenticity or its reliability The trial court ruled that the absence of any evidence showing that the proffered booking sheet was a genuine police department record precluded admission of the evidence The trial court also excluded the document because the conclusion as to defendant's intoxication upon which the code number was based was supplied by the officer who

1 Rule 63(13) provides in full text
Business Entries and the Like Writings offered as memoranda or records of acts conditions or events to prove the facts stated therein if the judge finds that they were made in the regular course of a business at or about the time of the act condition or event recorded and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness

It is also significant that in *Joseph* the doctor making the entry was not an employee of the hospital The requisite trustworthiness arose from the doctor s duty to render proper service to the patient

searched the defendant at the police station and not by the booking officer who filled out the form.

Since the searching officer who supplied the information acted in the regular course of his duties in reporting to the booking officer, we are not convinced that that was sufficient to require exclusion of the document. *See Joseph v. W.H. Groves Latter Day Saints Hospital, supra; United States v. Smith,* 521 F.2d 957 (D.C.Cir.1975). After a recess, defendant's counsel proffered the testimony of the custodian of the police department's booking documents to overcome the objection based on foundation. The proffer was refused, however, because the trial court ruled that even with an adequate foundation, the evidence was not sufficiently trustworthy.

On its face, Rule 63(13) appears to provide for the admission of all hearsay entries contained in a business record as long as the source of the information and the method and circumstances of the preparation of the record are such as to indicate its trustworthiness.

[3–5] For evidence to be admissible as a business record, a proper foundation must be laid to establish the necessary indicia of reliability. That foundation should generally include the following: (1) the record must be made in the regular course of the business or entity which keeps the records; (2) the record must have been made at the time of, or in close proximity to, the occurrence of the act, condition or event recorded; (3) the evidence must support a conclusion that after recordation the document was kept under circumstances that would preserve its integrity, and (4) the sources of the information from which the entry was made and the circumstances of the preparation of the document were such as to indicate its trustworthiness. Generally, the requisite foundation can be made by the custodian of the records. *See generally Carpenter Paper Co. v. Brannock,* 14 Utah 2d 34, 376 P.2d 939 (1962). Thus, whether police records are admissible depends on the nature of the records and the purpose for which they are offered. Police records of routine matters are admissible under Rule 63(13), such as the day a crime was reported. *United States v. Smith, supra.* Even fingerprint records of a defendant are admissible under this rule if a proper foundation is laid. *State In re Marquez,* Utah, 560 P.2d 342 (1977).

[6, 7] On the other hand, police reports containing non-routine information as to which the memory, perception, or motivation of the reporter may raise a serious question of reliability, are inadmissible. Furthermore, statements by witnesses to a crime and recorded by officers are not made in the regular course of the witness' business and do not have the indicia of reliability associated with routine and regularly recorded entries upon which reliance is placed by an organization.[3] *See Gencarella v. Fyfe,* 171 F.2d 419 (1st Cir.1948); *Johnson v. Lutz,* 253 N.Y. 124, 170 N.E. 517 (1930). *See also United States v. Shiver,* 414 F.2d 461 (5th Cir.1959); *Standard Oil Co. of California v. Moore,* 251 F.2d 188 (9th Cir.1957); *Gordon v. Robinson,* 210 F.2d 192 (3rd Cir.1954); McCormick, *The Law of Evidence* § 308 (2d ed. 1972). Thus, the "circumstances of their preparation" are not such "as to indicate their trustworthiness," as required by Rule 63(13).

Furthermore, since police reports of the factual events and details of a criminal case are generally made for the purpose of successfully prosecuting a crime, the reasons which might otherwise provide a basis to assume reliability of such reports as business records do not exist where police reports are offered by the prosecution in a criminal proceeding. *United States v. Smith,* 521 F.2d 957 (D.C.Cir.1975). It does not necessarily follow, however, that such records may not be admissible when proffered by a defendant

3. They may, however, be admissible if the witness' statement to the police officer meets the requirements of some other exception to the hearsay rule. See Annot., 69 A.L.R.2d 1148, § 5 (1960).

The present state of the pertinent law began with *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), in which the Supreme Court held that an accident report prepared by a since-deceased railroad engineer and offered by the railroad in its defense in a grade-crossing collision case did not qualify as a business record since the report was prepared in contemplation of litigation. As the court of appeals had stated in that case, the report was "dripping with motivations to misrepresent." *Hoffman v. Palmer,* 129 F.2d 976, 991 (2d Cir.1942). The *Palmer* doctrine has generally been extended to exclude "business records" which were made with an eye toward litigation when offered by the party responsible for making the record. *See, e.g., Bracey v. Herringa,* 466 F.2d 702 (7th Cir.1972) (in suit by prisoner against prison guards for alleged beating, guards' reports as to prisoner's behavior were inadmissible because they were possibly "self-serving.")

A number of cases have excluded police reports under the *Palmer* doctrine when offered by the prosecution even though the police reports met the literal, specific requirements of the business records exception to the hearsay rule. Thus, in the leading case of *United States v. Ware,* 247 F.2d 698 (7th Cir.1957), the court held:

> [E]ven if memoranda such as the ones in question are regularly prepared by law enforcement officers, they lack the necessary earmarks of reliability and trustworthiness. Their source and the nature and manner of their compilation unavoidably dictate that they were inadmissible under section 1732. They are also subject to the objection that such utility as they possess relates primarily to prosecution of suspected law breakers, and only incidentally to the systematic conduct of the police business. *Cf. Palmer v. Hoffman, supra.*

See also United States v. Frattinni, 501 F.2d 1234 (2nd Cir.1974); *United States v. Brown,* 451 F.2d 1231 (5th Cir 1971); *United States v. Adams,* 385 F 2d 548 (2nd Cir. 1967); *Sanchez v. United States,* 293 F 2d 260 (8th Cir 1961), *Annot.,* 31 A L R Fed 457 (1977); *Annot.,* 77 A L R 3d 115 (1977)

In most cases dealing with police reports of a criminal investigation, it is apparent that the reports are made in part in contemplation of litigation. Although the reports may not be readily describable as "dripping with motivation to misrepresent," their exclusion is more fundamentally explainable on the ground that substantial rights under the confrontation clause of the United States Constitution, and especially the right of cross-examination, may be severely prejudiced when the information in the report calls into question the motivation and the accuracy of perception, recall, the manner of language usage, or the soundness of conclusions by the author of the report. *Cf. Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (the right to cross-examine is essential to a fair trial). It would be "error and ordinarily reversible error to receive an exhibit containing 'a neat condensation of the government's whole case against the defendant'" in the form of a police report for which there can be no effective cross-examination. *United States v. Parker,* 491 F.2d 529 (8th Cir.1974) (denial of rehearing; main opinion at 491 F.2d 517) (quoting *Sanchez v. United States, supra,* 293 F.2d at 269; *United States v. Ware, supra,* 247 F.2d at 700). We have long ago forsaken the practice of allowing a person to be convicted on the basis of out-of-court statements, whether written or oral, of persons not subject to cross-examination

[8, 9] After a careful and scholarly analysis of many cases under the business records exception involving the admissibility of police records, *United States v. Smith,* 521 F.2d 957 (D.C.Cir.1975), synthesized the rule, to which we adhere, that police reports of crimes should ordinarily be admitted when offered by the defendant in a criminal case to support his defense. When offered by the prosecution, however, they should ordinarily be excluded, except when offered to prove simple routine matters which are based on first-hand knowledge of the maker of the report and do not involve conclusions, and when the "circumstances of

their preparation indicate their trustworthiness." Rule 63(13). *Cf. Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller,* 292 F.2d 775 (D.C.Cir.1961) (business reports admissible where adverse to employer's interest); *Pekelis v. Transcontinental & Western Air, Inc.,* 187 F.2d 122 (2nd Cir.1951) (same); *Korte v. New York, N.H. & H.R. Co.,* 191 F.2d 86 (2nd Cir.1951) (business reports prepared by doctors admissible). This rule finds support in the similar application given to a similar exception to the hearsay rule, i.e., official governmental reports. Rule 63(15) provides an exception for official reports and findings of public officers. This exception may, of course, overlap with the business record exception. As with business records, investigatory reports of government officials containing opinions not based on first-hand knowledge are not admissible under that exception. *E.g., Emmet v. American Insurance Co.,* 265 A.2d 602 (D.C.Ct.App.1970) (fire official's report); *Dale v. Trent,* 146 Ind.App. 412, 256 N.E 2d 402 (1970) (policeman's report); *Middlesex Supply, Inc. v. Martin & Sons, Inc.,* 354 Mass. 373, 237 N.E.2d 692 (1968) (fire chief's report); *Hall v. Boykin,* 207 So.2d 645 (Miss.1968) (highway patrolman's accident report).

Since the booking sheet was offered by the defendant, we conclude that the trial court erred in excluding the booking sheet in the instant case even though it contained what might be considered a conclusion.

Our next inquiry must then be whether that error was prejudicial or harmless in nature. The defense raised by the defendant was that he was so intoxicated that he was not criminally liable for the act of burglary. To maintain a successful defense of that sort, the defendant had to meet the requirements established by U.C.A., 1953, § 76-2-306, which provides:

> Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense; however, if recklessness or criminal negligence establishes an element of an offense and the actor is unaware of the risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense.

[10] The defense of intoxication was not intended to justify a criminal act by someone whose behavior controls were lessened or somewhat diminished by voluntary intoxication. It is not a defense to a crime that "one does things one might not otherwise have done" because of the influence of alcohol. *State v. Sisneros,* Utah, 631 P.2d 856, 859 (1981).

[11, 12] Voluntary intoxication of a sufficient degree may destroy a person's ability to form the necessary specific intent to commit a particular crime requiring a specific intent. *State v. Wood,* Utah, 648 P.2d 71 (1982). But there is nothing on the facts of this case which would justify a conclusion that because the defendant may have been intoxicated at the time of booking, as the code number "2" indicates, such evidence is probative that defendant was so overcome by the influence of alcohol at the time of the crime that he was not able to form the required criminal intent to steal. Indeed, the evidence in the instant case strongly indicates that the defendant was not so mentally beclouded at the time of the commission of the crime that he simply did not know what he was doing, as he would now have this Court believe. The evidence indicated that he intentionally and deliberately broke into the pharmacy, entered, and removed the stolen drugs, including a controlled substance. There is nothing whatsoever that appears on the booking sheet that would have supported the inference that the defendant, at the time of the crime, was unaware of breaking and entering the pharmacy and of leaving with the drugs in hand. Furthermore, since the officer who made the conclusion reflected on the booking sheet was not the same officer who testified at trial that defendant had been drinking but was not intoxicated, the out-of-court statement of the "searching" officer could not have been used for impeachment as a prior inconsistent statement. In sum, we find no prejudicial error in the trial court's exclusion of the booking sheet

[13] Defendant also contends that the trial court erred in not giving an instruction on the lesser-included offense of criminal trespass. The facts are all but incontrovertible that defendant entered the pharmacy and in fact committed a burglary. He was caught with the goods. We do not have a case where the defendant made an unlawful entry but his intention after the entry was unclear and a matter of inference. The facts, therefore, unequivocally demonstrate a burglary, not a criminal trespass. On these facts, *State v. Hendricks,* Utah, 596 P.2d 633 (1979), controls, and an instruction on criminal trespass was not required.

Affirmed.

HALL, C.J., and OAKS and HOWE, JJ., concur.

DURHAM, J., does not participate.

TAYLOR, District Judge, sat but died before the opinion was filed.

George L. JEFFRIES, Plaintiff and Appellant,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, Defendant and Respondent.

No. 18742.

Supreme Court of Utah.

May 11, 1983

Claimant appealed from decision of the Industrial Commission denying extended unemployment benefits because of claimant's failure to actively engage in seeking work. The Supreme Court, Stewart, J., held that substantial evidence supported finding by the Industrial Commission that claimant intended application for extended unemployment benefits to be effective during claimant's first week without work, during which time he failed to satisfy work-search requirement, contrary to claimant's contention on appeal that application was for subsequent weeks, during which he allegedly did satisfy work-search requirement.

Affirmed.

Social Security and Public Welfare ⇐593.5

Substantial evidence supported finding by the Industrial Commission that the claimant intended application for extended unemployment benefits to be effective during claimant's first week without work, during which time he failed to satisfy work-search requirement, contrary to claimant's contention on appeal that application was for subsequent weeks, during which he allegedly did satisfy work-search requirement. U.C.A.1953, 35-4-10(i).

George L. Jeffries pro se.

David L. Wilkinson, Floyd G. Astin, K. Allan Zabel, Salt Lake City, for defendant and respondent.

STEWART, Justice:

This is an appeal from a decision by the Industrial Commission board of review, denying extended unemployment benefits to appellant because of his failure "to actively engage in seeking work." We affirm.

Appellant, having exhausted his regular unemployment benefits, filed his initial claim for extended benefits on April 8, 1982, to be effective beginning the week before. He received extended benefits for the weeks ending April 3 through May 1, 1982. He was then employed from May 5th to June 11th. On Friday of the following week, June 18th, he returned to the Job Service office and completed a form to resume the extended benefit payments, effective that week, June 13th-19th. However, appellant's work search record submitted for that week showed that he had made no

of damage, an adjustment of the judgment in this case was appropriate. However, the judgment may only be reduced to the extent it specifically and identifiably included special damages of the same types as those for which no-fault benefits had previously been received. This is consonant with the basic procedure outlined in *Allstate v. Ivie, supra.* Under *Allstate* a judgment for damages may only reflect damages suffered over and above those particular types of damages reimbursed by the no-fault insurer. Defendant is not entitled to a reduction of plaintiff's award of general damages to offset no-fault insurance payments for different types or categories of damages. See *Transamerica Insurance Company v. Barnes*, 29 Utah 2d 101, 505 P.2d 783 (1972); see also *Street v. Farmers Ins. Exchange, supra*, wherein a similar factual situation arose and the same result was reached. Also see *Brophy v. Ogden Rapid Transit Company*, 46 Utah 426, 151 P. 49 (1915).

The judgment of the lower court is affirmed. No costs.

HALL and CROCKETT,* JJ., and MAURICE HARDING, Retired District Judge, concur.

MAUGHAN, C. J., does not participate herein; HARDING, Retired District Judge, sat.

WILKINS, J., heard the arguments but resigned before the opinion was filed.

* CROCKETT, Justice, concurred in this case before his retirement.

Willie Mae WALKER, aka Dell Walker, Plaintiff and Appellant,

v.

STATE of Utah, Defendant and Respondent.

No. 16705.

Supreme Court of Utah.

Jan. 23, 1981.

Defendant was convicted of unlawful possession of controlled substance with intent to distribute for value, and following her later discovery that prosecution was made aware of and failed to disclose during trial certain evidence favorable to her defense, she petitioned for writ of coram nobis or in the alternative writ of habeas corpus. The Third District Court, Salt Lake County, Peter F. Leary, J., denied her petition, and she appealed. The Supreme Court, Maughan, C. J., held that: (1) prosecutor's action in failing to disclose contradicting testimony to plaintiff or court and his reliance on false impression created by original testimony in both closing argument and summation to jury constituted prosecutorial misconduct analogous to knowing use of false testimony; (2) there existed reasonable likelihood that false impression fostered by prosecutor could have affected judgment of jury; and (3) prosecutor's actions deprived defendant of fair trial and constituted denial of due process.

Reversed and remanded for new trial.

Hall, J., dissented and filed opinion.

1. Criminal Law ⇐706(2)

Any conviction obtained by knowing use of false testimony is fundamentally unfair and totally incompatible with rudimentary demands of justice.

2. Constitutional Law ⇐268(9)

Conviction obtained through use of false evidence known to be such by representatives of state must fall under due process clause of Federal and State Constitutions if there is any reasonable likelihood that such false testimony could have affect-

ed judgment of jury. U.S.C.A.Const. Amend. 14; Const. Art. 1, § 7.

3. Criminal Law ⇐706(2)

Conviction obtained through use of false evidence must fall when State, although not soliciting false evidence, allows it to go uncorrected when it appears. U.S. C.A.Const. Amend. 14; Const. Art. 1, § 7.

4. Criminal Law ⇐700

In role as state's representative in criminal matters, prosecutor must not only attempt to win cases, but must see that justice is done, and while he should prosecute with earnestness and vigor, it is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one. U.S.C.A. Const. Amend. 14; Const. Art. 1, § 7.

5. Criminal Law ⇐706(2)

Where prosecutor discovered during course of trial that testimony of two police officers in direct conflict with position advocated by plaintiff was incorrect, failed to disclose contradicting testimony to plaintiff or court, and deliberately relied on false impression created by original testimony in both his closing argument and summation to jury, his conduct constituted prosecutorial misconduct analogous to knowing use of false testimony and therefore was subject to same standard of materiality used in such cases.

6. Constitutional Law ⇐268(9)

Where prosecutor discovered during trial that testimony of two police officers was incorrect, failed to disclose contradicting testimony to plaintiff or to the court, and instead relied on false impression created by original testimony in both closing argument and summation to jury, there existed reasonable likelihood that false impression fostered by prosecutor could have affected judgment of jury and prosecution's actions therefore deprived defendant of fair trial and constituted denial of due process. U.S.C.A.Const. Amend. 14; Const. Art. 1, § 7.

7. Criminal Law ⇐700

In criminal trial it is essential that evidence which tends to exonerate defendant be aired as fully as that which tends to implicate him.

Richard J. Leedy, Salt Lake City, for plaintiff and appellant.

Robert B. Hansen, Atty. Gen., Craig L. Barlow, Asst. Atty. Gen., Salt Lake City, for defendant and respondent.

MAUGHAN, Chief Justice:

The plaintiff appeals the District Court's judgment denying her petition for a Writ of Coram Nobis or in the alternative a Writ of Habeas Corpus. We reverse the judgment and remand the matter to the District Court for further proceedings in conformity with this opinion. All statutory references are to Utah Code Annotated, 1953, as amended.

The plaintiff Willie Mae Walker, hereinafter "Walker," was originally tried and convicted by a jury of unlawful possession of a controlled substance with intent to distribute for value. On September 26, 1977, the Court entered judgment against the plaintiff, sentenced her to an indefinite term as provided by law, and ordered her commitment to commence forthwith. The plaintiff appealed her conviction to the Utah Supreme Court, which in an unpublished per curiam opinion upheld the conviction.[1]

Following her conviction and our decision on appeal, the plaintiff discovered the fact that during the trial the prosecution was made aware of and failed to disclose certain evidence which Walker contends was favorable to her defense. In order to understand the import of these allegations a brief review of the factual basis for the conviction is necessary.

The plaintiff was initially arrested after the search of a building, owned by her, uncovering a brown prescription bottle

1. *State v Walker*, Utah, No. 15568, September 5, 1978

filled with 56 balloons of heroin. The upstairs portion of this building contains three bedrooms which share a common living room area. None of the bedrooms have separate bathroom or kitchen facilities and a common bathroom and washroom are used jointly by the occupants. The upstairs also contains an office-bedroom in which the plaintiff kept the various records of her restaurant business. Only this latter room had functioning locks on its door.

At the time of the search, which was made pursuant to a warrant, Walker was detained by the police in the adjacent restaurant where she was working. After securing the plaintiff the police went upstairs and searched the three bedrooms, one of which was used by the plaintiff as her residence. While upstairs they found Robert Westley, hereinafter "Westley," who was also named in the warrant. A search of Westley uncovered 4 balloons of heroin. Westley was then placed in custody and the search moved to the office-bedroom.

Finding this room locked, the police entered the room by breaking down the door. Once inside they found the prescription bottle containing heroin in a nightstand next to the only bed in the room. They also found in the nightstand two letters addressed to the plaintiff. Other areas of the room contained furs, jewelry, women's clothing, a cash box and business receipts, all of which were identified as belonging to the plaintiff.

After what one of the police officers characterized as a thorough search of the room the plaintiff was read her *Miranda* rights and questioned about the room where the heroin was found. She was subsequently tried and convicted of possession of a controlled substance with intent to distribute for value in violation of 58-37-8(1)(a)(ii).

Walker's defense at trial was grounded upon the premise that Westley had use and control of the room in question. The plaintiff argued Westley was using the room as his residence prior to and at the time of the search. In support of this contention the plaintiff testified Westley had clothing and toiletry articles in the room at the time of the search.

During the trial the plaintiff also denied making a post-arrest statement testified to by the police in which she allegedly indicated she had exclusive control over the locked room and possessed the only key to that room.

In contravention to the plaintiff's defense, the prosecuting attorney, Spencer Austin, elicited testimony from two of the officers present at the time of the search and arrest to the effect that no men's clothing or toiletries were found in the locked room.[2] The prosecuting attorney later referred to this testimony and the lack of any evidence corroborating the plaintiff's defense in his closing argument and final summation to the jury.[3]

However, after the trial and appeal, the plaintiff became aware of evidence known by the prosecution which supported her contention that Westley had access to and actually occupied the room in question.

2. On direct examination Officer Michael George explained:

A. Yes, I completed the search of this room.

* * * * * *

Q. What if any did you observe in men's clothing or men's articles in that room?

A. There were no men's articles in that room.

During cross-examination by the plaintiff's attorney Officer George further explained:

A I searched practically the whole room, yes, Sir.

Q. Did you find in any closet by the window clothing of Robert Westley?

A There was no male clothing found in that bedroom.

Officer Randall Anderson's testimony was of similar import.

3. In his closing argument the prosecutor stated: "He (Sheriff's Deputy Michael George) made a further search of that room after Deputy Anderson had, and what did he testify that he found? Women's clothing . He testified that he found perfume, jewelry and different types of women's clothing. I would submit to you that that's possession of that particular heroin. Who else was using that room?"

In an affidavit accompanying the plaintiff's Petition for Relief, Ophelia Buford, who worked at the plaintiff's restaurant at the time of the search, explained the police had asked her to come upstairs and take possession of jewelry and money found in the locked room. Once upstairs she asked if they were going to take Westley to jail in his pajamas. When questioned about the location of his clothes, she, according to her affidavit, explained they were in the locked room where he had been sleeping. She further explained in the affidavit that Sheriff's Deputy Duncan then entered the room with Westley where certain articles of clothing belonging to the latter were found in diverse areas of the room.

During the Habeas Corpus-Coram Nobis proceeding, Sheriff's Deputy Duncan confirmed the fact that after arresting Westley he accompanied him into the office-bedroom where Westley's clothes were located. Furthermore, at the petition hearing the prosecuting attorney, Spencer Austin, testified that Sheriff's Deputy Duncan informed him during the second day of the trial of the existence of the clothes in the room.

The District Court's findings of fact relating to the Petition for Relief acknowledged the existence of this undisclosed evidence concerning the presence of Westley's clothing in the room containing the heroin. The findings also credited the prosecution with knowledge of this evidence on the second day of the trial and, thus, at the time of his closing argument. The findings also stated the prosecuting attorney did not, at the time of his initial discovery, nor at any later time, disclose this evidence to the plaintiff or her counsel.

Thus, in the present case, the prosecuting attorney solicited testimony from two of the officers present during the search of the building. This testimony indicated the room in which the heroin was found did not contain men's clothing. Furthermore, the testimony was in direct conflict with the position advocated by the plaintiff. Whether or not the prosecution was aware of the fact this testimony was incorrect at the time it was given, he was later made expressly aware of that fact during the course of the trial. Yet, the prosecuting attorney failed to disclose the contradicting testimony to the plaintiff or the court, and instead deliberately relied on the false impression created by the original testimony in both his closing argument and summation to the jury.

[1-3] It is an accepted premise in American jurisprudence that any conviction obtained by the knowing use of false testimony is fundamentally unfair and totally incompatible with "rudimentary demands of justice."[4] The proposition is firmly established that a conviction obtained through the use of false evidence known to be such by representatives of the State, must fall under the due process clause of the Fourteenth Amendment[5] and Article I, Section 7, of the Utah State Constitution, if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[6] The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.[7] This standard derives from both the prosecutorial misconduct and more importantly the fact that the use of false evidence involves a corruption

4. See *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 765, 31 L.Ed.2d 104 (1972), quoting from *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

5. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959); see also *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967), *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942)

6. See *Giglio v. United States*, supra, 405 U.S. note 4, at 153, 92 S.Ct. at 765, quoting from *Napue*, supra, note 5, 360 U.S. at 271, 79 S.Ct. at 1178, see also *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)

7. See *State v. Jarrell*, Utah, 608 P.2d 218 (1980)

of the truth seeking function of the trial process.[8]

In a similar manner the prosecution's reliance on the false impression created by the testimony of the two police officers also represents a corruption of the truth seeking function of our criminal trial process.

[4] We have previously stated that the State while charged with vigorously enforcing the laws "has a duty to not only secure appropriate convictions, but an even higher duty to see that justice is done."[9] In his role as the State's representative in criminal matters, the prosecutor, therefore, must not only attempt to win cases, but must see that justice is done.[10] Thus, while he should prosecute with earnestness and vigor, it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[11]

In the present instance the State's case against the plaintiff is based on circumstantial evidence. The heroin was not found on the person of the plaintiff or in her living quarters. Instead, the heroin was found in a separate room which the plaintiff used as an office. The position advocated by the State imputed possession of the heroin to the plaintiff because of her control over the room in which it was found. In support of that position the State introduced police testimony crediting the plaintiff with a post arrest statement in which she allegedly stated she had exclusive control of that room and the only key to its locked door. The police testimony concerning the absence of any men's clothing in the room was presented in direct support of this testimony and the prosecution's case and in direct contravention of the plaintiff's contentions.[12]

This latter testimony which was allowed to stand uncorrected by the prosecution created the false impression that no men's clothes were found in the room at the time of the search. Although the prosecution was aware of the false character of that testimony, he did nothing to correct the false impression created in the minds of the jury. Rather, he expressly relied on this false impression in his closing arguments. It is possible that the prosecution's misleading statements relating to this issue and his manipulation of the evidence had an effect on the jury's determination.[13]

[5] The false impression which the prosecution knowingly fostered in the present case constitutes prosecutorial misconduct which seriously interferred with the trial court's truth seeking function. We believe this to be analogous to the prosecution's knowing use of false testimony and therefore subject to the same standard of materiality used in those cases.

[6, 7] Applying this standard to the present case, we believe there exists a reasonable likelihood the false impression fostered by the prosecutor could have affected the judgment of the jury.

Therefore, the prosecution's actions have deprived the defendant of a fair trial[14] and

8. Id., at 225.

9. See *Codianna v. Morris*, Utah, 594 P.2d 874, 877 (1979).

10. Cf. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

11. *State v. Adams*, Utah, 583 P.2d 89, 91 (1978).

12. For example, in her defense, the plaintiff challenged the police testimony relating to her post arrest statement and the search of the room. The testimony of Deputy Duncan which was not disclosed by the prosecution would have added direct support to the plaintiff's position that Westley had use and control of the room. Equally important, revelation of the false character of the police testimony relating to the occupancy of the room inferentially supports the plaintiff's position regarding her post arrest statement by impugning the credibility of those witnesses. See *Napue v. Illinois*, supra, note 5, 360 U.S. at 269, 79 S.Ct. at 1177.

13. See *Donnelly v. DeChristoforo*, supra note 5, 416 U.S. at 647, 94 S.Ct. at 1873

14. As we explained in *State v. Jarrell*, supra note 7, at 225, "The overriding concern in cases involving the prosecutorial nondisclosure (and more importantly prosecutorial misconduct) is the defendant's right to a fair trial."

constitute a denial of due process. As we explained in *State v. Jarrell*, "In a criminal trial it is essential that evidence which tends to exonerate the defendant be aired as fully as that which tends to implicate him." [15] In the present case this has not occurred and the defendant is entitled to have that error rectified.[16]

The judgment of the District Court is therefore reversed and the case remanded for a new trial.

STEWART and CROCKETT,* JJ., concur.

WILKINS, J., heard the arguments but resigned before the opinion was filed.

HALL, Justice (dissenting):

The statutory provision [1] which bears upon the propriety of granting a new trial on the basis of newly-discovered evidence reads, in pertinent part, as follows:

> When a verdict or decision has been rendered against the defendant the court may, upon his application, grant a new trial in the following cases only:
>
> * * * * * *
>
> (7) When new evidence has been discovered, material to the defendant and which he could not with reasonable diligence have discovered and produced at the trial.

The matter of granting or refusing to grant a new trial is within the sound discretion of the trial judge and this Court will reverse his decision thereon only where he has abused that discretion.[2] I do not agree that the trial judge in the instant case has abused his discretion.

The "new evidence" relied upon relates to the officer's knowledge of the existence of men's clothing in the office-bedroom in which the heroin was found. Although the prosecution did not disclose such evidence, the record is clear that it was equally accessible to Walker at the time of trial. *It is undisputed that Walker was present with Officer Duncan when Westley obtained clothing from the room on the night of his arrest.* At the hearing on the writ (herein appealed), Officer Duncan testified that to the best of his recollection he entered the room with Walker and Westley and that Walker opened the closet and procured the clothes for Westley. Ophelia Buford, appearing as a witness on behalf of Walker, disputes some of that testimony, but not the presence of Walker. Buford testified as follows:

Q. Do you recall when Robert Westley was getting dressed?

A. Yes.

Q. When [they] took him into Room 6 [the upstairs room in which the heroin was found] and had him change from his pajamas into—.

A. Yes.

Q. Where was Mrs. Walker at that time?

A. She was upstairs.

Q. Was she in the room?

A. Yes.

Q. Did she get a key to open the closet?

A. No.

Q. How did she get into the closet?

A. They broke it open.

At trial, Officer Duncan took the witness stand, but was never asked by the defense on cross-examination whether he saw any men's clothing in Room 6. Walker herself testified and denied having exclusive control over the room but apparently never informed her attorney of the incident now relied upon in this proceeding. In light of the foregoing, the officer's knowledge of the existence of men's clothing in the room cannot be construed to be newly-discovered evidence.

15. *State v. Jarrell*, supra note 7, at 225.

16. Cf. *Codianna v. Morris*, supra note 9, at 877.

* Crockett, Justice, concurred in this case before his retirement.

1. U.C.A., 1953, 77-38-3.

2. *State v. Bundy*, Utah, 589 P.2d 760 (1978)

Even assuming, *arguendo*, that such evidence was "newly discovered," it still must be shown that Walker could not with reasonable diligence have discovered and produced it at trial. In his closing argument at the hearing, Walker's attorney concedes that "perhaps there could have been more diligence in obtaining that type of evidence," but that he did not anticipate the need for that defense. It is his contention that "it came as a complete surprise to me when these officers testified that Mrs. Walker stated that she had 'sole and exclusive control' over Room 6." However surprised counsel may have been, certainly it cannot be said that Walker was similarly surprised if the testimony of Buford is to be believed that Walker was present in Room 6 when the clothing was taken therefrom for Westley. Had Walker apprised her counsel of that fact, he would have had an opportunity to meet the issue at trial, either by more appropriate cross-examination of the State's witnesses, or by producing further defense witnesses, notably, Buford. Reasonable diligence simply has not been demonstrated.

In any event, the trial court concluded that, although corroborative of Walker's position at trial, the prosecutor's undisclosed evidence would not have changed the decision of the jury.

The main opinion makes reference to the case of *United States v. Agurs*.[3] In that case, the Court declared that the rule of *Brady v. Maryland*[4] arguably applies in three quite different situations: (1) where the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew or should have known of the perjury; (2) where there is a pretrial request for specific evidence and the prosecution suppresses the information; and (3) where the defense either makes no request or merely makes a general request for exculpatory material, and certain favorable material is not voluntarily supplied by the prosecutor. The instant case involves no perjury and clearly falls within the third situation. *Agurs* held that under the third situation, the appropriate standard to be applied is as follows:

> . . . [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

The role of the trial court in making a determination as to the effect of non-disclosed evidence was articulated in *Cannon v. State of Alabama*.[5] In the instant case, the trial court properly relied upon that case in its ruling:

> The Court has reviewed the transcript of the evidence. The Court has read the cases submitted.
>
> And there is no question that, in the Court's mind, that the County Attorney's Office failed to disclose the fact that the men's clothing was contained in the room wherein the heroin was found.
>
> However, in reviewing the cases and in reviewing the transcript of the trial, the Court endeavored to approach it the same as was done in the case of *Cannon v. State of Alabama*, and approached the reading of the testimony and the evidence from the point of view of a fact-finder in connection with the matter.
>
> * * * * * *
>
> Now, with the background, and with what the evidence would appear to a finder of fact, the Court has concluded that the evidence would have been somewhat corroborative of the defendant's po-

3. 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

4. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), dealing with the suppression by the prosecution of evidence favorable to an accused.

5. 558 F.2d 1211 (5th Cir. 1977).

sition in the matter, but that the fact that the clothing in the room, and the fact that the defendants put on evidence both the heroin found in the possession of Mr. Westley in the room and that in the room appeared to be the same, would not have been matters that would have changed the fact-finders [sic] decision in connection with the matter and would not have weighed heavily in connection with the fact finder as far as the court can determine.

Therefore, the Petition for Coram Nobis and/or In the Alternative Habeas Corpus will be denied.

The narrow question the trial court was called upon to answer was this: Did the omitted evidence that Duncan saw Westley get a pair of pants from a closet in the room where the heroin was found create a reasonable doubt as to Walker's guilt? At trial, there was ample evidence that Westley had access to the room. Walker testified that Westley would go into the room for periods of time when he had headaches. Westley was also found to have the same type of heroin on his person at the time of arrest as was found in the room. On the other hand, it is undisputed that numerous items of personal property which belonged to Walker were also discovered in the room. At trial, the court specifically instructed the jury that ownership of the controlled substance need not be exclusive—it may have been jointly owned. Although the men's clothing found in the room may have corroborated Walker's theory of the case, it is not, as phrased by the trial court, "material" to Walker's conviction in a constitutional sense.

I would affirm.

The STATE of Utah, Plaintiff and Appellant,

v.

Walter Darwin BARKER, Defendant and Respondent.

No. 16676.

Supreme Court of Utah.

Jan. 28, 1981.

State appealed from an order of the Third District Court, Salt Lake County, Peter F. Leary, J., quashing an information charging defendant with third-degree felony criminal mischief. The Supreme Court, Maughan, C. J., held that the state could not, for purposes of charging defendant with a felony, aggregate the damages suffered by individual property owners from separate acts of vandalism occurring at the same general location over a short period of time.

Affirmed.

Hall, J., filed a dissenting opinion in which Crockett, J., joined.

1. Malicious Mischief ⇐1

State could not, for purpose of charging defendant with felony criminal mischief, aggregate damages suffered by individual property owners from separate acts of vandalism occurring at same general location over short period of time. U.C.A. 1953, 76–6–106, 76–6–106(2)(c).

2. Larceny ⇐88

Purpose of single larceny doctrine is to prevent aggregation of criminal penalties for single act.

3. Criminal Law ⇐1208(1)

Doubts in enforcement of penal code must be resolved against imposition of harsher punishment.

Theodore L. Cannon, County Atty., Susan Creager, Deputy County Atty., Robert B. Hansen, Atty. Gen., Craig L. Barlow, Asst. Atty. Gen., Salt Lake City, for plaintiff and appellant.

Robert M. McRae and Loni F. DeLand of McRae & DeLand, Salt Lake City, for defendant and respondent.

MAUGHAN, Chief Justice:

The State appeals the District Court's order granting the defendant's motion to quash the information filed against him. We affirm. All statutory references are to Utah Code Annotated, 1953, as amended.

The defendant, Walter Darwin Barker, was initially charged with criminal mischief in violation of 76–6–106.[1] In support of this charge the State alleged that on the evening of March 8, 1979, the defendant broke or damaged the windshields of 16 separately owned vehicles. The State further contends the several acts of vandalism occurred within a short period of time and at one location, to-wit: the parking lot of P. J.'s Lounge in Salt Lake City, Utah.

Although the damage to any single vehicle did not exceed $250, the total damage to all the vehicles was approximately $1800.00. Relying on this latter amount the State charged the defendant with a third-degree felony as provided for in 76–6–106(2)(c).[2]

Pursuant to 77–23–3(e) and (g) the defendant moved to quash the information on the grounds the facts presented in the State's bill of particulars did not constitute the offense charged, but rather represented 16 separate misdemeanor offenses involving 16 separate victims. The defendant further argued this series of misdemeanor offenses could not be aggregated to support the third-degree felony charge. Following a hearing on the matter, the District Court granted the defendant's motion and dismissed the charge.

[1] The sole issue before this Court is whether the State may, for the purpose of charging a defendant with a felony under 76–6–106 aggregate the damages suffered by individual property owners from separate acts of vandalism occurring at the same general location over a short period of time.

In support of its aggregation of the damage amount, the State relies on an analogy to the single larceny doctrine. This common law doctrine which is rooted in antiquity rests upon a specific analytical foundation. That foundation provides a single larcenous taking of property, whether owned by one or several individuals, will be treated as a single criminal offense.[3] This conclusion is based on the premise that if the taking (in the older cases referred to as the caption) constitutes but a single act, then there is but one offense and the multiple ownership of the property taken is immaterial.[4]

Implicit in this analytical foundation is the opposite conclusion, i. e., that several distinct acts of larceny constitute separate criminal offenses.[5] This concept is explained in Wharton's Criminal Law and Procedure,[6] which states:

"If different articles are taken from different owners at different times, the de-

1. 76–6–106 reads, in pertinent part: "(1) A person commits criminal mischief if: . (c) He intentionally damages, defaces, or destroys the property of another "

2. 76–6–106(2)(c) states. "Any other violation of this section is a felony of the third degree if the actor's conduct causes or is intended to cause pecuniary loss in excess of $1,000 value; a class A misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss in excess of $500; a class B misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss in excess of $250; and a class C misdemeanor if the actor's conduct causes or is intended to cause loss of less than $250."

3. See *People v. Sichofsky*, 58 Cal.App. 257, 208 P. 340 (1922) See generally 37 A.L.R.3d 1407–1416.

4. This rationale is followed in the first Utah case which expressly employs the single larceny doctrine, i. e., *State v. Mickel*, 23 Utah 507, 65 P. 484 (1901). In that case, this court explained: "Where many articles are stolen at one time, there is only one theft, whether the ownership is in one or many." Id. at 485.

5. See *State v. Warren*, 77 Md. 121, 26 A. 500 (1893).

6. 2 Anderson, Wharton's Criminal Law and Procedure, § 451 (1957).

(Okl.1984). *See generally* 18 Charles A. Wright et al., *Federal Practice and Procedure*, § 4443 (1981).

The policies advanced by the doctrine of res judicata have particular importance in this case because the child's right not to be bastardized far outweighs defendant's interest in asserting nonpaternity more than six years after having acknowledged paternity.[5] *See A v. X, Y, and Z*, 641 P.2d 1222, 1227 (Wyo.), *cert. denied*, 459 U.S. 1021, 103 S.Ct. 388, 74 L.Ed.2d 518 (1982). Because of the potentially damaging effects that relitigation of a paternity determination might have on a child, we rigorously observe the doctrine of res judicata. *See, e.g., In re Paternity of JRW*, 814 P.2d 1256, 1263-65 (Wyo.1991); *see also* 27 C.J.S. *Divorce* § 702 at 331 (1986) ("A determination of paternity in a child support order, particularly where the issue has been contested or could have been contested, generally, precludes subsequent denials of paternity.").

We conclude that res judicata precludes defendant from asserting nonpaternity as a defense to the petition for modification. The trial court therefore erred in admitting any evidence going to defendant's claim of nonpaternity. It also erred in denying the petition. Accordingly, we reverse and remand for a determination as to whether, consistent with this court's opinion, the child support order should be modified as originally requested by ORS.

RUSSON, J., concurs.

ORME, J., concurs in result only.

5. "If there ever is a situation where the rules of law, the interests of justice, and sound considerations of policy combine to require the application of the rules of res judicata, it should be especially so as to the adjudication on the parenthood of a child." *Roche v. Roche*, 596 P.2d 647, 649 (1979) (Crockett, J., concurring)

STATE of Utah, Plaintiff and Appellee,

v.

Thomas W. SCHNOOR, Defendant and Appellant.

No. 900330-CA.

Court of Appeals of Utah.

Jan. 7, 1993.

Defendant was convicted in the Third District Court, Salt Lake County, Michael R. Murphy, J., of forgery and he appealed. The Court of Appeals, Garff, J., held that: (1) record did not establish that state used false testimony, and (2) defendant did not establish ineffectiveness of counsel.

Affirmed.

1. Criminal Law ⇐706(2)

State may not knowingly use false evidence to obtain conviction, even where false evidence goes only to credibility of a witness.

2. Criminal Law ⇐706(2), 1171.8(1)

If court determines that evidence used by state to obtain conviction was false, reviewing court must determine whether remarks called to the attention of jurors matters which they could not properly consider in determining their verdict and whether error is so substantial and prejudicial that there would be reasonable likelihood that, without error, result would have been more favorable.

3. Criminal Law ⇐706(2)

State did not use false evidence by allowing main witness against defendant to testify that he was not granted immunity and was not testifying because he had received immunity, even though court had held at preliminary hearing that it would hold state to its assertion that it would not file charges against witness, where witness' testimony was already available to

state in the form of earlier confession and fair interpretation could be that witness, who had learning disorder, was confused rather than dishonest.

4. Criminal Law ⇐1134(3)

Ineffective assistance of counsel claim cannot ordinarily be raised on appeal because the trial record is insufficient to allow claim to be determined, but appellant may raise such claim if trial record is adequate to permit determination of issue and there is new counsel on appeal.

5. Criminal Law ⇐641.13(2.1)

Counsel was not ineffective for failing to insist that bench conference concerning testimony by witness be recorded, failing to impeach witness through his preliminary hearing transcript, or failing to proffer evidence regarding his immunity status where he vigorously cross-examined witness regarding his immunity status and his testimony on cross-examination did not conflict with events that transpired at preliminary hearing. U.S.C.A. Const.Amend. 6.

Jan Graham, State Atty. Gen., Kris C. Leonard (argued), Asst. Atty. Gen., R. Paul Van Dam, Salt Lake City, for plaintiff and appellee.

Joan C. Watt, Robert L. Steele, Ronald S. Fujino (argued), Salt Lake Legal Defender Ass'n, Salt Lake City, for defendant and appellant.

Before GARFF, GREENWOOD and JACKSON, JJ.

OPINION

GARFF, Judge:

Appellant, Thomas W. Schnoor, appeals from a conviction of forgery in violation of Utah Code Ann. § 76-6-501 (1990). We affirm.

On February 21, 1990, Schnoor was charged with forgery. During the preliminary hearing, held March 29, 1990, sixteen year old B.L. testified for the State. Schnoor's counsel pointed out that B.L. was also a suspect in the forgery. Thus he should not be required to testify and possibly incriminate himself. The prosecutor, who did not later represent the State at the evidentiary hearing, then committed not to file charges against B.L. The court noted that the proper way to grant immunity was via a formal written document signed by the county attorney. Despite the court's statement that it would "hold the County Attorney to it," the prosecutor never executed a written statement of immunity.

Trial was held May 1 and 2, 1990. B.L. testified as follows: He knew Schnoor because Schnoor was romantically involved with his mother. Schnoor offered B.L. fifty dollars for cashing a paycheck from Huish Detergents made out to Robert B. Saupe. Schnoor told B.L. he could not tell anybody what he was going to do. Schnoor first drove B.L. and his twin sister to Mike's Pawn Shop, owned by Jack Lords. Schnoor instructed B.L. to memorize the name on the check and to cash it. While at the pawn shop, Schnoor repurchased his television set and took it to his car while B.L. attempted to cash the check at a different counter. When Lords required an endorsement on the check, B.L., who has a learning disorder, misspelled Saupe's name. Lords refused to cash the check.

Schnoor drove B.L. and his sister to their apartment. While there, Schnoor made two telephone calls, each time asking whether the establishment on the other end cashed checks. Schnoor ordered B.L.'s twin sister to get him some scissors so he could cut off the end of the check that bore the misspelled name.

Schnoor drove B.L. and his sister to Cash-A-Check, stopping across the street to let B.L. out. Schnoor gave B.L. the check, told him what to do, and admonished him not to mention Schnoor's name, his description, or where he was parked, in the event there were a problem. Because B.L. did not have the payee's identification, the manager required him to fill out an information sheet. B.L. neglected to fill in most of the form and again misspelled the payee's name. Becoming suspicious, the manager went to the back room, telephoned Huish Detergents for verification, spoke with Robert Saupe, discovered Saupe had reported the check missing, and then the manager called the police. The police arrived minutes later. Schnoor drove away when the police arrived. The police arrested B.L.

B.L.'s twin sister corroborated her brother's testimony concerning Schnoor's instructions to B.L. prior to each attempt. She also corroborated B.L.'s story about the scissors.

She admitted on cross-examination that she had originally told defense counsel that B.L. found the check at Huish Detergents, while Schnoor was there to pick up his check.

During cross-examination, B.L. reported he was not granted immunity, he was not testifying because he had received immunity, and he had not been promised that the State would not press charges against him if he testified against Schnoor. He further testified he did not know why charges had not been pursued against him, and that he was not told that if he testified against Schnoor, he would not go to detention or to jail.

Also during cross-examination, an unrecorded bench conference was held.

Schnoor's testimony contradicted that of B.L. Schnoor testified that it was B.L. who obtained the check and who asked Schnoor to drive him to a place where he could cash it. On cross-examination, the prosecutor asked Schnoor whether he felt Lords, the owner of Mike's Pawn Shop, was telling the truth, confused, or mistaken.

The court instructed the jurors that they were not to concern themselves with the status of any other person or defendant named in the case. Defense counsel objected to this instruction. After another unrecorded bench conference concerning the instruction, the court pointed out to the jury that they could properly consider the credibility of both B.L. and his sister.

During closing argument, the prosecutor told the jurors they should protect B.L., that the prosecutor believed this case was important, that he believed Schnoor was guilty, that B.L.'s trial would be for another day, that B.L. had much to lose by testifying, that B.L. incriminated himself, and that the jury should not let B.L. down.

Schnoor's counsel did not object to any part of the prosecutor's closing argument. The jury found Schnoor guilty as charged. He was sentenced to an indeterminate term of one to fifteen years.

Schnoor appeals claiming the court committed reversible error in admitting the testimony regarding B.L.'s immunity status. He also claims the court denied his right to a fair trial because of the prosecutor's comments during closing arguments regarding immunity, the need to protect B.L., and his personal opinion as to the importance of the case. Schnoor claims he was also denied his right to a fair trial because the prosecution asked Schnoor to speculate as to whether the owner of Mike's Pawn Shop was telling the truth, confused, or mistaken.

FALSE TESTIMONY

Schnoor claims the court erred in convicting him because of B.L.'s testimony regarding his immunity status.

[1] A state may not knowingly use false evidence to obtain a conviction, even where the false evidence goes only to the credibility of the witness. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959); *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue*, 360 U.S. at 269, 79 S.Ct. at 1177.

[2] If we determine that the evidence was false, we then apply the two-part test articulated in *State v. Humphrey*, 793 P.2d 918 (Utah App.1990). This test asks (1) whether "the remarks call to the attention of the jurors matters which they could not properly consider in determining their verdict," and (2) whether the error was so "substantial and prejudicial such that there

is a reasonable likelihood that without the error the result would have been more favorable for the defendant." *Id.* at 925.

[3] Here, B.L.'s immunity status was based on the prosecutor's commitment that he would not file future charges against B.L., and the court's statement that it would hold the prosecutor to his commitment. The record reveals no exchange of testimony for immunity. In fact, B.L.'s testimony was already available to the State in the form of his earlier confession to the police. Moreover, a fair interpretation of the trial transcript could be that B.L., who has a learning disorder, was confused rather than dishonest.

Moreover, B.L.'s statements on cross-examination did not conflict with what took place at the preliminary hearing: He reported he was not testifying because he had received immunity. He testified he was not promised that the State would not press charges against him if he testified against Schnoor. He testified he did not know why charges had not been pursued against him. He testified he was not told that if he testified against Schnoor, he would not go to detention or to jail.

In short, the fact the prosecutor had committed not to file charges against B.L. would not affect the "jury's estimate of the truthfulness and reliability" of B.L. *Napue*, 360 U.S. at 269, 79 S.Ct. at 1177. Likewise, it would in no way "be determinative of guilt or innocence" of Schnoor. *Id.* Because we determine that B.L.'s testimony was not false, we need not apply the two-part *Humphrey* test.

STATE CONSTITUTIONAL CLAIMS

Schnoor also claims his state constitutional rights were violated. However, because Schnoor (1) did not preserve this issue at trial; (2) offers no separate analysis; and (3) claims no broader protection, we decline to consider this claim. *State v. Jensen*, 818 P.2d 551, 552 n. 2 (Utah 1991); *State v. Earl*, 716 P.2d 803, 805–06 (Utah 1986).

INEFFECTIVE ASSISTANCE OF COUNSEL

Schnoor claims for the first time on appeal that he was denied effective assistance of counsel.

[4] Schnoor did not raise this issue at trial. Ordinarily, an ineffective assistance of counsel claim cannot be raised on appeal because the trial record is insufficient to allow the claim to be determined. *State v. Humphries*, 818 P.2d 1027, 1029 (Utah 1991). However, an appellant may raise such a claim if the trial record is adequate to permit determination of the issue and there is new counsel on appeal. *Id.; State v. Johnson*, 823 P.2d 484, 487 (Utah App. 1991). Because the trial record is adequate and Schnoor is represented by new counsel, we reach the merits of the claim.

We have no order to review. Thus, we must determine whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced Schnoor under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Accord State v. Frame*, 723 P.2d 401, 405 (Utah 1986) (per curiam).

To prevail on a claim of ineffective assistance of counsel, Schnoor must show that (1) "counsel's representation falls below an objective standard of reasonableness,"; and (2) counsel's representation had a prejudicial effect on the outcome. *Strickland*, 466 U.S. at 687–88, 104 S.Ct. at 2064; *Frame*, 723 P.2d at 405.

[5] Schnoor claims the following acts and omissions of his counsel fell below an objective standard of reasonableness and prejudiced the outcome of his trial: (1) failure to insist that the bench conference be on the record; (2) failure to impeach B.L. via the preliminary hearing transcript; (3) failure to proffer evidence regarding B.L.'s immunity status; (4) failure to object to the prosecutor's closing argument; and (5) failure to record counsel's objections and arguments regarding instruction number seven. In sum, all of the alleged acts and omissions relate to a presumption that B.L. received immunity in exchange for his testimony.

Here, defense counsel vigorously cross-examined B.L. regarding his immunity status. Moreover, because we have already determined that B.L. did not receive immunity in exchange for his testimony and thus, B.L.'s testimony on cross-examination did not conflict with the events that transpired at the preliminary hearing, we find no fault in defense counsel's strategy regarding this issue. We thus find no merit in Schnoor's claim of ineffective assistance of counsel.

We decline to consider Schnoor's other claims, including those of prosecutorial misconduct and cumulative effect of errors, because they were not preserved for appeal, and/or because they are without merit. *See Low v. Bonacci*, 788 P.2d 512, 513 (Utah 1990). Affirmed.

GREENWOOD and JACKSON, JJ., concur.

LAKE PHILGAS SERVICE, a Utah corporation, Plaintiff and Appellee,

v.

VALLEY BANK & TRUST COMPANY, a Utah corporation; and Carl D. Bennett, Defendants and Appellants.

No. 910128–CA.

Court of Appeals of Utah.

Jan. 12, 1993.

Trailer owner filed conversion action against creditor of trailer occupant based on its execution sale of trailer. The Fourth District Court, Millard County, J. Robert Bullock, J., awarded vehicle owner $16,300 in compensatory damages and $25,000 in punitive damages. Defendant creditor appealed. The Court of Appeals, Greenwood, J., held that: (1) sales agreement between trailer occupant and trailer owner, Motor Vehicle Division records and county tax records showing occupant as trailer's owner, insurance obtained by occupant, and occupant's possession of trailer, merely created presumption of ownership by occupant, which was rebutted by evidence that proposed sale of vehicle had fallen through due to lack of financing; (2) plaintiff was not estopped from recovering damages from occupant's creditor; and (3) punitive damages were not assessed out of passion or prejudice.

Affirmed.

1. Appeal and Error ⇐1008.1(5)

A reviewing court will not set aside the trial court's findings of fact unless they are clearly erroneous. Rules Civ.Proc., Rule 52(a).

2. Appeal and Error ⇐842(2)

An appellate court reviews a trial court's conclusions of law under a correction-of-error standard, granting no deference to the trial court. Rules Civ.Proc., Rule 52(a).

3. Trover and Conversion ⇐1

To sustain an action for conversion, a party must prove that the act in question constituted an act of willful interference with a chattel, done without lawful justification, by which the person entitled thereto is deprived of its use and possession.

4. Trover and Conversion ⇐35

Trailer purchase agreement between trailer occupant and seller, records of the Motor Vehicle Division of State Tax Commission and county tax records showing occupant as owner of trailer, insurance obtained by occupant through his application identifying him as owner, and occupant's possession of trailer, established only a rebuttable presumption of occupant's ownership of trailer.

5. Contracts ⇐187(1)

Provision in vehicle purchase agreement, requiring any modifications of agree-

[488 US 227]

JAMES OLDEN, Petitioner

v

KENTUCKY

488 US 227, 102 L Ed 2d 513, 109 S Ct 480

[No. 88-5223]

Decided December 12, 1988.

Decision: Kentucky limitation on cross-examination, in sexual assault case, as to cohabitation of complaining witness with third party at time of trial, held (1) to violate accused's Sixth Amendment right of confrontation, and (2) not to be harmless error.

SUMMARY

A black accused and his black codefendant were indicted, in Kentucky, for the kidnapping, rape, and forcible sodomy of a white woman. The woman was allegedly cohabiting with a black male third party, and the accused asserted that (1) the accused and the woman had engaged in consensual acts; and (2) the woman, out of fear of jeopardizing her relationship with the third party, had lied when she told the third party that she had been raped, and had continued to lie since. The Kentucky trial court, however, (1) granted the prosecutor's motion to keep all evidence of current cohabitation between the woman and the third party from the jury, and (2) sustained the prosecutor's objection to an attempted cross-examination of the woman about her living arrangements, after the woman had claimed during direct examination that she was living with her mother. The jury, which acquitted the codefendant of all three charges and acquitted the accused of kidnapping and rape, convicted the accused only of forcible sodomy. On appeal, the accused's claims included an argument that the trial court's refusal to allow the accused to impeach the woman's testimony by introducing evidence supporting a motive to lie deprived the accused of his right, under the Federal Constitution's Sixth Amendment, to confront the witnesses against him, but the Court of Appeals of Kentucky, in upholding the accused's conviction, expressed the view that (1) the evidence that the woman and the third party were living together at the time of trial (a) was not barred by the state's "rape shield" law, and (b) was relevant to the accused's theory of

the case; but (2) the evidence was properly excluded on the grounds that its probative value was outweighed by its possibility for prejudice, for the trial court's admission of such evidence might have created extreme prejudice against the woman, because the woman was white and the third party was black.

Granting leave to proceed in forma pauperis and granting certiorari, the United States Supreme Court reversed the judgment of the Kentucky Court of Appeals and remanded the case for further proceedings. In a per curiam opinion expressing the view of REHNQUIST, Ch. J., and BRENNAN, WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., it was held that (1) it was beyond a reasonable limit on cross-examination, and violated the accused's right of confrontation, under the Sixth Amendment, as incorporated in the Fourteenth Amendment, to prohibit the accused from cross-examining the woman as to the woman's alleged cohabitation with the third party at the time of trial, where (a) the accused had consistently made the assertions described, (b) a reasonable jury might have received a significantly different impression of the witness' credibility had the accused's counsel been permitted to pursue the proposed line of cross-examination, and (c) speculation as to the effect of the jurors' racial biases could not justify exclusion of cross-examination with such strong potential to demonstrate the falsity of the woman's testimony; and (2) the violation was not harmless error beyond a reasonable doubt, where (a) the woman's testimony was essential, indeed crucial, to the prosecution's case, (b) the woman's story, which was directly contradicted by the accused and the codefendant, was corroborated only by the largely derivative testimony of the third party, whose impartiality would also have been somewhat impugned by revelation of the relationship, and (c) as demonstrated by the jury's verdicts and by the dissenting opinion in the Court of Appeals below, the state's case against the accused was far from overwhelming.

MARSHALL, J., dissented, expressing the view that summary dispositions (1) deprive litigants of a fair opportunity to be heard on the merits; and (2) create a significant risk that the Supreme Court is rendering an erroneous or ill-advised decision that may confuse the lower courts.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Appeal §§ 910.6, 951, 1552, 1677, 1692.3; Criminal Law § 50 — limits on cross-examination — right to confrontation — harmless error — in forma pauperis — grant of certiorari — reversal — remand

1a-1e. In a state prosecution of a black accused and a black codefendant for the kidnapping, rape, and

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

5 Am Jur 2d, Appeal and Error §§ 776-778, 809; 21A Am Jur 2d, Criminal Law §§ 720-722, 731

8 Federal Procedure, L Ed, Criminal Procedure §§ 22:814, 22:1273-22:1277

24 Am Jur Proof of Facts 2d 515, Defense to Charges of Sex Offense

18 Am Jur Trials 341, Handling the Defense in a Rape Prosecution

USCS, Constitution, Amendments 6, 14

US L Ed Digest, Appeal §§ 910.6, 951, 1552, 1677, 1692.3; Criminal Law § 50

Index to Annotations, Abduction and Kidnapping; Bias or Prejudice; Confrontation of Witnesses; Cross-Examination; Harmless and Prejudicial Error; Intent or Motive; Rape; Sodomy

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Federal Constitutional right to confront witnesses—Supreme Court cases. 98 L Ed 2d 1115.

What provisions of the Federal Constitution's Bill of Rights are applicable to the states 18 L Ed 2d 1388, 23 L Ed 2d 985.

Race discrimination. 94 L Ed 1121, 96 L Ed 1291, 98 L Ed 882, 100 L Ed 488, 3 L Ed 2d 1556, 6 L Ed 2d 1302, 10 L Ed 2d 1105, 15 L Ed 2d 990, 21 L Ed 2d 915.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts 94 ALR3d 257.

Preventing or limiting cross-examination of prosecution witness as to his motive for testifying 62 ALR2d 610.

forcible sodomy of a white woman, which prosecution results in the co-defendant's acquittal of all three charges, the accused's acquittal of kidnapping and rape, and the accused's conviction only for forcible sodomy, it is beyond a reasonable limit on cross-examination and violates the accused's right of confrontation, under the Federal Constitution's Sixth Amendment, as incorporated in the Fourteenth Amendment, to prohibit the accused from cross-examining the woman as to the woman's alleged cohabitation with a black male third party at the time of trial, where (1) the accused has consistently asserted that (a) the accused and the woman engaged in consensual acts, and (b) the woman, out of fear of jeopardizing her relationship with the third party, lied when she told the third party that she had been raped, and has continued to lie since, (2) a reasonable jury might receive a significantly different impression of the witness' credibility if the accused's counsel were permitted to pursue the proposed line of cross-examination, and (3) despite the argument that testimony as to such interracial cohabitation might create extreme prejudice against the woman, speculation as to the effect of the jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of the woman's testimony; such a violation is not harmless error beyond a reasonable doubt, where (1) the woman's testimony was essential, indeed crucial, to the prosecution's case, (2) the woman's story, which was directly contradicted by the accused and the codefendant, was corroborated only by the largely derivative testimony of the third party, whose impartiality would also have been somewhat impugned by revelation of the relationship, and (3) as demonstrated by the jury's verdicts and by the dissenting opinion in a state court of appeals below, the state's case against the accused was far from overwhelming; under such circumstances, the United States Supreme Court will grant leave to proceed in forma pauperis and grant a petition for certiorari, reverse the judgment of the state court of appeals, and remand the case for further proceedings. (Marshall, J., dissented in part from this holding.)

Constitutional Law § 37 — Sixth Amendment — states

2. An accused's right, under the Federal Constitution's Sixth Amendment, to be confronted with the witnesses against the accused, is incorporated in the Constitution's Fourteenth Amendment and is therefore available in state proceedings.

Criminal Law § 50 — right to cross-examine witnesses

3. An accused's right to be confronted with the witnesses against the accused, under the Federal Constitution's Sixth Amendment, as incorporated in the Fourteenth Amendment, includes the right to conduct reasonable cross-examination.

Criminal Law § 50 — right to confrontation — limits on cross-examination

4. With respect to an accused's right of confrontation, under the Federal Constitution's Sixth Amendment, as incorporated in the Fourteenth Amendment, a trial court may impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, in order to take account of such factors as harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that would be repetitive or only marginally relevant.

Appeal § 1552 — harmless error — denial of right to cross-examine witnesses

5. With respect to harmless-error analysis of a violation of an accused's right to conduct reasonable cross-examination, pursuant to an accused's right of confrontation, under the Federal Constitution's Sixth Amendment, as incorporated in the Fourteenth Amendment, the correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt; whether such an error is harmless in a particular case depends upon a host of factors, including (1) the importance of the witness' testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case.

OPINION OF THE COURT

[488 US 228]

Per Curiam.

Petitioner James Olden and his friend Charlie Ray Harris, both of whom are black, were indicted for kidnaping, rape, and forcible sodomy. The victim of the alleged crimes, Starla Matthews, a young white woman, gave the following account at trial: She and a friend, Regina Patton, had driven to Princeton, Kentucky, to exchange Christmas gifts with Bill Russell, petitioner's half brother. After meeting Russell at a local car wash and exchanging presents with him, Matthews and Patton stopped in J.R.'s, a "bootlegging joint" serving a predominantly black clientele, to use the restroom. Matthews consumed several glasses of beer. As the bar became more crowded, she became increasingly nervous because she and Patton were the only white people there. When Patton refused to leave, Matthews sat at a separate table, hoping to demonstrate to her friend that she was upset. As time passed, however, Matthews lost track of Patton and became somewhat intoxicated. When petitioner told her that Patton had departed and had been in a car accident, she left the bar with petitioner and Harris to find out what had happened. She was driven in Harris' car to another location, where, threatening her with a knife, petitioner raped and sodomized her. Harris assisted by holding her arms. Later, she was driven to a dump, where two other men joined the group. There, petitioner raped her once again. At her request, the men then dropped her off in the vicinity of Bill Russell's house.

On cross-examination, petitioner's counsel focused on a number of inconsistencies in Matthews' various accounts of the alleged crime. Matthews originally told the police that she had been raped by four men. Later, she claimed that she had been raped by only petitioner and Harris. At trial, she contended that petitioner was the sole rapist. Further, while Matthews testified at trial that petitioner had threatened her

with a knife, she had not previously alleged that petitioner had been armed.

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Russell, who also appeared as a State's witness, testified that on the evening in question he heard a noise outside his home and, when he went out to investigate, saw Matthews get out of Harris' car. Matthews immediately told Russell that she had just been raped by petitioner and Harris.

Petitioner and Harris asserted a defense of consent. According to their testimony, Matthews propositioned petitioner as he was about to leave the bar, and the two engaged in sexual acts behind the tavern. Afterwards, on Matthews' suggestion, Matthews, petitioner, and Harris left in Harris' car in search of cocaine. When they discovered that the seller was not at home, Matthews asked Harris to drive to a local dump so that she and petitioner could have sex once again. Harris complied. Later that evening, they picked up two other men, Richard Hickey and Chris Taylor, and drove to an establishment called The Alley. Harris, Taylor, and Hickey went in, leaving petitioner and Matthews in the car. When Hickey and Harris returned, the men gave Hickey a ride to a store and then dropped Matthews off, at her request, in the vicinity of Bill Russell's home.

Taylor and Hickey testified for the defense and corroborated the defendants' account of the evening. While both acknowledged that they joined the group later than the time when the alleged rape occurred, both testified that Matthews did not appear upset. Hickey further testified that Matthews had approached him earlier in the evening at J.R.'s and told him that she was looking for a black man with whom to have sex. An independent witness also appeared for the defense and testified that he had seen Matthews, Harris, and petitioner at a store called Big O's on the evening in question, that a policeman was in the store at the time, and that Matthews, who appeared alert, made no attempt to signal for assistance.

Although Matthews and Russell were both married to and living with other people at the time of the incident, they were apparently involved in an extramarital relationship. By the

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time of trial the two were living together, having separated from their respective spouses. Petitioner's theory of the case was that Matthews concocted the rape story to protect her relationship with Russell, who would have grown suspicious upon seeing her disembark from Harris' car. In order to demonstrate Matthews' motive to lie, it was crucial, petitioner contended, that he be allowed to introduce evidence of Matthews' and Russell's current cohabitation. Over petitioner's vehement objections, the trial court nonetheless granted the prosecutor's motion in limine to keep all evidence of Matthews' and Russell's living arrangement from the jury. Moreover, when the defense attempted to cross-examine Matthews about her living arrangements, after she had claimed during direct examination that she was living with her mother, the trial court sustained the prosecutor's objection.

Based on the evidence admitted at trial, the jury acquitted Harris of being either a principal or an accomplice to any of the charged offenses. Petitioner was likewise acquitted of kidnaping and rape. However, in a

somewhat puzzling turn of events, the jury convicted petitioner alone of forcible sodomy. He was sentenced to 10 years' imprisonment.

Petitioner appealed, asserting, inter alia, that the trial court's refusal to allow him to impeach Matthews' testimony by introducing evidence supporting a motive to lie deprived him of his Sixth Amendment right to confront witnesses against him. The Kentucky Court of Appeals upheld the conviction. No. 86-CR-006 (May 11, 1988). The court specifically held that evidence that Matthews and Russell were living together at the time of trial was not barred by the State's rape shield law. Ky Rev Stat Ann § 510.145 (Michie 1985). Moreover, it acknowledged that the evidence in question was relevant to petitioner's theory of the case. But it held, nonetheless, that the evidence was properly excluded as "its probative value [was] outweighed by its possibility for prejudice." App to Pet for Cert A6. By way

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of explanation, the court stated: "[T]here were the undisputed facts of race; Matthews was white and Russell was black. For the trial court to have admitted into evidence testimony that Matthews and Russell were living together at the time of the trial may have created extreme prejudice against Matthews." Judge Clayton, who dissented but did not address the evidentiary issue, would have reversed petitioner's conviction both because he believed the jury's verdicts were "manifestly inconsistent," and because he found Matthews' testimony too incredible to provide evidence sufficient to uphold the verdict. Id., at A7.

[1a, 2, 3] The Kentucky Court of Appeals failed to accord proper weight to petitioner's Sixth Amendment right "to be confronted with the witnesses against him." That right, incorporated in the Fourteenth Amendment and therefore available in state proceedings, Pointer v Texas, 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065 (1965), includes the right to conduct reasonable cross-examination. Davis v Alaska, 415 US 308, 315-316, 39 L Ed 2d 347, 94 S Ct 1105 (1974).

In Davis v Alaska, we observed that, subject to "the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation . . . , the cross-examiner has traditionally been allowed to impeach, i. e., discredit, the witness." Id., at 316, 39 L Ed 2d 347, 94 S Ct 1105. We emphasized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id., at 316-317, 39 L Ed 2d 347, 94 S Ct 1105 citing Greene v McElroy, 360 US 474, 496, 3 L Ed 2d 1377, 79 S Ct 1400 (1959). Recently, in Delaware v Van Arsdall, 475 US 673, 89 L Ed 2d 674, 106 S Ct 1431 (1986), we reaffirmed Davis, and held that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" 475 US, at 680, 89 L Ed 2d 674, 106 S Ct 1431, quoting Davis, supra, at 318, 39 L Ed 2d 347, 94 S Ct 1105.

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[1b] In the instant case, petitioner has consistently asserted that he

and Matthews engaged in consensual sexual acts and that Matthews —out of fear of jeopardizing her relationship with Russell—lied when she told Russell she had been raped and has continued to lie since. It is plain to us that "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." Delaware v Van Arsdall, supra, at 680, 89 L Ed 2d 674, 106 S Ct 1431.

[1c, 4] The Kentucky Court of Appeals did not dispute, and indeed acknowledged, the relevance of the impeachment evidence. Nonetheless, without acknowledging the significance of, or even adverting to, petitioner's constitutional right to confrontation, the court held that petitioner's right to effective cross-examination was outweighed by the danger that revealing Matthews' interracial relationship would prejudice the jury against her. While a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant," Delaware v Van Arsdall, supra, at 679, 89 L Ed 2d 674, 106 S Ct 1431, the limitation here was beyond reason. Speculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of Matthews' testimony.

[1d, 5] In Delaware v Van Arsdall, supra, we held that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman [v California, 386 US 18 [17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065 (1967)] harmless-error analysis." Id., at 684, 89 L Ed 2d 674, 106 S Ct 1431. Thus we stated:

> "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.
>
> [488 US 233]
>
> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Ibid.

Here, Matthews' testimony was central, indeed crucial, to the prosecution's case. Her story, which was directly contradicted by that of petitioner and Harris, was corroborated only by the largely derivative testimony of Russell, whose impartiality would also have been somewhat impugned by revelation of his relationship with Matthews. Finally, as demonstrated graphically by the jury's verdicts, which cannot be squared with the State's theory of the alleged crime, and by Judge Clayton's dissenting opinion below, the State's case against petitioner was far from overwhelming. In sum, considering

the relevant Van Arsdall factors within the context of this case, we find it impossible to conclude "beyond a reasonable doubt" that the restriction on petitioner's right to confrontation was harmless.

[1e] The motion for leave to proceed in forma pauperis and the petition for certiorari are granted, the judgment of the Kentucky Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SEPARATE OPINION

Justice **Marshall,** dissenting.

I continue to believe that summary dispositions deprive litigants of a fair opportunity to be heard on the merits and create a significant risk that the Court is rendering an erroneous or ill-advised decision that may confuse the lower courts. See Pennsylvania v Bruder, ante, p 11, 102 L Ed 2d 172, 109 S Ct 205 (1988) (Marshall,

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J., dissenting); Rhodes v Stewart, ante, p 4, 102 L Ed 2d 1, 109 S Ct 202 (1988) (Marshall, J., dissenting); Buchanan v Stanships, Inc., 485 US 265, 269, 99 L Ed 2d 289, 108 S Ct 1130 (1988) (Marshall, J., dissenting); Commissioner v McCoy, 484 US 3, 7, 98 L Ed 2d 2, 108 S Ct 217 (1987) (Marshall, J., dissenting). I therefore dissent from the Court's decision today to reverse summarily the decision below.

into the traffic lane due to a parked car and an encroaching fence, a material question of fact then arises whether the City has discharged its obligation to provide reasonably safe conditions for pedestrian travel. Governmental immunity has been waived by statute in such case. Whether a street is reasonably safe is a factual question to be resolved by the fact finder. *Ingram v. Salt Lake City*, 733 P.2d 126 (Utah 1987).

The Supreme Court of Colorado was faced with a similar situation in *Wheeler v. County of Eagle*, 666 P.2d 559 (Colo.1983). The trial court and the court of appeals held that the county had no duty to construct a pedestrian walkway along a rural road. In reversing, the supreme court stated that the issue was not whether the county was required to construct sidewalks, but whether it breached its duty to maintain the roadway in a reasonably safe manner for members of the public who use it:

> The factual predicate was that a large trailer court, where a number of high school students resided, was located near County Road 13. Trees and bushes which extended to the edge of the road forced pedestrians to walk on the pavement. A genuine issue exists as to whether, under the circumstances, the County failed in its duty to exercise reasonable care to ensure the safety of motorists and pedestrians who travel upon County Road 13. Therefore, a summary judgment should not have been entered for the County.

Id. at 561.

The summary judgment is reversed, and the case is remanded to the trial court for further proceedings in accordance with this opinion.

HALL, C.J., and STEWART and ZIMMERMAN, JJ., concur.

DURHAM, J., having disqualified herself, does not participate herein; Regnal W. Garff, Jr., Court of Appeals Judge, sat but retired before acting on the case.

STATE of Utah, Plaintiff and Appellee,

v.

Curtis PALMER, Defendant and Appellant.

No. 930192-CA.

Court of Appeals of Utah.

July 22, 1993.

Certiorari Denied Dec. 1, 1993.

Defendant was convicted in the Third District Court, Salt Lake County, Michael R. Murphy, J., of aggravated sexual abuse of a child. Defendant appealed. The Court of Appeals, Billings, P.J., held that: (1) prosecutor's questions which implied inculpatory facts unsupported by evidence were improper; (2) prosecutor's questioning of defendant regarding veracity of witnesses was improper; (3) evidence did not support prosecutor's comments in closing argument; (4) stipulated testimony implicating defendant's prearrest silence was inadmissible; and (5) errors were cumulatively harmful.

Reversed.

1. Criminal Law ⇐728(2), 1037.1(1)

Failure to object to prosecutor's improper remarks waives claim unless remarks reach level of plain error.

2. Criminal Law ⇐1030(1)

Normally, Court of Appeals finds plain error only if error exists, it should have been obvious to trial court, and it was harmful.

3. Criminal Law ⇐1030(1)

Error is harmful, and may reach level of plain error, if it undermines confidence in verdict or, there is reasonable likelihood of more favorable outcome without error.

4. Criminal Law ⇐706(4)

Prosecutor's questions, asking defendant charged with aggravated sexual

abuse about incriminating statements allegedly made to child's stepfather, were improper where state did not introduce supporting evidence to show that defendant actually made such statements.

5. Criminal Law ⇐1037.1(3)

Although prosecutor's questions implying inculpatory facts not supported by evidence were not obvious error, Court of Appeals would dispense with requirement of obviousness of error to allow review of prosecutor's error; egregious nature of prosecutor's question and strong inculpatory inferences contained therein allowed review so that justice cold be done.

6. Criminal Law ⇐706(4)

Prosecutor's question of defendant charged with aggravated sexual abuse regarding veracity of other witnesses was improper.

7. Criminal Law ⇐719(1)

Comment by prosecutor during closing argument that jury consider matters outside evidence is prosecutorial misconduct.

8. Criminal Law ⇐1037.1(2)

Even if error in prosecutor's comments during closing argument that jury consider matters outside evidence was not obvious, Court of Appeals would dispense with requirement of obviousness of error to allow review of prosecutor's error.

9. Criminal Law ⇐719(1)

Evidence did not support prosecutor's comment in closing argument that defendant touched child on penis while child was naked and sitting in defendant's lap.

10. Criminal Law ⇐719(1)

In prosecution for sexual abuse, evidence did not support prosecutor's statement in closing argument that court could take judicial notice of hot tub business location and that particular business was where defendant had taken child; neither child nor defendant had identified location of hot tub business mentioned by prosecutor and defendant denied taking child to any hot tub business.

11. Criminal Law ⇐719(1)

In prosecution for aggravated sexual abuse, evidence did not support prosecutor's comment in closing argument that defendant was worried about seven counts when speaking to alleged victim's mother; defendant actually spoke to victim's mother before finding out about seven counts from detective and victim's mother never testified about defendant's statement as to seven counts.

12. Witnesses ⇐347

Prosecution may use defendant's prearrest, pre-*Miranda* silence for impeachment purposes. U.S.C.A. Const.Amend. 5.

13. Witnesses ⇐347

Postarrest silence may be used for impeachment purposes where *Miranda* warnings have not been given. U.S.C.A. Const. Amend. 5.

14. Witnesses ⇐293½

Fifth Amendment protections exist in civil investigations. U.S.C.A. Const. Amend. 5.

15. Criminal Law ⇐407(1)

Evidence of defendant's pre-*Miranda*, prearrest silence was not admissible to demonstrate defendant had consciousness of guilt. U.S.C.A. Const.Amend. 5.

16. Criminal Law ⇐1186.1

Determination of whether errors can be classified as cumulatively harmful turns on whether errors undermine confidence in verdict.

17. Criminal Law ⇐1186.1

Where case turned primarily on jury's assessment of credibility of victim of alleged sexual abuse versus credibility of defendant, cumulative effect of numerous errors, including prosecutor's questions containing unsupported innuendo, prosecutor's misstatement of evidence, and admission of statements in stipulated testimony regarding defendant's pre-*Miranda*, prearrest silence was not harmless.

Elizabeth Holbrook, Salt Lake City, for appellant.

Jan Graham and Kris Leonard, Salt Lake City, for appellee.

Before BILLINGS, JACKSON and RUSSON, JJ.

OPINION

BILLINGS, Presiding Judge:

Defendant, Curtis Palmer, appeals his conviction of aggravated sexual abuse of a child, a first degree felony in violation of Utah Code Ann. § 76-5-404.1 (1990). We reverse.

FACTS

Defendant lived with his mother at 520 East Commonwealth Avenue in Salt Lake County.[1] He met Chuck Bartholomew while both men were incarcerated at the Utah State Prison. After their release, the men maintained a friendship. Sometime in early 1990, Bartholomew introduced defendant to his stepson, nine year old E.N. Between the end of school in 1990 and December of 1990, E.N. visited defendant numerous times to return borrowed items, to work at defendant's home, or to stay while his parents were gone. Additionally, E.N. once spent the night at defendant's house when E.N.'s sister and some friends were staying at E.N.'s house.

At age five, E.N. had been sexually abused by his natural father. E.N. was removed from his mother's home for a time when he was eight years old for molesting his little sister. E.N. had participated in counseling as a result of these experiences.

On January 7, 1991, E.N.'s mother was walking him and his sisters to school. Because children had teased E.N. previously, he did not want to go to school and threw a tantrum. E.N.'s mother told him she was going to call defendant. The record is unclear as to her motivation for calling defendant. It was either to help calm E.N. down or to have defendant take E.N. to Bartholomew to be punished, or both. E.N. then accused defendant of sexually abusing him. E.N.'s mother took him home and after further questioning called the police.

The case was assigned to Salt Lake City Police Detective Dennis Sweat. On January 11, 1992, the detective left a message on defendant's answering machine. After receiving the message, defendant attempted to phone Bartholomew but reached E.N.'s mother and talked to her instead. On January 14, 1992, and again two days later, defendant contacted Detective Sweat by phone and discussed the situation. According to Detective Sweat, defendant suggested making a deal for community service stating "he never once claimed it didn't happen" and "he wanted to get some advice" before talking. The Salt Lake County Attorney filed an information. The information alleged defendant had committed the crime of "[a]ggravated sexual abuse of a child, a first degree felony, at 520 East Commonwealth, in Salt Lake County, State of Utah." Defendant surrendered and was arrested. The preliminary hearing was held March 28, 1992, at which time defendant was bound over for trial.

At trial, E.N. testified defendant had touched his penis and buttocks "about seven" different times at defendant's house between the end of school in 1990 and December of 1990, forced him to touch defendant's penis once, and tried to force him to kiss defendant's lips. E.N. further testified the last time defendant touched him was at a hot tub rental business. Additionally, E.N. alleged defendant had asked him to touch defendant several times. E.N. also testified defendant had warned E.N. his mother and stepfather would get in trouble if E.N. told anyone about the incidents.

The trial court allowed a "Stipulation of Expected Testimony" of Detective Sweat regarding defendant's prearrest conversations with him to be read into evidence.

1. On appeal we recite the facts from the record in the manner most consistent with the jury's verdict. *State v. Verde*, 770 P.2d 116, 117 (Utah 1989); *State v. Ellifritz*, 835 P.2d 170, 172 n. 1 (Utah App.1992).

The jury convicted defendant of sexual abuse of a child. Because he had previously been convicted for attempted sexual abuse of a child, this conviction was enhanced to a first degree felony pursuant to Utah Code Ann. § 76–5–404.1(3)(e) (1990).

Defendant raises numerous claims on appeal. We do not discuss all the issues,[2] but rather focus on the numerous issues which require our reversal of defendant's conviction.

I. PROSECUTORIAL MISCONDUCT

[1–3] Defendant points to a number of instances of prosecutorial misconduct. He argues the prosecutor, both in his cross examination of defendant and his closing arguments, made improper statements. The State responds that defendant failed to preserve all but one issue for appeal and the preserved issue did not amount to prosecutorial misconduct.

> Generally, the test used for determining whether a prosecutor's statements are improper and constitute error is whether the remarks " 'called to the jurors' attention matters which they would not be justified in considering in reaching a verdict.' " Improper statements will require reversal if they are determined to be harmful.

State v. Emmett, 839 P.2d 781, 785 (Utah 1992) (quoting *State v. Johnson*, 663 P.2d 48, 51 (Utah 1983) (quoting *State v. Creviston*, 646 P.2d 750, 754 (Utah 1982))) (footnote omitted). Failure to object to the improper remarks, however, waives the claim unless the remarks reach the level of plain error. *Id.* Normally, we find plain error only if we conclude: an error exists, it should have been obvious to the trial court, and it was harmful. *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993); *see also State v. Verde*, 770 P.2d 116, 121 n. 10; *State v. Ellifritz*, 835 P.2d 170, 174 (Utah App. 1992). *But see State v. Eldredge*, 773 P.2d 29, 35 n. 8 (Utah) (noting "obviousness requirement poses no rigid and insurmountable barrier to review"), *cert denied, Eldredge v. Utah*, 493 U.S. 814, 110 S.Ct. 62, 107 L.Ed.2d 29 (1989). An error is harmful if it undermines our confidence in the verdict or, put another way, there is a reasonable likelihood of a more favorable outcome without the error. *Dunn*, 850 P.2d at 1208–09; *Ellifritz*, 835 P.2d at 174.

A. Unsupported Innuendo

First, defendant claims the prosecutor failed to support prejudicial, inculpatory inferences arising from his questions with appropriate evidence. During cross-examination of defendant the following exchange occurred:

> Q. [Prosecutor] You really liked [E.N.], didn't you?
>
> A. [Defendant] Yes.
>
> Q. You admitted as much to his stepfather, didn't you?
>
> A. Yes. I mean, I had a friendship with the stepfather and with [E.N.].
>
> Q. And didn't you, at one time, say to the stepfather, "Yes, I'm having feelings for [E.N.] that I really shouldn't be having?"
>
> A. I don't know whether I made [a] statement to that effect.
>
> Q. That certainly would have been an accurate statement wouldn't it?
>
> A. I mean, I was close to [E.N.]. But if you're talking about sexual feelings, no.
>
> Q. You deny you ever had sexual feelings toward this young boy?
>
> A. Yes.

After further questions on different topics, the prosecutor asked:

> Isn't it true that you in fact, on previous occasions, had told [E.N.'s stepfather] that you were concerned about feelings that you were having for E.N. that were inappropriate?

To which defendant answered "no."

[4] The prosecution did not put on evidence that defendant made such an incriminating statement to E.N.'s stepfather. Defendant claims the failure to introduce supporting evidence means the question brought improper information to the jurors' attention. The State responds that under the plain error test any error embodied in the exchange was neither obvious nor harmful.

[5] The Utah Supreme Court, in dicta, recently noted this type of questioning is generally error. *See State v. Emmett*, 839 P.2d 781 (Utah 1992). In *Emmett*, after ruling the defendant was entitled to a new trial, the court addressed some issues which it felt might be presented on retrial. One of those issues was the propriety of the prosecutor's questioning. Referring to the defendant's pretrial witness preparation, "the prosecutor asked, 'He didn't tell you to face the jury and *tell you exactly what to say?*' " *Id.* at 786 (emphasis in original). The defendant denied the allegation and no evidence was entered which supported it. The court noted: "Generally, it is error to ask an accused a question that implies the existence of a prejudicial fact unless the prosecution can prove the existence of the fact. Otherwise, the only limit on such a line of questioning would be the prosecutor's imagination." *Id.* at 786–87. *See also United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir.1984) (requiring prosecutor who asks accused question implying existence of prejudicial fact to prove the fact); *State v. Peterson*, 722 P.2d 768, 769–70 (Utah 1986) (per curiam) (holding questioning about prior convictions after witness's denial improper without extrinsic proof of convictions). Hence, we conclude the prosecutor's questions which implied inculpatory facts that were unsupported by evidence were error.

The next question is whether the error is obvious. The trial judge could not know whether later evidence would support the inculpatory inferences of the prosecutor's questions. Thus, we cannot say the error was obvious. However, this is a circumstance "when an error not readily apparent to the court" does not raise an "insurmountable barrier to review." *State v. Eldredge*, 773 P.2d 29, 35 n. 8 (Utah 1989). In this case, the egregious nature of the prosecutor's question and the strong inculpatory inferences contained therein lead us "to dispense with the requirement of obviousness so that justice can be done." *Id.* Unless we apply this exception, this type of error would always escape review under the obviousness requirement.

We reserve an analysis of the harmfulness of this error in order to consider it in conjunction with all other errors in the case. *See Emmett*, 839 P.2d at 786 (assessing harmfulness after considering all errors).

B. Examination on the Veracity of Other Witnesses

[6] While cross-examining defendant, the prosecutor asked him to comment on the conflict between his testimony and that of two other witnesses, E.N. and his mother. The prosecutor asked defendant if E.N. was "mistaken or lying" regarding the visit to the hot tub establishment. Defendant answered "yes." Later, while discussing defendant's phone conversations with Detective Sweat, the prosecutor again had defendant comment on E.N.'s veracity.

> Q. [Prosecutor] You knew that whatever [E.N.] had to say regarding sexual abuse, it was not true, as applied to you?
>
> A. [Defendant] That's correct.
>
> Q. Had you by that time formulated any reason that you could think of that [E.N.] would say these things about you if they weren't true?
>
> A. Oh, I—
>
> Q. Just yes or no.
>
> A. Not really.
>
> Q. Did you think about it?
>
> A. I was kind of in shock.

The prosecutor later asked if E.N.'s mother was "mistaken or lying" regarding a conversation she testified about. Defen-

2. Defendant's claims that we have examined but do not address are: (1) The trial court erred when it referred to the charge as one of aggravated assault; (2) Evidence of the hot tub incident is inadmissible "other bad act" evidence; (3) The elements jury instruction contained a fatal variance from the information, (4) The prosecutor improperly violated the trial court's bifurcation order; (5) The prosecutor's reference to E.N.'s molestation of his sisters rather than just one sister and to the magistrate's determination at the preliminary hearing were prosecutorial misconduct, and (6) Utah Rule of Evidence 408 or 410 made admission of portions of the stipulation of Detective Sweat's testimony improper.

dant again answered in the affirmative Defendant argues these questions regard ing the veracity of the other witnesses amount to prosecutorial misconduct The *State responds they must be analyzed for* plain error

In the dicta portion of *Emmett*, the su preme court addressed the propriety of ex amination on another witness's veracity The court noted this type of

> question is improper because it is argumentative and seeks information beyond the witness's competence The prejudi cial effect of such a question lies in the fact that it suggests to the jury that a witness is committing perjury even though there are other explanations for the inconsistency In addition, it puts the defendant in the untenable position of commenting on the character and motivations of another witness who may appear sympathetic to the jury

Emmett, 839 P 2d at 787 (footnote omitted)

Thus, we conclude these questions, amounted to obvious error We again re serve an analysis of the harmfulness of this error so we can consider it in conjunc tion with all other errors in the case

C Argument on Matters Not in Evidence

[7, 8] Defendant identifies three com ments by the prosecutor in closing argu ment on matters not in evidence A com ment by a prosecutor during closing argu ment that the jury consider matters outside the evidence is prosecutorial misconduct *See State v Troy*, 688 P 2d 483, 486 (Utah 1984) Again, defendant's counsel failed to object to these comments and we can only reach them under a plain error analysis In two of the instances we address, the State argues only that any error was harm less, thus conceding both error and obvi ousness Regarding the other remark, the State argues the failure to object was an affirmative trial strategy of defense coun sel and thus plain error analysis is preclud ed We need not decide whether these misstatements of the evidence should have been obvious to the trial judge We are hesitant to set a rule which would require a trial judge to intervene in closing argument whenever the judge believes a misstate ment of the evidence by counsel has oc curred *Whether or not objections to such* misstatements are to be made is trial coun sel's decision In the vast majority of in stances, failure to object to such a mis statement will be deemed a waiver of the error However, the three misstatements we address went to the heart of the State's case and, especially in light of the pattern of errors in this case, we are compelled to assess their impact Thus, even if the mis statements were not "obvious," we would "dispense with the obviousness require ment so that justice can be done" *State v Eldredge*, 773 P 2d 29, 35 n 8 (Utah 1989)

[9] First, in closing argument the prose cutor stated

> It [a minor inconsistency in E N 's testi mony] shows only that he's capable of having the same failure of memory that we all are, but the central core of his memory is unaffected This man touched him touched him on the penis He did it while he was naked, while he was sitting in his lap

There was no evidence of any abusive touching while E N was sitting on defen dant's lap The harmfulness of this single *comment on the alleged lapsitting incident* is considered in conjunction with the other errors in the case

[10] Second, in the final portion of his closing remarks the prosecutor referred to the hot tub incident Defendant s counsel attempted to attack E N 's credibility dur ing the defense's closing argument Try ing to reduce the impact of that attack, the prosecutor discussed the hot tub incident

> I don t care about the hot tub It was kind of interesting, as discombobulated as it was, that [defendant] wasn t pre pared with his sticko testimony to talk about the hot tub But he did admit that he had been to the hot tub before, on more than one occasion He did admit that, yes, you can t get kids in there unless you have got an adult with them And if memory serves correctly, he told us where the hot tub was, even though he couldn't agree or couldn't confirm, or whatever you want to use, with my sug gestion about what the possible name of it was
>
> I think the Court can take judicial notice of the fact there's such a place as Rub-A-Dub Hot Tub If memory serves cor rectly, it's on about 21st South and Ninth East It's not where [E N] said it was That he wasn't to the hot tub But it's where [defendant] says he went to the hot tub It's the same place that [E N] said he went

E N testified that defendant had taken him to a hot tub business on South State Street He could not remember the name of it Defendant testified he had been to a hot tub business but denied ever taking E N there He admitted "going by" Rub-A-Dub Hot Tub

Defendant contends there is no evidence connecting E N with Rub-A-Dub Hot Tub Further, there is no testimony regarding the business's address Thus, the prosecu tor's statement the court could take judicial notice of the hot tub business and his argu ment this business was where defendant took E N could well have convinced the jury the hot tub evidence was stronger than it actually was Defendant notes these comments came in the prosecutor's final closing remarks to which defendant had no opportunity to respond

The State concedes the prosecutor's statement is "not entirely accurate" but contends defendant was not harmed by the error Whether the prosecutor's improper statements regarding Rub-A-Dub Hot Tub are harmful will be considered in conjunc tion with the other errors in this case

[11] Third, the prosecutor told the jury "We know that when he talked to [E N 's mother], he somehow figured out that he was worried about seven different counts" The prosecutor then focused on this fact as supporting both E N 's testimony and the State's theory that defendant was unusual ly sophisticated regarding these charges The prosecutor argued defendant's knowl edge evidenced a consciousness of guilt However, there was no testimony from E N 's mother that defendant ever men tioned seven charges In fact, defendant testified he learned of the potential for seven charges from Detective Sweat, to whom he talked after he talked to E N 's mother Further, defendant expressly de nied ever mentioning the potential for sev en charges to E N 's mother Thus, the prosecutor not only argued facts not in evidence but argued facts directly contra dictory to the evidence

The State argues that because defen dant's counsel used this contradiction as an example of problems with the State's case, he made an affirmative decision not to ob ject to the prosecutor's comments Thus according to the State, we should not un dertake a plain error analysis of these com ments *See State v Bullock*, 791 P 2d 155 (Utah 1989) (holding strategic decision by counsel to allow evidence precludes plain error analysis) We disagree We find the prosecutor's comments error and consider any harm from this error in conjunction with the other errors

II PRE-MIRANDA CONVERSATION WITH DETECTIVE SWEAT

Detective Sweat had a conflict at the time of trial and was not called to testify In place of his live testimony there was a *document read into the record* captioned 'Stipulation of Expected Testimony" Pri or to the stipulation being read, an infor mal conference was held where the judge deleted some portions of the stipulation objected to by defendant The judge how ever refused to delete other portions of the stipulation objected to by defendant

The portion of the stipulation relevant to our analysis that the trial judge allowed over defendant's objection provides

> Mr Palmer told me he would call back after he decided whether he wanted to talk to me in person or not
>
> Mr Palmer then said he had never once claimed that it didn t happen he just wanted to get some advice before talking to me

Prior to admission of this stipulated testimony, defendant's counsel indicated he had objected to it in the informal conference held by the trial judge in part because the statements included evidence of defendant "trying to decide whether or not [he] ought to have counsel in this case"[3] The prosecutor indicated he thought the contested portions were admissible because

> [t]hat's the theory of the State's case that this shows a consciousness of guilt The detective [told defendant] he wanted to discuss some allegations of [E N] that [defendant] had sexually abused him
>
> [G]iven the specificity of that and the fact that [defendant] is the one who initiated the telephone call, I think it ought to be allowed for the purpose of showing consciousness of guilt

Following the introduction of Detective Sweat's testimony in the case in chief, defendant took the stand He testified that in the first phone conversation he had informed Detective Sweat he wanted to check with legal counsel According to defendant, Detective Sweat responded to the effect "if you're not guilty, why do you need a lawyer?" Defendant testified he told Detective Sweat that he was neither admitting nor denying anything He further testified his reason for not denying everything was that he wanted a chance to talk to a lawyer first

The prosecutor argued that defendant's choice to remain silent and neither admit nor deny guilt to Detective Sweat showed a consciousness of guilt Discussing defendant's refusal to admit or deny the charges in his closing argument, the prosecutor stated

> What kind of a person would do that? I mean, he's not working for the CIA He's not one of these public officials who have been instructed to tell the newsman, "I can neither confirm nor deny such and such a rumor" He's a person who has been accused of a crime
>
> Now, what is so incredibly difficult about saying, "No, I didn't do it?" Why didn't he do that? Because he knew he was guilty, that's why

Defendant claims admission of the contested paragraphs of the stipulation to support an inference of guilt was unconstitutional Defendant asserts he has a right, under the Fifth Amendment to the United States Constitution, to not have his decision to seek advice and neither admit nor deny the charges against him placed in evidence in the prosecution's case in chief to prove culpability[4] The State responds that the contested paragraphs do not implicate the Fifth Amendment

The Fifth Amendment provides "No person shall be compelled in any criminal case to be a witness against himself" U S Const amend V[5] Utah courts have never explicitly addressed whether evidence of a person exercising the constitutional right to remain silent or to consult with an attorney prior to custodial interrogation can be used as inferential evidence of guilt during the State's case in chief[6] Furthermore, the United States Supreme Court has not directly considered the issue raised by defendant The Supreme Court has noted the seminal Fifth Amendment silence case, *Miranda v Arizona*, 384 U S 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966), and its predecessor *Escobedo v Illinois*, 378 U S 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964), are not innovations but are merely "explication[s] of basic rights that are enshrined in our Constitution" *Miranda*, 384 U S at 442, 86 S Ct at 1611 The Fifth Amendment right to silence is a comprehensive privilege that

> "can be claimed in any proceeding, be it criminal or civil, administrative or judicial, *investigatory* or adjudicatory
>
> [I]t protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used"

In re Gault, 387 U S 1, 47–48, 87 S Ct 1428, 1454, 18 L Ed 2d 527 (1967) (quoting *Murphy v Waterfront Comm'n*, 378 U S 52, 94, 84 S Ct 1594, 1611, 12 L Ed 2d 678 (1964) (White, J , concurring)) (emphasis modified)

The Supreme Court has held that comment by a prosecutor on a defendant's failure to testify at trial is an unconstitutional violation of the defendant's Fifth Amendment rights *Griffin v California*, 380 U S 609, 615, 85 S Ct 1229, 1233, 14 L Ed 2d 106 (1965) Further, the Court has ruled a defendant's silence cannot be used to impeach his testimony at trial if his silence follows the delivery of *Miranda* warnings In *Doyle v Ohio*, 426 U S 610, 96 S Ct. 2240, 49 L Ed 2d 91 (1976), the Supreme Court held a prosecutor's attempt to impeach a defendant's testimony by questioning him about his silence following arrest and receipt of *Miranda* warnings violated due process *Id* 426 U S at 619, 96 S Ct at 2245 The Court reasoned that this silence follows the delivery of *Miranda* warnings and could simply be an exercise of these rights "Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested" *Id* 426 U S at 617, 96 S Ct at 2244

Even the three dissenters in *Doyle* found "merit in a portion" of petitioner's argument *Id* at 620, 96 S Ct at 2246 (Stevens, J , dissenting) In discussing the aspect they found meritorious, they indicate using silence as a direct inference of guilt is improper "Comment on the lack of credibility of the defendant is plainly proper, it is not proper, however, for the prosecutor to ask the jury to draw a direct inference of guilt from silence—to argue, in effect, that silence is inconsistent with innocence" *Id* at 634–35, 96 S Ct at 2252–53 (Stevens, J , dissenting) Because the permissible credibility reference and the impermissible inference of guilt reference by the prosecutor were "inextricably intertwined,' the dissenters rejected reversing the conviction due to the inference of guilt argument *Id* at 636, 96 S Ct at 2253 (Stevens, J , dissenting) Thus, while rejecting the Court's holding that post *Miranda* silence was inadmissible for impeachment purposes, the dissent implies evidence of silence is inadmissible in the case in chief

Later, in *Jenkins v Anderson*, 447 U S 231, 100 S Ct 2124, 65 L Ed 2d 86 (1980), the Court held a defendant's prearrest pre *Miranda* warnings silence could be used to impeach his exculpatory testimony at trial[7]

3 The fact that these evidentiary rulings and arguments were made in an informal conference makes assessment of this issue much more difficult than it would be if the conference was part of the record We have however a summary made by counsel for both sides on the record and we make our determination based on that oral summary As we have recognized before a record should be made of *all* proceedings of courts of record including those in chambers *Birch v Birch* 771 P 2d 1114 1116 (Utah App 1989) (citing *Briggs v Holcomb* 740 P 2d 281 283 (Utah App 1987)) (emphasis in original)

4 In a footnote defendant refers to Article I sections 7 and 12 of the Utah Constitution and invites us to apply a state constitutional analysis to this question This argument however is not developed to any meaningful extent We therefore refuse to consider it *See State v Arroyo* 770 P 2d 153 154 n 1 (Utah App 1989) *rev'd on other grounds* 796 P 2d 684 (Utah 1990)

5 The Fifth Amendment privilege against self incrimination is based on numerous social policies

> It reflects many of our fundamental values and most nobel aspirations our unwillingness to subject those suspected of crime to the cruel trilemma of self accusation perjury or contempt our preference for an accusatorial rather than an inquisitorial system of criminal justice our fear that self incriminating statements will be elicited by inhumane treatments and abuses our sense of fair play which dictates a fair state individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life our distrust of self-deprecatory statements and our realization that the privilege while some times a shelter to the guilty is often a protection to the innocent

Murphy v Waterfront Comm'n 378 U S 52 55 84 S Ct 1594 1596–97 12 L Ed 2d 678 (1964) (citations omitted)

6 *See State v Gray* 851 P 2d 1217 1223–24 (Utah App 1993) (assessing passing reference to silence under custodial interrogation standard)

7 The *Jenkins* Court expressly reserved the issue of whether prearrest silence was ever protected

Id. 447 U.S. at 240, 100 S.Ct. at 2130. It is clear the ambiguity issue on which *Doyle* turned does not arise in this setting. Impeachment questioning is acceptable here because it "follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." *Id.* 447 U.S. at 238, 100 S.Ct. at 2129.

> "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.... Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process."

Id. at 237–38, 100 S.Ct. at 2129 (quoting *Harris v. New York*, 401 U.S. 222, 225, 91 S.Ct. 643, 645–46, 28 L.Ed.2d 1 (1971)). "Once a defendant decides to testify, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'" *Id.* 447 U.S. at 238, 100 S.Ct at 2129 (quoting *Brown v United States*, 356 U.S 148, 156, 78 S.Ct. 622, 627, 2 L.Ed.2d 589 (1958)).

[12] Hence, the prosecution may use a defendant's prearrest, pre-*Miranda* silence for impeachment purposes because, following defendant's waiver of his right to silence, justice demands the court's role in ascertaining truth outweigh the privilege against self-incrimination. Simply put, the courts cannot countenance perjury. However, the mere act of taking the stand does not independently make defendant's silence relevant. The prosecution can only question defendant regarding silence for impeachment purposes if, for example, the silence is inconsistent with the testimony the defendant offers at trial.

[13] Subsequently, in *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982) (per curiam), the Court allowed post-arrest silence to be used for impeachment purposes where *Miranda* warnings were not given. Thus, after *Doyle*, *Jenkins*, and *Fletcher*, use of privileged silence for impeachment purposes is constitutional unless the silence was potentially induced by the government's delivery of *Miranda* warnings

[14] The United States Court of Appeals for the Second Circuit has addressed the question before us. In *United States v. Caro*, 637 F.2d 869 (2nd Cir.1981), the court indicated prearrest, pre-*Miranda* silence could not be admitted in the government's case in chief. In *Caro*, the defendant's luggage was searched at the border. Customs officials found counterfeit money hidden inside. In the government's case in chief, the customs officer testified the defendant said nothing when the money was found. The defendant later took the stand and denied any knowledge of the money. In dicta, the court noted it "found no decision permitting the use of silence, even the silence of a suspect who has been given no *Miranda* warnings and is entitled to none, as part of the Government's direct case." *Id.* at 876. The court was "not confident" the Supreme Court would allow evidence "that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief." *Id.*[8] *See also United States v. Blanton*, 730 F.2d 1425, 1433–44 (11th Cir.1984) (recognizing *Caro* reasoning but not reaching issue because any error was harmless); *United States v. Lewis*, 651 F.2d 1163, 1169 (6th Cir.1981) (holding post-*Miranda* prearrest silence inadmissible in government's case in chief).

Only one state court[9] has addressed the issue we face head on. In *State v. Fencl*, 109 Wis.2d 224, 325 N.W.2d 703 (1982), the Wisconsin Supreme Court held "the protections of the Fifth Amendment do extend to pre-*Miranda*, prearrest silence." *Id* 325 N.W.2d at 710. In that case, the prosecutor, in opening and closing argument and through questioning of one witness, introduced evidence that the defendant had stated he wanted to speak to his lawyer prior to arrest or *Miranda* warnings. The court reasoned

> [t]he Fifth Amendment protects a person from compelled self-incrimination at all times, not just upon arrest or during a custodial interrogation. Any time an individual is questioned by the police, that individual is compelled to do one of two things—either speak or remain silent. If both a person's prearrest speech and silence may be used against that person, as the state suggests, that person has no choice that will prevent self-incrimination. This is a veritable "Catch-22." Thus the state's theory places an impermissible burden on the exercise of Fifth Amendment rights.[10]

Id. 325 N.W.2d at 711. The court, however, found the erroneous admission of evidence of the defendant's silence was harmless and affirmed his conviction. *Id.* at 712.

[15] The contested portions of the stipulation in this case were used at trial in the prosecution's case in chief to infer defendant exhibited a consciousness of guilt. Merely because an individual does not need to be advised of his right to remain silent until he is subject to a custodial interrogation does not mean he should be penalized for invoking that right earlier. To hold differently would impermissibly burden Fifth Amendment protections for any individual who attempts to exercise them prior to a custodial interrogation. Such a rule would also encourage the authorities to refrain from issuing *Miranda* warnings as long as possible in an attempt to generate either inferential evidence of guilt from silence or an admission prior to custodial interrogation. Providing law enforcement an incentive to withhold *Miranda* warnings would be poor public policy and contrary to the spirit of Fifth Amendment jurisprudence

[16] Thus, we conclude admission of the portions of the stipulated testimony impli-

by the Fifth Amendment *Jenkins*, 447 U.S at 236 n. 2, 100 S.Ct at 2128 n. 2

8. The Tenth Circuit, in a combined civil and criminal prosecution, may have reached a different conclusion. However, we do not find the opinion's reasoning persuasive and think it may conflict with dicta in *Doyle*. In *United States v Harrold*, 796 F.2d 1275 (10th Cir.1986), *cert denied, Harrold v United States*, 479 U.S. 1037, 107 S.Ct. 892, 93 L.Ed.2d 844 (1987), the defendant was subject to both a civil and a criminal investigation by the IRS. Separate IRS agents conducted the investigations. At trial, the government elicited testimony from each that the defendant invoked his right to silence. The civil investigator did not read the defendant his *Miranda* rights before the defendant invoked them. The criminal investigator testified defendant refused to reply to some questions after being apprised of his rights. On appeal, the government conceded both sets of testimony were inappropriate and asserted a harmless error argument. The court, however, ruled that the civil investigator's testimony was proper *Id.* at 1279. It reasoned he was conducting a civil investigation and had not given the defendant any *Miranda* warnings. According to the court "a comment on a defendant's silence is error only when the defendant remained silent in reliance on government action, *i.e.*, a *Miranda* warning." *Id.* (citing *United States v Massey*, 687 F.2d 1348, 1353 (10th Cir.1982))

The authority the Tenth Circuit relied on, that arising in the *Doyle* and *Fletcher* line of cases, concerned the use of silence for purposes of impeachment. In that area, the interest in preventing perjury and furthering the truth finding function of the courts after a defendant's waiver of his right to silence weighs heavily in favor of allowing the silence for impeachment, yet the ambiguity that arises following a defendant's receipt of *Miranda* warnings tips the scale in the other direction. The factors considered in an impeachment situation are not relevant in the inference of guilt setting. Further, the *Harrold* court implies Fifth Amendment protections do not exist in civil investigations. It is clear that this is not true. *See, e.g., Estelle v Smith*, 451 U.S. 454, 462, 101 S.Ct. 1866, 1873, 68 L.Ed.2d 359 (1981) (recognizing Fifth Amendment protections are available regardless of type of proceeding)

9. At least two other courts have recognized the issue of the admissibility of prearrest, pre-*Miranda* silence in the prosecution's case in chief exists but have refused to reach the issue because they held any error to be harmless. *See Johnson v United States*, 613 A.2d 1381, 1389–90 (D.C.App.1992), *People v Hayes*, 139 Ill.2d 89, 151 Ill.Dec. 348, 564 N.E.2d 803 (1990), *cert denied, Hayes v Illinois*, — U.S. —, 111 S.Ct. 1601, 113 L.Ed.2d 664 (1991)

10. This analysis has been criticized by one commentator as incorrectly equating a requirement that a person make a difficult choice with government compulsion. *See* Barbara R. Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 Wm. & Mary L.Rev. 285, 312–18 (1988)

cating defendant's decision to remain si lent, along with the prosecutor's cross ex amination of defendant and closing argu ments based on that testimony, used to demonstrate defendant had a consciousness of guilt was error Whether it was harm ful error is analyzed in conjunction with the other errors in this case

III HARMFULNESS OF ERRORS

[17] In summary, we conclude there were numerous errors in the trial of this case They are (1) the prosecutor's ques tions containing unsupported innuendo (2) the prosecutor s request that defendant comment on the veracity of E N and his mother's testimony, (3) the prosecutor s misstatement of the evidence regarding the alleged lapsitting incident, (4) the prosecu tor's misstatement of the evidence regard ing the Rub-A-Dub Hot Tub business, (5) the prosecutor s statements directly contra dicting the only testimony about the con tent of the conversation between defendant and E N s mother and (6) the admission of the statements in the stipulated testimony and arguments based thereon regarding defendant s neutrality after accusation and desire to consult counsel Whether these errors can be classified as cumulatively harmful turns on whether the errors under mine our confidence in the verdict *See State v. Dunn*, 850 P 2d 1201, 1208-09 (Utah 1993)

The conviction in this case is based al most entirely on the testimony of E N The numerous errors by the prosecutor all are attempts to bolster the credibility of E N and to attack the credibility of defen dant The unsupported innuendo in the prosecutor s question that defendant had expressed having inappropriate feelings for E N provided the jury a basis to impute motives to defendant that are not sup ported by any testimony By asking the defendant to comment on the veracity of E N and his mother the prosecution forced defendant into the position of assessing the credibility of sympathetic adverse witness es If a juror had reached a different conclusion as to the witnesses credibility defendant s speculation could cause the ju ror to become biased against defendant The comment on the alleged lapsitting sex ual contact could have caused the jurors to believe there was more evidence of guilt than had actually been introduced The comments on the hot tub business could have caused the jury to give E N 's testimo ny greater credibility E N had experi enced other incidents of sexual abuse, but the evidence offered no other explanation for his knowledge of commercial hot tub establishments The comments on E N 's mother's testimony improperly bolstered the prosecution's consciousness of guilt ar gument These comments made defendant appear more aware of the factual allega tions against him than the testimony dis closed The admission of testimony re garding defendant s exercise of his consti tutional right to remain silent provided im proper support for the prosecution's con sciousness of guilt theory and could have convinced the jury to convict

While any one of these errors would in itself be harmless, their cumulative effect is not The testimony in the case basically consisted of E N 's assertions and descrip tions of sexual encounters and defendant's denial of those encounters This case turned primarily on the jury's assessment of the credibility of E N versus the credi bility of defendant Because of the nature of the evidence of guilt and the number of serious errors, we find the errors cumula tively harmful and cannot say we have confidence in the verdict

CONCLUSION

In light of the numerous errors in the prosecution of this case, our confidence in the verdict is undermined Thus, we re verse defendant's conviction

JACKSON and RUSSON JJ concur

final and conclusive as to the Missouri, Kansas & Northwestern Railroad Company. The defendant did not choose to intervene, but allowed the judgment to be taken in favor of the administrator against its privy and predecessor in interest, and cannot now open the adjudication with respect to parties, any more than it could do so with respect to the amount of the judgment. Railroad Co. v. Murphy, 75 Kan. 707, 715, 90 Pac. 290.

[2] It is claimed that the present action is barred by the statute of limitations; the defendant having taken possession of the right of way in 1902 and the increased award having been made by the district court in 1906. This argument is based upon the implied assumption that the defendant's liability is something separate from and independent of the liability of its predecessor. Such, however, is not the case. By taking over and electing to keep the benefits of the appropriation, the defendant became subject to the liability of the condemning company, whatever that might be, and whenever finally ascertained. Railroad Co. v. Murphy, 75 Kan. 707, 90 Pac. 290. The debt of the defendant not having been conclusively established until the judgment of this court was rendered in 1909, the statute of limitations did not commence to run against a suit to recover that debt until that time.

The judgment of the district court is affirmed. All the Justices concurring.

STATE v. TOPHAM.

(Supreme Court of Utah. May 4, 1912.)

1. INDICTMENT AND INFORMATION (§ 71*)—CERTAINTY.

To withstand either a motion in arrest or a demurrer, the indictment must inform accused of the crime charged with such reasonable certainty that a judgment thereon will be a defense to a second prosecution for the same offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. § 71.*]

2. CRIMINAL LAW (§ 314*) — APPEAL — PRESUMPTIONS.

Since every man is presumed to be innocent until proved guilty, he is also presumed to be ignorant of what is intended to be proved against him, except as informed thereof by the indictment. †

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 747; Dec. Dig. § 314.*]

3. INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE—PANDERING.

Sess. Laws 1911, c. 108, makes any person who "shall by promises, threats, violence, or by any device or scheme, cause, induce, persuade, encourage, inveigle, or entice an inmate of a house of prostitution" to remain therein as an inmate, guilty of pandering. Comp. Laws 1907, § 4730, requires the information to contain a statement of the acts constituting the offense in ordinary and concise language so as to enable a person of common understanding to know what is intended. The information charged that accused did willfully, unlawfully, etc., "by promises, threats, and by divers devices and schemes, cause, induce, persuade, and encourage" the woman named, "being then and there an inmate of a certain house of prostitution, to remain therein as such inmate," describing and locating the house. *Held*, that the information was insufficient on demurrer and motion in arrest for not alleging the facts and circumstances constituting the promises, devices, etc., by which the female was induced to remain in the house of prostitution.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289–294; Dec. Dig. § 110.*]

4. INDICTMENT AND INFORMATION (§ 110*)—STATUTORY OFFENSES—SUFFICIENCY.

In order that an information charging a statutory offense may be sufficient by following the language of the statute, it must fully, directly, and expressly contain all the elements constituting the offense, and, if not sufficient to do so, the statutory language must be expanded in the information. [1]

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289–294; Dec. Dig. § 110.*]

5. INDICTMENT AND INFORMATION (§ 169*)—SUFFICIENCY.

Essential elements of the offense not included in the information cannot be supplied by the evidence.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 320, 535; Dec. Dig. § 169.*]

6. INDICTMENT AND INFORMATION (§ 55*)—NATURE OF "PLEADING."

"Pleadings" are the juridical means of investing the court with jurisdiction of a subject-matter to adjudicate thereon.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 174; Dec. Dig. § 55.*

For other definitions, see Words and Phrases, vol. 6, pp. 5409–5411; vol. 8, p. 7756.]

7. PROSTITUTION (§ 1*) — ELEMENTS OF OFFENSE—PANDERING.

Under Sess. Laws 1911, c. 108, making a person who shall by promises, etc., cause or induce an inmate of a house of prostitution to remain therein guilty of pandering, the promises must have been made with the purpose of causing or inducing the inmate to remain, and must have actually tended to cause such result, and the inmate must have been induced thereby to remain in the house, and the fact that accused told the inmate that, if the inmate's mother was willing to let her stay there, accused would fit the inmate out with nice clothes and send her to another house of prostitution run by accused did not show a promise by accused, within the statute.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

8. PROSTITUTION (§ 4*)—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for pandering contrary to the statute *held* not to show a promise by accused whereby an inmate of a house of prostitution was induced to remain therein.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.*]

9. INDICTMENT AND INFORMATION (§ 161*)—AMENDMENT—RIGHT.

An amendment to an information for pandering, charging accused with having induced a female to remain an inmate of a house of prostitution by promises and divers devices un-

[1] State v. Swan, 31 Utah, 336, 88 Pac. 12; State v. Williamson, 22 Utah, 248, 62 Pac. 1022, 83 Am. St. Rep. 780; State v. Evans, 27 Utah, 12, 73 Pac. 1047.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† State v. McKenna, 24 Utah, 317, 67 Pac. 815.

named, so as to allege the promises made and devices used to induce her to remain, was as to a matter of substance and could not be made after judgment, so that, upon determining that the information was insufficient, accused must be discharged, under Comp. Laws 1907, § 4694, permitting an information to be amended at any time after defendant pleads, and on trial as to all matters of form at the court's discretion, where it can be done without prejudice to accused.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 516–523; Dec. Dig. § 161.*]

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Dora B. Topham was convicted of pandering, and she appeals. Reversed and remanded, with directions to discharge accused.

E. A. Rogers and Powers & Marioneaux, all of Salt Lake City, for appellant. A. R. Barnes, Atty. Gen., for the State.

STRAUP, J. The defendant was convicted of the crime of pandering, and was sentenced to imprisonment in the state prison for a term of 18 years. She appeals.

The portion of the statute (Sess. Laws 1911, c. 108) under which she was charged and convicted reads: "Any person who shall, by promises, threats, violence, or by any device or scheme, cause, induce, persuade, encourage, inveigle, or entice an inmate of a house of prostitution or place of assignation to remain therein as such inmate," is guilty of the crime of pandering and punishable by imprisonment in the state prison for a term of not more than 20 years. The information charged that the defendant on, etc., at, etc., "did then and there willfully, unlawfully, and feloniously, by promises and threats, and by divers devices and schemes, cause, induce, persuade and encourage" a particularly named female, "being then and there an inmate of a certain house of prostitution, to remain therein as such inmate; such house of prostitution being then and there known as No. 140 in what is commonly known as the stockade in Salt Lake City." To this information the defendant, before plea, interposed a general and a special demurrer alleging that the information did not state facts sufficient to constitute an offense, and especially did not sufficiently set forth the nature and cause of the accusation, nor the acts constituting the offense, nor the particular circumstances of the offense necessary to constitute a complete offense. The demurrers were overruled. After verdict, and before sentence, the defendant on the same grounds also made a motion in arrest of judgment, which motion was also denied. These rulings and those relating to insufficiency of evidence to support the verdict are complained of.

[1] The doctrine is fundamental, and, as stated by the Supreme Court of the United States in Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606, that "the constitutional right of a defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense;" and by Mr. Justice Sanborn in Floren v. United States, 186 Fed. 961, 108 C. C. A. 577, that "On a motion in arrest of judgment, as well as on a demurrer, it is essential to the validity of an indictment that it contain averments of the facts which constitute the offense it charges so certain and specific that upon conviction or acquittal thereon it, and the judgment upon it, will constitute a complete defense to a second prosecution of the defendant for the same offense." Many cases in support of this doctrine are there cited.

[2] It is also elementary and, as stated by the Michigan court in People v. Marion, 28 Mich. 257, approved and quoted by this court in State v. McKenna, 24 Utah, 317, 67 Pac. 815, that, "as every man is presumed to be innocent until proved to be guilty, he must be presumed also to be ignorant of what is intended to be proved against him, except as he is informed by the indictment or information." These doctrines are not here disputed. Our statute is in harmony with them. Comp. Laws 1907, § 4730, provides that "the information or indictment must contain * * * a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended;" and by section 4732 that "the information or indictment must be direct and certain as it regards * * * the offense charged," and "the particular circumstances, when they are necessary to constitute a complete offense." Here, then, we have a statute which in all cases requires the information to contain "a statement of the acts constituting the offense," and to be "direct and certain as it regards the offense charged, and the particular circumstances of the offense, when they are necessary to constitute a complete offense."

[3] Does the information meet these requirements? If it does, it is good; if not, it is bad and will not support the judgment. The material parts of the information in this respect are that the defendant did "by promises and threats, and by divers devices and schemes, cause, induce, persuade, and encourage" an inmate of a house of prostitution to remain therein as such inmate. The offense is charged in the mere language of the statute. That, the state urges, is suffi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cient. But that is not what the statute declares.

[4] Of course there are cases where an indictment or information in the language of the statute is good. But there are many where that is not true. Says Mr. Bishop in 1 New Criminal Procedure, § 624: "The indictment must fully state the offense; and, if the statutory words do not suffice for this, it must be expanded beyond them." Said the Supreme Court of the United States in United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588: "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars." The same thought is expressed by Mr. Justice Frick in the case of State v. Swan, 31 Utah, 336, 88 Pac. 12, that, "Where an act denounced by the statute is couched in generic terms, the information must go further in stating the offense than by merely using the language of the statute," and that an information in such language is not sufficient "in those cases where the acts constituting the offense are nearly as varied as the number of cases in which the charge is made."

In order that an information merely in the words of the statute may be sufficient, the words of the statute themselves "must fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, and must state all the material facts and circumstances embraced in the definition of the offense." 22 Cyc. 340; Evans v. United States, 153 U. S. 587, 14 Sup. Ct. 934, 38 L. Ed. 830; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

The Supreme Court of California well expressed the rule in People v. Perales, 141 Cal. 581, 75 Pac. 170, in the following language: "While it is the general rule that it is sufficient to charge an offense in the language of the statute, yet this rule is subject to the qualification that, where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made. The statute may, and often does, define the offense by the use of precise and technical words which have a well-recognized meaning or designates and specifies particular acts or means whereby an offense may be committed. Under such circumstances, to charge the offense substantially in the language of the statute will be sufficient. When, however, the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted."

Said the court in Commonwealth v. Milby (Ky.) 24 S. W. 625: "The language of the statute cannot always be followed in punishments for offenses of either a criminal or a penal nature. Enough must be stated to enable the defendant to know in what particular he has violated the statute." And in State v. Frazier, 53 Kan. 87, 36 Pac. 58, 42 Am. St. Rep. 274: "The physical acts done towards the commission of the offense should be stated in the information or indictment, so that the court may see whether or not the law has been violated, and so that the accused may know to what he must make answer." To the same effect is Thompson v. People, 96 Ill. 161, and are also many other cases.

What are here the essentials of the charged offense? The state urges to cause, induce, and encourage an inmate of a house of prostitution to remain therein as such inmate. That is one essential; but it is not all the essentials declared by the statute. It declares that "any person who shall, by promises, threats, violence, or by any device or scheme," cause, induce, etc., an inmate of such a house to remain therein, is guilty of an offense. The act or conduct of the person who shall, by a promise or threat or violence, or by a device or scheme, cause, induce, or encourage, etc., is a necessary "act constituting the offense," and is a "particular circumstance of the offense to constitute a complete offense." Without it no offense under the statute is committed. That is manifest from a reading of the statute. And so did the pleader conclude, for the information charges, not that the defendant caused and induced, etc., an inmate of a house of prostitution to remain therein, but that the defendant did, "by promises and threats and by divers devices and schemes, cause, induce," etc., such a person to remain in such a house as an inmate. The statute thus making such acts and conduct of a promise or threat or violence, or by a device or scheme, necessary acts constituting the offense, and requiring "the particular circumstances necessary to constitute a complete offense" to be stated, were they here set forth in the information with reasonable certainty and distinctness, so that the court, in the language of the Cali-

fornia and other courts, could determine whether an offense within the statute had been charged, and so that the defendant could be advised of the particular nature of it in order to defend against it and plead in bar a judgment of conviction or acquittal thereof if subsequently prosecuted? In other words, were the acts and particular circumstances of the offense set forth with such reasonable certainty and in ordinary and concise language and in such manner as to enable a person of common understanding to know what particular acts or conduct were complained of, what physical acts would be claimed the accused had committed, what things said or done by her, or of what particular conduct she was guilty, and which were intended to be proved against her? Should one assert to another that he had a "device or scheme" to accomplish a particular result, would that "in ordinary and concise language enable a person of ordinary understanding to know what was intended" or meant? To enable such a person to know what was intended, would not the first question necessarily be, "What is the device or scheme?"

When the defendant was charged that she had "by divers devices and schemes" accomplished a particular result, who but the pleader knew what was intended or expected to be proved against her in such respect? Or, if it should be claimed that she by "threats" had accomplished such result, again, who but the pleader could know with reasonable certainty what menacing act or conduct of hurt or fear, or threatening menace to inflict pain or punishment or injury to person, reputation, or property, or to restrain freedom of action, was intended or expected to be proved? Should one complain of another that he "threatened" him, would not again the first question necessarily be, in order to "enable a person of common understanding to know" what was meant or intended, "What did he say or do?" And, if it should be claimed that the defendant by "promises" had accomplished such result, again, could any one but the pleader know with reasonable certainty just what particular acts or conduct in that regard was intended or expected to be proved? This information may be looked at with the utmost liberality, and yet what facts or circumstances or acts are there set forth from which the court may determine whether a promise or promises in law were made by the defendant, if it should be claimed that she, by such means, accomplished the charged result, or a threat made or device or scheme used or employed, if by either of these it be claimed the defendant accomplished such result? Neither she nor any one else except the pleader could know whether he intended to prove some kind of a promise or a threat or a device or scheme. Under the information, if it is good, the state would be permitted to prove anything which the prosecution thought tended to show a promise, anything a threat, anything a device, anything a scheme, and no objection to the offer of any such evidence could properly be made by the defendant. If that be true, then the state might as well be permitted in an information to generally charge the defendant "with having committed the offense of pandering" and be allowed to prove anything tending to show the commission of such an offense.

Under this information, neither the court nor the defendant, until the evidence was adduced, could know what particular acts or conduct would be claimed had been committed by the defendant, and, until then, the court could not know whether an offense had been charged, nor the defendant what she was called upon to meet and answer. As the accused "must be presumed ignorant of what is intended to be proved against him except as he is informed by the information or indictment," it is essential that the information or indictment, not the evidence, apprise him with reasonable certainty what is intended or expected to be proved, and what he is required to meet and defend. And, as repeatedly stated by the courts, the acts constituting the offense, and the particular circumstances of the offense, when they are necessary to constitute a complete offense, are required to be stated in the information, so that the court may determine whether the acts and conduct complained of constitute a violation of the statute. It surely cannot be contended that the determination of such a question is alone for the jury, and that it is at liberty to regard anything a promise, anything a threat, anything a device, anything a scheme. Should one either in a civil or criminal pleading charge another at a specified time and place "with having cheated and defrauded" him, without alleging the acts, the conduct, the facts constituting the cheat or fraud, certainly no one would contend that to be a sufficient pleading to withstand a demurrer. What more has been done here? The pleader has stated his conclusion that the defendant has said or done something, that she has been guilty of some kind of conduct, or committed acts of some kind, which in his opinion amount to a promise or a threat or a device or a scheme, but withheld from the court and the defendant a statement of any acts committed, or things said or done, by her, or any facts or circumstances from which it may be determined whether in law a promise or threat was made, or a device or scheme used or employed, by her. The acts and conduct of the defendant, and the facts and circumstances constituting the promise, the threat, the device, the scheme, were required to be alleged in the information, so that the court could judge whether the accused should have been put upon trial, and that she might then know what she

was to defend against. Turnipseed v. State, 6 Ala. 664. The allegations here do not meet such requirements. In addition to the authorities already referred to holding such an information as this insufficient, we also refer to United States v. Hess, 124 U. S. 483, *8 Sup. Ct. 571, 31 L. Ed. 516*; United States v. Post (D. C.) 113 Fed. 852; Stewart v. United States, 119 Fed. 89, 55 C. C. A. 641; Dalton v. United States, 127 Fed. 544, 62 C. C. A. 238; People v. Neil, 91 Cal. 465, 27 Pac. 763; State v. Farmer, 104 N. C. 887, 10 S. E. 563; Bowles v. State, 13 Ind. 427; State v. Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717; Id. (Mo.) 11 S. W. 264.

In United States v. Hess, supra, and in the federal cases just cited, it was held that an indictment based on and in the language of the statute directed against "devising or intending to devise any scheme or artifice to defraud," to be effected by communication through the post office, must not only allege that the person did devise a scheme or artifice to defraud, but it must set out clearly and distinctly what that artifice was, wherein the fraud consisted, the facts and circumstances by which it was to be accomplished, the facts which constitute the specific scheme or artifice so devised by the defendant, and that this must be done, not inferentially, but by direct and positive averments.

In People v. Neil, supra, it was held that an information charging that the defendant "fraudulently voted at an election when he was not entitled to vote," though in the language of the statute, is not sufficient to state an offense, but must set forth the facts relied on to show *fraudulent voting and the* particular fact or facts showing that the defendant was not entitled to vote.

In State v. Farmer, supra, it was held that an indictment against a physician, in the language of the statute, for giving a false and fraudulent prescription for liquors, must set out not only that the prescription was either false or fraudulent, but also the facts and particulars constituting the falsity or fraud.

In State v. Bennett, supra, an information charging in the language of the statute that the accused "did enter upon and exercise and continue the exercise and practice of a business, avocation, or profession of a private detective," without stating facts to show in what way he acted as such, was held fatally defective.

The insufficiency of the information is thus shown by numerous authorities. We have been referred to no case which in our judgment supports the information. The Attorney General has referred us to a number of cases, but upon a careful examination of them it will be found that they lend but little support to his contention. He starts with the proposition that "it is the universal rule that statutory offenses should be alleged in the words of the statute." But that, under all the authorities, is stating the rule much too broadly. The rule is this, and as we have already indicated, especially by the cases of People v. Perales and State v. Swan, where the statute creating the offense defines it by the use of precise words and designates and specifies particular acts or means whereby the offense may be committed, it is sufficient to charge the offense in the language of the statute; but where the particular facts or acts which constitute it are not specified, and from the general language used in the statute many things may be done which may constitute the offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged.

The Attorney General refers us to State v. Williamson, 22 Utah, 248, 62 Pac. 1022, 83 Am. St. Rep. 780, and to State v. Evans, 27 Utah, 12, 73 Pac. 1047, where informations in the language of the statute were held good. But in those cases the offense charged was, in the one having carnal knowledge, and in the other attempting to have carnal knowledge, of the body of a female under 18 years of age. The statute there specified the particular act declared to be the offense—having carnal knowledge of the body of a female. The information which charged that the accused "had carnal knowledge of the body" of a woman described the particular act or conduct of which complaint was made. No language, however artful or replete with *literary foliage, could describe that act or* conduct more precisely or certainly. It describes not many or divers acts or things, but one particular, precise, and definite act. Contrast that with this information: "Did, by promises, threats, and divers devices and schemes, induce," etc.—generic terms broad enough to embrace almost innumerable species and particulars, and about every conceivable thing which may be called a promise, a threat, or a device or scheme. Under it, not only one or several precise or definite, but many and divers, acts and things are embraced. Let the language of the court in United States v. Cruikshank, supra, again be noticed: "Where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment should charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars." This principle was recognized in the cited case of State v. Evans, for the court there well observed: "This is not a case where the accused, under such an information, may be taken by surprise, as in case of a crime which may be committed in several different ways or with various means, and therefore the reason of the rule which requires the overt act

or acts by which a crime was committed to be pleaded does not apply, and hence the rule itself ought not to be enforced." The court could have gone further by saying that the "overt act" was particularly described by the use of the words "carnal knowledge"; they having such a precise and well-recognized meaning as to enable a person of common understanding to know just what is intended.

We are also referred to the case of State v. Bauguess, 106 Iowa, 107, 76 N. W. 508. But in that case the same principle was also recognized. The court said: "It has been repeatedly held that an indictment is sufficient if it charges the offense in the language of the statute, when that shows the material facts which constitute the offense." There the accused was charged in the language of the statute with having made "an indecent exposure of the person." The court properly held the indictment good, for, as there stated by the court, the offense was both named and particularly described, the phrase "indecent exposure of the person" having a well-settled and commonly accepted signification and meaning the exhibition of such parts of the person as modesty or a sense of self-respect requires to be kept usually covered. The court well distinguished that case from a prior decision of the same court (State v. Butcher, 79 Iowa, 111, 44 N. W. 239), where it was held that an information in the language of the statute charging the accused with having "willfully and unlawfully interrupted and disturbed a public school" was fatally defective for "the acts constituting the offense should be set out in the information in order that it might appear whether they amounted to a crime."

The Attorney General strongly relies on the case of State v. Porter, 105 Iowa, 677, 75 N. W. 519, seemingly, not so much on the exact point decided as on particular language there employed. In that case the indictment charged that the accused suborned and procured a witness in a certain cause to falsely testify to certain facts specifically set forth in the information. The insufficiency of the indictment was urged on the ground that it failed to state the means and methods by which the accused suborned the witness and procured him to falsely testify to the alleged facts. The court, in holding the indictment good, well observed that "if the defendant induced" the witness "to testify falsely, and did so knowingly, it is quite immaterial what means he used, whether in themselves illegal or not. The crime does not inhere in the method or means, but in the result—the procurement." This language is pointed to and sought to be applied thus: That the gravamen of the charged offense here is to "cause, induce, persuade, or encourage" an inmate of a house of prostitution to remain therein, and that the means or method employed to accomplish such result are immaterial and unessential. That leads to the conclusion that the means and method were employed to accomplish the charged result need not be and were unnecessarily alleged, and that an information charging that the accused caused, induced, persuaded, and encouraged an inmate of a house of prostitution to remain therein would be a good information. But a glance at the statute shows such a position wholly untenable. As already observed, the language of the statute here is not that "any person who shall cause, induce," etc., an inmate of a house of prostitution to remain therein is guilty of an offense, but that "any person who shall by promises, threats, violence, or by any device or scheme cause," etc., an inmate to remain in such house is guilty of an offense. In the Iowa case the means and method of procuring the false testimony to be given were not by statute made essential parts of the offense. Here the means and method employed by which an inmate of a house of prostitution is caused or induced to remain therein are expressly made essential parts of the offense. Unless one or more of the means or methods so stated by the statute are employed, no offense is committed.

The case of State v. George, 93 N. C. 567, is also cited. The indictment there charged that the defendant, at a specified time and place, willfully and unlawfully "did abduct" a child under 14 years of age from the custody of her father, and induced her to leave him, etc. The court very properly held the indictment not bad because it failed to allege the means by which the abduction was effected. Again the court observed that the term "abduction" has a well-known signification and means "the taking and carrying away of a child," etc., and that "when a statute makes the particular act an offense, and sufficiently describes it, by terms having a definite and specific meaning, without specifying the means of doing the act, it is enough to charge the act itself, without its attendant circumstances." But here the statute does describe the means of doing the act, not in terms having a definite or specific meaning, but in generic terms having a general, comprehensive, and a varied meaning, and under which many things may be done which may constitute the offense.

We do not deem it necessary to further review cases. We have reviewed those apparently most relied on by the state, and have carefully considered all cited by it. We do not think any of them support its contention. To the contrary, the authorities, with substantial unanimity, hold such an information as this, under similar statutes as here, fatally defective; and such, in effect, has been the holding of this court since its organization.

A further rather ingenious argument is made by the state that, when the evidence is looked to, it will be seen that "the prosecu-

tion did not attempt to show at the trial any threats, devices, or schemes, but did show, as we contend, certain promises by which the inmate of a house of prostitution was induced and persuaded to remain therein as such inmate."

[5, 6] Firstly, an information wanting in essentials cannot be helped or aided by evidence, and its sufficiency in such regard cannot be determined by what the state proved or failed to prove. If anything is established and set at rest in the law, it is that defects in substance of an information or indictment are not cured by evidence or verdict. And so does our statute expressly provide, for it permits, after verdict, a motion in arrest of judgment founded on defects of the information or indictment in failing to substantially conform to the requirements of Comp. Laws 1907, §§ 4730 and 4732, heretofore referred to. That must necessarily be true, for it is an orient peak in the law that pleadings are the juridical means of investing a court with jurisdiction of a subject-matter to adjudicate it, and, for res adjudicata, that matter must be described with reasonable certainty and particularity. Secondly, following the argument of the Attorney General, how did the defendant know by the information that the state would only attempt to prove "certain promises?" Under the information, if it is good, the state was equally entitled to prove any kind of a threat, or a device, or a scheme. In that respect the defendant was left in the dark by the information until the evidence was adduced; and thus the evidence, and not the information, apprised her what was intended to be proved against her and what she was required to meet and defend. But what were "the certain promises" which she by the information ought to have known were intended to be proved against her? Promises of employment or of remuneration, investment, gift, forbearance, or to do or not to do one or more of almost innumerable and inconceivable things? Who, by the information, could know until the evidence was adduced? When in a pleading it is alleged that one promised employment or reward or compensation, or to pay money, or to give something, or to do or not to do one or several particular things, something has been described with at least some degree of certainty or understanding. But what matter or thing is here so described by the information which, by the use of the generic and variant term "promises," embraced a hundred or more indefinite and uncertain things, all equally described by it?

Furthermore, much of the evidence relating to the question in hand—the certain promises, the only thing which the state claims was attempted to be proved—is as vague and uncertain as the information itself. It is shown that in Salt Lake City there was maintained a "stockade," an inclosed cluster of houses of prostitution. The houses were occupied and the business of prostitution conducted therein by different so-called "landladies" who received and employed their own inmates and prostitutes. The buildings were owned by an investment company of which the defendant was a stockholder and in which she was interested. She rented them to different landladies, collected the rents, maintained an office in the stockade, and was a sort of supervisor or director of the stockade. She had nothing to do with procuring or employing the inmates. So far as disclosed by the evidence, she exercised no control or direction over them except the inmates were required to report at her office for a physical examination as to health and cleanliness by a physician employed for such purpose. The physician reported to the defendant the result of the examination, and she gave the inmate a certificate, either of health or for free entrance to a hospital for treatment if diseased or sick. The inmate of one of the houses of prostitution, No. 140, whom the state claimed and alleged was an inmate therein, and whom it is alleged the defendant, by promises, etc., caused and induced to remain therein as such inmate, voluntarily entered the house of prostitution occupied and conducted by one of the landladies, and there for hire voluntarily prostituted her person to divers men, some of whom had roomed at her mother's rooming house and with whom she was acquainted. She at will left the house in the morning and returned in the evening. The next day, she with other inmates, voluntarily reported to the defendant's office for an examination. There she met the defendant. It is not charged or claimed that the defendant had anything to do in causing or inducing the inmate to enter the house of prostitution. Upon the record, it is conceded that the defendant did not know she was there until the inmate reported at the defendant's office for an examination, or that the defendant then knew that she was or had been such an inmate. From a conversation then had between the inmate and the defendant, and things said by the defendant thereafter, the "certain promises" of the defendant, which it is claimed induced the inmate to remain as such inmate, are deduced. We give them as testified to by the inmate herself, and on whose testimony alone the state relied to show the promises. On her direct examination she testified that she knew the defendant, but had not seen her since she was a child; that the defendant was also acquainted with her mother; that the defendant asked her how old she was, and that she told her between 16 and 17; and that "I talked with her (the defendant) before and after I was examined. She asked me what my name was and I told her [first an assumed name and then her right name]. She said, 'You

ought to know me,' and I said 'Yes, ma'am; I do.' She said, 'Where have I seen you,' and I said, 'In Ogden' [where the inmate and her mother formerly lived]. I asked her if I was not too young to be down there, and she said, 'No, you are just the right age.' She said I was a blonde and could make good money down there; that there were several calls for blondes. She said I could make good money, and I could get me some good clothes." Then, after testifying as to her examination, she further testified in response to a question if anything else was said, that "there was one thing I forgot, down at the preliminary hearing, she (defendant) said, 'I don't know why your mother should have any objections for you to do a little sporting when you have had one sister down here who has been doing sporting.'" She further testified that a night or two thereafter she saw the defendant in the dance hall and the defendant "told me to get in and hustle. I asked her if she would telephone to my mother, and she said, 'Yes.' Then she told me to get in a hustle." This is all that was testified to by her on her direct examination relating to conversations had with, or things done by, the defendant. She testified to no additional things in that respect on her cross-examination. At the conclusion of her cross-examination a recess was had. Thereafter she was recalled for further direct examination. She was asked and answered: "Q. I understand you to say that it was on Tuesday morning that you were examined in No. 10? A. Yes, sir. Q. And is that the time that the statement was made to you, something about your clothing by" the defendant? "A. Yes, sir. Q. Why did you stay there after that? A. Because," the defendant "said that if my mother was willing to let me stay there she would fit me out with nice clothes and send me to Ogden. Q. Is that the reason you stayed? A. Yes, sir." On recross-examination she testified that during the recess the district attorney had talked to her and "just asked me about this question, and if I remembered that. That was something that I had forgot this morning and forgot at the preliminary examination. I was going to say it but forgot it. The district attorney asked me why I stayed there and I told him." On the recross-examination the witness several times testified that what the defendant said to her was "if your mother don't object I'll buy you a nice suit of clothes and send you to Ogden," or "if your mother don't object she would send me to Ogden and give me some clothes." Neither on her direct nor cross-examination did she testify that the defendant said to her that if she remained or stayed, or if her mother was willing to let her stay, the defendant would buy her clothes or do anything, but that if her mother did not object the defendant would buy or give her clothes and send her to Ogden.

This is all the evidence in the record on the part of the state bearing on the question of any promises having been made by the defendant, or of her causing, persuading, or inducing the inmate to remain an inmate of a house of prostitution, and is all in support thereof that is pointed to by the state. Putting it in the Attorney General's own language, the defendant said to the inmate "that she was not too young to be in that business; that she was just the right age; that she was a blonde, and that blondes took well. She told her to get in and hustle. She told her that she could make good money and could get some good clothes. She told her that she did not know why her mother should have any objection for her to do a little sporting when she had one sister down there (in the stockade), and in addition to this she further made the further promise that, "if her mother was willing to let her stay there (at the stockade), she would fit her out with nice clothes and send her to Ogden" (where the defendant was also interested in a "red light district"). These, and only these, are the "certain promises" claimed to have been made by the defendant and which caused, induced, and persuaded the inmate of a house of prostitution to remain therein as such inmate. Let them be looked at singly or collectively, and yet what reasonable certainty of a promise or promises is shown? What declaration or offer, either express or implied, made by the defendant and accepted or acted on by the inmate, to do or forbear some act or thing calculated, or having a natural tendency to cause, persuade, or encourage such an inmate to remain in the house of prostitution, or tending to show any causal connection between the claimed promises and the continuance of the inmate in the house of prostitution, or one designed to produce such a result and made for such purpose? Many of them cannot even be called any kind of a promise. The only thing approaching it is the reason given by the inmate why she remained; the claimed promise that the defendant would buy her clothes and send her to Ogden if "her mother," not the defendant, "was willing to let me stay." Giving this language the most liberal meaning, it is plainly seen that the promise to fit the inmate out with nice clothes and send her to Ogden was not conditioned on the defendant's wish or will that the inmate remain or stay, but on the wish or will of the mother, if she, not the defendant, "was willing to let me stay there" in the stockade. That but implies if her mother was willing she could stay, if she was not willing, the negative is equally implied, and thus the staying or remaining of the inmate was conditioned on the will of the mother, and not of the de-

fendant. But, when the inmate was asked what in fact the defendant said to her with respect to giving or buying her clothes, she each time testified, not that the defendant said that she would buy or give her clothes if she remained or stayed, or if her mother was willing for her to remain or stay, or that the defendant said or offered to do anything of that kind on any such conditions, but what the defendant in fact did say was, "If your mother don't object, I will buy or give you clothes and send you to Ogden."

[7] It is not enough that the defendant made some kind of a promise to the inmate; it must also appear that the promise was made with the design or purpose of causing or inducing the inmate to remain in the alleged house of prostitution, and that it was one fairly calculated or naturally tending to produce such a result, and that the inmate in fact did so remain, not as evidenced by a state of mind expressed on the witness stand, but as evidenced by some act or conduct on her part, or by something said or done by her, showing, or tending to show, that she acted on, or was induced or influenced by, the promise, and by reason thereof remained in the house of prostitution. And while she was asked why she remained at the stockade, the very issue to be determined, she gave as a reason "because" the defendant "said that, if my mother was willing to let me stay there, she would fit me out with nice clothes and send me to Ogden," but, when asked what it was that the defendant said to her in that respect, she repeatedly answered that "I could make good money and I could get me some nice clothes," and "if your mother don't object I will buy or give you a nice suit of clothes and send you to Ogden." Nowhere does the record disclose that the defendant asked, requested, or invited the inmate to remain, or that the defendant did or said anything that if the inmate did remain the defendant would do anything for her, or give her anything, or that the defendant declared or offered to do or not to do anything whatever on condition or an understanding of any kind that the inmate remain. Nothing of that kind was testified to by the inmate or by any one else.

As testified to by the inmate, the day after she entered the house of prostitution she took the examination, on a Tuesday. On Wednesday or Thursday following she, according to her testimony, asked the defendant to telephone to her mother, who, in Salt Lake City, was conducting an uptown rooming house, and, according to the testimony of the defendant, the defendant telephoned the mother against the protest of the inmate. No matter about that, for the evidence shows beyond dispute, and as testified to by the mother herself, that the defendant did telephone the mother, who, in response to the message, visited the defendant's office at the stockade on the Friday following. The inmate was brought into her presence, and the mother, as testified to by her, said to her, "Why are you here? Aren't you ashamed of yourself?" The inmate, as testified to by herself, began to cry and said, "I couldn't help it," and that, upon her mother's stating that she would "whip me when she got me home," the defendant asked her not to do so, and said "if she had a daughter who went out that way she would take her back, because she was her own flesh and blood." After further conversations, in which the mother and the inmate did not remember what was said, the two left the stockade. No act or conduct on the part of the inmate, nor anything said or done by her during the time she was in the stockade and before she left it, is shown from which it may be inferred or implied that by reason of anything said or done by the defendant the inmate remained in the house of prostitution, or was caused, induced, or persuaded to do so. The evidence, without dispute, shows that the inmate during the time she was in the stockade at will and voluntarily left it each morning and returned in the evening to ply her calling. Thus, looking at the portion of the evidence most favorable to the state relating to the question in hand —the alleged promises—it is seen that the defective information is even in that particular also unsupported by evidence.

We have thus reviewed such matters, not from the standpoint of the defendant's evidence, but wholly from that of the state. Nor does the evidence of the defendant aid the state in that regard, for she and other witnesses testified that the inmate, when she applied for the examination, gave an assumed name and stated her age to be between 19 and 20, and that the defendant did not then know her. A day or two after that the husband of the inmate's sister, and who was a piano player in one of the houses, informed the defendant who the inmate was and told her that the inmate was his wife's sister. Thereupon the defendant sent for the inmate and asked her her name. She declined at first to give it, but finally admitted who she was. The defendant then stated to her that she would telephone the inmate's mother, but the inmate protested and asked her not to do so. The defendant, however, on the following day telephoned the mother, who, in response to the message, came to the stockade and took the inmate with her.

There is other evidence relating to the inmate's conduct in entering the house of prostitution and becoming an inmate therein, but as it is not charged or claimed that she was, against her will, caused or induced to enter the house and to become such inmate, or that the defendant had anything to do in causing or inducing her to do so, we have not in detail referred to that. There is also much evidence to show the manner in which the

unlawful and disreputable business was carried on in the stockade, the defendant's interest in, her connection with and supervision over it, and that she was an active and the principal factor in fostering and maintaining it. The evidence amply shows that the law in such particulars was violated, that the business ought to have been suppressed, and the defendant and all other offenders prosecuted and punished for such violations. But she was not charged with, nor tried for, or convicted of, that. There is also evidence to show that the defendant told one of the witnesses who also was charged with pandering "to lie like hell," and some to justify the inference that both the mother and the inmate were unwilling witnesses for the state, and that they, especially the mother, through collusion or otherwise with the defendant seemingly colored their testimony in the defendant's favor, and, in some particulars, attempted to shield her and evaded answering direct questions put to them by the district attorney. While such conduct of the defendant and the witnesses were matters affecting their credibility, the weight of their testimony, and the merits of the defendant's defense, yet they, in themselves, could not supply a want of evidence of necessary affirmative facts.

[8] And so, while we have not for these reasons in detail referred to all the evidence relating to the stockade, the disreputable and unlawful business carried on therein, the defendant's conduct with respect to it, nor the conduct of the inmate in entering the house of prostitution and becoming an inmate, yet we have in detail referred to all the evidence in any manner relating to a promise or promises made by the defendant to the inmate and to all that was said or done by the defendant and the inmate in respect of that question, the only thing claimed by the state on the evidence by which the inmate was caused or induced by the defendant to remain an inmate in a house of prostitution.

Even though the evidence should support a good information, yet, for the reasons already stated, the prosecution must fail because of the fatally defective information; such a defect being incurable by evidence or verdict. An information or indictment when assailed as to substance must stand or fall by its own structure. It is not a technical, but a sound and fundamental, rule in the law of criminal procedure that the accused be apprised, not by the evidence adduced, but, at the outset, by the indictment or information, with reasonable certainty of the exact nature of the accusation against him. This rule cannot be bent to meet exigencies of a particular case, nor the class or grade of the person accused. The Constitution and the statute prescribe the rules by which the sufficiency of an information may be determined, and they apply to all alike. They do not prescribe one rule for a keeper or director of a house of prostitution and another for a nun, nor one rule for one offense and another for another offense.

[9] The conclusion reached holding the information defective in the particulars stated not only works a reversal of the judgment but a discharge of the defendant. We have a statute (C. L. 1907, § 4694) which provides that "an information may be amended in matter of substance or form at any time before the defendant pleads, without leave of court. The information may be amended at any time thereafter and on the trial as to all matters of form, at the discretion of the court, where the same can be done without prejudice to the rights of the defendant." An amendment supplying proper allegations and curing the defects of this information is matter of substance, not form. The particular defects were, before plea, specifically pointed out by the special demurrer. The undoubted right to amend the information in respect to the particulars wherein it is defective then existed. Instead of amending it, when an amendment was permissible, the hazard of a trial and a conviction on a bad information was taken. The right to now amend is lost. The statute, whether wisely or unwisely, forbids it.

The order therefore is that the judgment of the court below be reversed, and the case remanded to the district court, with directions to discharge the defendant.

FRICK, C. J., and McCARTY, J., concur.

STATE v. GUSTALDI.

(Supreme Court of Utah. May 10, 1912.)

1. INDICTMENT AND INFORMATION (§ 140*)—MOTION TO QUASH—WAIVER OF PRELIMINARY EXAMINATION.

A person accused of crime may on motion to quash an information show that he did not waive a preliminary examination before a magistrate, although the magistrate's transcript recites that the examination was waived.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 474, 475; Dec. Dig. § 140.*]

2. CRIMINAL LAW (§ 224*) — PRELIMINARY EXAMINATION—NECESSITY.

Where a magistrate who holds a person to answer a complaint charging him with a felony files a transcript of his proceedings in the district court, such court has jurisdiction until a motion to quash the information is sustained, although accused had no preliminary examination, or did not have one in compliance with the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 466–467; Dec. Dig. § 224.*]

3. CRIMINAL LAW (§ 225*) — PRELIMINARY EXAMINATION—WAIVER.

Under Const. art. 1, § 13, providing that offenses theretofore required to be prosecuted by indictment may be prosecuted by information after examination and commitment by a magistrate, unless an examination is waived, where the committing magistrate files a tran-

THE CITY OF MOAB
vs. 9317-97
MICHAEL BRUCE GIOLAS

Documents received per Judge Anderson for purpose of Appellate Review. Not offered or received into evidence

Sue Batchelor
Assistant Clerk of Court
10-29-93

Incident Number: 931064
Nature: Assault/DV Address: 549 N Main
Location: 03 City: Moab ST: UT Zip: 84532
Contact: Dispatch Complainant ID: 12362

Complainant
Last: Giolas First: Rebecca Mid: M
Addr: 917 N Trinnaman Ln Phone: ( ) -
City: Lehi ST: UT Zip: 84043 DOB: 04/23/65 SSN: 529-98-8154

Offense Codes: ASIM DOMV Reported Observed ASIM
Received By: Mallon B How Received: R Radio
Rspndg Officers: Mallon B Lindquist K Wiler M &
Rspnsbl Officer: Mallon B Agency: MCPD Call ID: 931064
When Reported: 19:12:00 04/10/93 Last Radlog: : : / /
Occurred: Between 19:12:00 04/10/93 Clearance: CAA Cleared Adult Arrest
and 19:12:00 04/10/93 Disposition: CAA Disp Date: 04/10/93
Misc Entry: Judicial Status:
Circumstances: DOMV LT14 WPERS
MO:
Narrative: (See below)
Supplement: (See below)

INVOLVEMENTS:

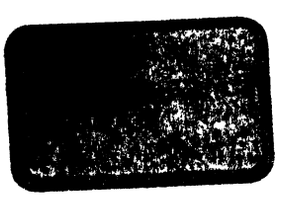
Type	Record #	Date	Description	Relationship
JM	3772	04/10/93	Assault	*Arrest/Offense
NM	536	04/16/93	Giolas, Michael Bruce	*Offender
NM	12362	04/16/93	Giolas, Rebecca M	*Victim
NM	12362	04/10/93	Giolas, Rebecca M	*Complainant
CT	013383	04/11/93	Assault	Citation
PR	8487	04/10/93	Photographs Polaroid Spect $0	Evidence

LAW Incident Offenses Detail:
OFFENSE CODES

Seq	Code	Description	Amount
1	ASIM	Assault, Simple	0.00
2	DOMV	Domestic Violence	0.00

LAW Incident Responders Detail
RESPONDING OFFICERS

Seq	Name	Unit
1	Mallon B	101
2	Lindquist K	80
3	Wiler M	115
4	Gay F	95



LAW Incident Circumstances:

CONTRIBUTING CIRCUMSTANCES

Seq	Code	Description	Miscellaneous
1	DOMV	Domestic Violence	
2	LT14	Hotel/Motel/Etc.	
3	WPERS	Personal Weapons Used	Hands

Narrative:
At 1912 I was dispatched to a possible domestic/assault situation. The dispatcher advised me that UHP trooper Doug Anderson had been told by some citizens that they had just dropped off a female subject at the Days Inn motel. The RP's told the trooper that the female had been assaulted by a man who was driving a black Laredo Jeep, and that he was following her to the motel.

The female was described as blonde, wearing a white shirt and white shorts. I went to the Days Inn and asked the desk clerks if a woman had just come in who matched that description, and which room she was staying in. They refused to give me any information, although they admitted she was there, and a male subject was there also. I advised them of the situation, and that I needed to check her welfare, but they continued to refuse any assistance. Finally they did tell me that the couple was in room 124.

I went to Room 124 and could hear yelling inside. I knocked on the door, and a man answered it immediately. Right behind him was a blonde female, who as soon as the door opened tried to exit the room, but the man moved in front of her, blocking her exit, and shoved her back into the room. He invited me into the room, saying there was no problem there.

There were numerous liquor bottles on tables and dressers in the motel room, some full and unopened, some partially empty, and some empty. Mike had a strong odor of alcohol on his breath and about his person. (However, when he submitted to an intoxilyzer test later at the GCSO and the results showed .00, an intoxication charge was not included in the booking).

I asked if everything was alright, and the female said, "Yes, if I can just get out of here." The man told me everything was alright, that I could leave, but she said "No, please don't, I need to go with you."

The man, later identified as Mike Giolas, turned toward the female, Becky Giolas, and shoved her backwards onto the bed, then leaned very closely over her, saying "Becky, don't do this, listen to me" in what I perceived as a very threatening manner. She rolled out from under him and got up, and he grabbed her by the left arm and spun her around, saying "Don't do this" again several times.

Becky began backing away from Mike, and he walked towards her, about one foot away from her, forcing her back into a corner of the motel room. He kept repeating "Don't do this." When she ducked out of the corner and tried to get to the door, he grabbed her by the arm again and pulled her back. I told him to let go of her, and she picked up her bags and went out into the hallway.

I asked Mike to remain inside the room while I spoke with his wife in the hallway, but I remained by the door, holding it slightly open, because it had an automatic lock on it. Mike stood right on the other side of the door, and kept pulling the door open and trying to participate in the conversation, saying "She's crazy, nothing happened, everything's okay." I had to repeatedly tell him to step back away from the door.

Becky told me that she and Mike had gone on a Jeep Safari trail during the day, and were on their way back to the motel, when a verbal argument began.

She said Mike "backhanded" her at least three times while they were driving north on Main St, telling her to "shut up," and once shoved her head down onto the gear-shift knob, holding it there for a short time. When they stopped at Center and Main, and he hit her again, she got out of the vehicle and ran. She was offered help by some bystanders, who took her to the motel, and then apparently flagged over the trooper to report the incident. (Those citizens were never identified, and left the area before I could make contact with them).

Several of Becky's friends/travelling companions were waiting in the hallway, and she went with them to another room while I talked with her husband. I went back into room 124, and asked Mike to tell me what had happened. By this time Sgt. Lindquist had arrived, and also Ann Twitchell who had been riding with him.

Mike told me that he had not struck Becky, but that she had scratched his face and thrown a beer bottle at him. He had no scratches or other injuries visible, except two small red marks on his left cheek that looked like razor cuts. He said that Becky has emotional problems, is taking anti-depressant medication, and had been drinking, and that I shouldn't take her seriously.

I told Mike to wait in the room for me, and Sgt. Lindquist stayed there with him while I went to speak with Becky again. She told me that she and Mike have a history of domestic violence, that he has assaulted her many times, and that there are several law enforcement agencies in northern Utah that are very familiar with their history. Becky's friends confirmed this information stating that they were very frightened for their own safety and for Becky's, because they were helping her. They said they have witnessed numerous assaults by Mike against Becky, and also against previous girlfriends. However, they declined to provide specific information or witness statements, saying they were afraid he would "hunt them down" if he got a copy of the police report. Becky said that was true, that he had taken such action before in similar situations. They requested that their names or any information they provided not be included in the report for that reason.

Becky had a large red mark on her right cheek area, which faded somewhat during my contact with her. She also had bruises on both sides of her neck, which she said had been caused by Mike on the previous night, at which time he told her that because she was his wife, he could injure her in any way he wanted to. The injuries were photographed later at the PD, and booked a evidence, and her written statement is included.

I went back into room 124 and advised Mike that he was under arrest for Domestic Assault. He told me that I wasn't justified in making an arrest, and suggested that Sgt. Lindquist "pull rank" on me and prevent me from taking any action. At my request, Mike stood up and placed his hands behind his back. He was taken into custody without incident, although because of his musculature it was difficult for him to place his arms behind his back. At his request Sgt. Lindquist and I carried his possessions out of the room and to his pickup out in the parking lot while he accompanied us in handcuffs.

When we reached the pickup, I asked Mike where the keys to it were, and he stated, "They're in my pocket, go ahead and reach in there, so I can add another charge to what I file against you." At that time, and with Sgt. Lindquist observing, I performed a cursory search, patting him down for weapons and locating the vehicle keys in the right side pocket of his shorts.

Giolas was wearing loose, baggy shorts, and the side pockets hung down the outside of his thigh. Sgt. Lindquist placed Mike's possessions into the pickup and secured the vehicle.

Mike had become progressively more verbally abusive, and resisted when I attempted to search him, pulling away from me and calling to some men who were across the parking lot to "come over here and help me." When he continued to pull away and try to walk away from me, I took hold of his left arm and walked with him to my patrol car, which was across the parking lot. All the way to that location, Mike kept pulling away from me and trying to stop. I tried numerous times to use a wrist-lock as a control hold, but Mike is an extremely large, muscular man (6'3", 255 lbs). He kept pulling away from me whenever I tried to get hold of his hand, and I was unable to exert any control on him at all. I continued to hold his left arm with my right hand and walk along with him. When we got to the patrol car, with Trooper Anderson standing by, I had Mike lean frontwards against the car while I searched him, emptying his pockets onto the roof of my vehicle and placing his possessions in an evidence bag. Mike then entered the back seat of the patrol car and seated himself without any assistance, after which I fastened his seat belt.

At the PD, Officer Fred Gay helped Giolas out of my vehicle and into the building and I began the booking. Giolas refused to answer any questions, saying "You're the smart bitch, you figure it out." Then he said that he thought his shoulder was dislocated, saying "I know my rights, and I want to see a doctor." I asked him if he was saying that I had dislocated his shoulder, and he said yes, that I had. I asked him exactly when it happened, but he refused to answer, although he did say it was an "old wrestling injury." Officer Gay transported Giolas to Allen Memorial Hospital, where he was assisted by Sgt. Lindquist who eventually transported Giolas directly to the Sheriff's Office. I had no further contact with Mike Giolas.

Becky Giolas came to the PD, accompanied by two friends, and brought me her written statement. It was at this time that I took the photographs of her injuries, at 2045 hrs. While Becky was in my office, we contacted the Lehi Police Department dispatcher, who in turn contacted Detective Chad Smith for information concerning previous dealings with Mike Giolas.

Detective Smith, through the dispatcher (Tammy), advised me that Mike Giolas is an extremely violent subject, that his department and others have had numerous past incidents involving him, and that if he were released from jail that "something worse would happen, for sure." Smith also stated that he had numerous photographs in evidence of previous serious injuries to Becky, caused by Mike Giolas.

Becky Giolas suggested that this agency contact several different law enforcement agencies in northern Utah, including Lehi PD, Utah County SO, South Jordan PD, West Valley City PD, South Salt Lake City PD, and Salt Lake County SO, who all have had incidents involving Mike Giolas. Again, this information was confirmed by the people travelling with them.

Becky told me that she was afraid for her life if he bailed out of jail, saying that he has completely disregarded protective orders in the past, and was highly unlikely to start obeying them now. Her companions verified this information, saying that they were also very frightened of him, and requesting that he not know they had participated in this incident in any way because he would retaliate violently. I also received a telephone call from a relative

in Lehi, who basically stated the same thing, and requested anonymity.

I contacted County Attorney Bill Benge and relayed this information to him, requesting a "No-Bail" order until Giolas went before a judge. Benge authorized No Bail, and advised the Sheriff's Office by telephone later that he had done so.

The Lehi Police Department asked that Becky Giolas immediately notify them when she returned home, as they were aware of Mike's behavior and would take precautions. Becky told me that she has a residence in Lehi, and that Mike's home is in Riverton, and she will obtain a Protective Order as soon as possible on Monday to prevent him from contacting her. She also signed the MCPD domestic violence victim's form stating that she did not wish to waive the No-Contact order.

Reporting Officer: Becky Mallon 2t5
Date and Time: 04/11/93----0100 hrs.

The undersigned, Sgt. [illegible] of the Moab Police under oath states that there existed probable cause for the arrest without warrant of the person named below based upon the following:

Name of person arrested: Michael B Giolas DOB: 04/22/6
Date of arrest: 04/10/93 Time: 19:45:00
Place of arrest: 549 N Main

The above-named person is currently being detained on the following charges:

Offense	Date/Time	Statute Code	CC	Bail Amt
Assault	19:45:00 04/10/93	76-5-102	BM	_____

The undersigned believes that probable cause existed for this warrantless arrest and the continued detention of the above-named person based upon the following information which was either known by the undersigned personally or was obtained by the undersigned in his/her capacity as a peace officer:

I was dispatched to the Days Inn when citizens reported to a UHP trooper that they had transported a female to the Days Inn who had been involved in a fight with her husband, and that he was violent and looking for her. I located the couple in Rm 124 at the Days Inn motel. When Mr. Giolas opened the door, Mrs. Giolas tried to get by him and exit the room, but he shoved her back into the room, telling me that there was no problem and inviting me inside the room.

While I was in the motel room, I observed Mr. Giolas push Mrs. Giolas onto the bed once, take her by the arm and spin her around at least twice, and back her into a corner in a threatening manner.

Mrs. Giolas said her husband had slapped her face twice on the right side with the back of his hand three times, and shoved her head down, holding it against the gearshift. Mr. Giolas denied doing that, but there were red marks on her face, and also bruised on Mrs. Giolas' neck which she stated were caused by her husband.

Mr. Giolas had a strong odor of alcohol on his breath, and there were numerous liqeur bottles, some full and unopened, some partially empty, and some entirely empty, strewn about the room.

Giolas was placed under arrest for Domestic Assault and Intoxication (DV related). When he submitted to an Intoxilyzer test at the Sheriff's Office, with results of .00, I did not cite him for Intoxication, but only for Domestic Assault.

I contacted the Utah County/Lehi Police Department, and through a dispatcher information was relayed to me from Detective Chad Smith concerning past domestic incidents involving Mike Giolas. His agency has responded several times to reports of violence at this couple's address in the past few months. Detective Smith described Mr. Giolas as "extremely violent," saying he had numerous photographs of serious physical injuries to his wife from those past incidents. Detective Smith also stated "There will be worse trouble if he is

released." Mrs. Becky Giolas stated to me that she was afraid for her life if he was released, that he has always disregarded ex parte protective orders and court orders in the past. Friends, who were with the Giolas' and staying in the same motel, also stated that they were afraid for their safety if he was released, but they refused to give me statements or even identify themselves in fear that if he found out they had said anything, he would "hunt them down."

I contacted County Attorney Bill Benge, who authorized a "No Bail" order holding Giolas in jail until he sees a judge.

The undersigned requests the magistrate to whom this statement is presented to execute an order determining that probable cause existed for the above-described warrantless arrest, authorizing the continued detention of the above-named person on the stated charges, and setting appropriate bail, if any.

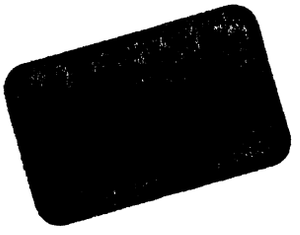
Officer

State of Utah
County of Grand

Sworn to before me this 10 day of April, 1993.

NOTARY PUBLIC
Dwayne R. Schecknmyer
622 Kane CreekBlvd #C 4
Moab, Utah 84532
My Commission Expires
September 18, 1995
STATE OF UTAH

Judge/Notary



TEST RECORD CARD FOR THE
INTOXILYZER® INSTRUMENT – 4011 MODELS

GRAMS ALCOHOL PER 210 LITRES BREATH	INSTRUMENT PRINT CODE
•	A — AIR BLANK
•	B — BREATH
•	C — CALIBRATOR (Simulator)
•	OBSERVED SUBJECT FOR REQUIRED OBSERVATION PERIOD AND FOLLOWED CHECK LIST
•	DL — OPERATOR'S INITIAL
•	GRAND 50 — INSTRUMENT LOCATION
A 0 0 •	94-001060 — INSTRUMENT SERIAL NUMBER
B 0 0 •	4-10-93 — DATE
A 0 0 •	MIKE GIOLAS — SUBJECT'S NAME
	2115 — TIME FIRST OBSERVED
	2130 — TIME TEST STARTED
	DENNIS LUND — OPERATOR

ADDITIONAL INFORMATION AND/OR REMARKS

INTOXILYZER

OPERATIONAL CHECKLIST - D (ASA)

SUBJECT MIKE GIOLAS DATE 4-10-93 TIME 2130
INSTRUMENT # 94-001060 LOCATION GRAND GUNNY 50
OPERATOR DENNIS LUND

[ ] 1. POWER SWITCH ON, READY LIGHT ON.
[ ] 2. CONNECT BREATH TUBE TO PUMP TUBE, INSERT TEST RECORD CARD.
[ ] 3. PRESS ADVANCE, WAIT FOR LIGHT 2.
[ ] 4. PRESS ADVANCE, WAIT FOR LIGHT 3.
[ ] 5. DISCONNECT PUMP TUBE FROM BREATH TUBE, EXTEND BREATH TUBE AND INSERT MOUTHPIECE. - TAKE BREATH SAMPLE. (NOTE TIME) LIGHT 4 WILL COME ON AFTER SAMPLE IS TAKEN.
[ ] 6. REMOVE MOUTHPIECE, HOUSE BREATH TUBE AND CONNECT TO PUMP TUBE, PRESS ADVANCE WAIT FOR LIGHT 5. REMOVE TEST RECORD CARD.
[ ] 7. POWER SWITCH OFF.

HPT—18 (P-418)
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