AGENDA

STANDING COMMITTEE ON THE
MODEL UTAH CRIMINAL JURY INSTRUCTIONS

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84111

Wednesday, January 4, 2017
12:00 p.m. to 1:30 p.m.
Judicial Council Room

12:00 **Welcome and Approval of Minutes** (Tab 1) — Judge James Blanch

12:05 **Proposed Amendments** (Tab 2) — Linda Jones

CR105 – Role of Judge, Jury and Lawyers
- Utah Code 77-17-10 (Tab 3)
- Utah Code 78A-2-201 (Tab 4)
- *State v. Sisneros* (Tab 5)
- *State v. Gleason* (Tab 6)
- 75 Am. Jur.2d Trial §§ 714, 719, 817 (Tab 7)

CR109B – Further admonition about electronic devices

CR 202 – Juror Duties
- Utah R. Crim. P. 18 (Tab 8)
- Utah Code 77-1-6 (Tab 9)
- *Holland v. United States* (Tab 10)
- *United States v. Rith* (Tab 11)

12:30 **Justification Defense Instructions** (Tab 12) — Mark Field

Utah Code 76-2-402 (Tab 13)
Utah Code 76-2-405 (Tab 14)
Utah Code 76-2-406 (Tab 15)
State v. Karr (Tab 16)

1:30 **Adjourn**

Upcoming Meetings (held on the 1st Wednesday of each month unless otherwise noted)
February 1, 2017
March 1, 2017
April 5, 2017
May 3, 2017
June 7, 2017
September 6, 2017

Tab 1

MINUTES

STANDING COMMITTEE ON
THE MODEL UTAH CRIMINAL JURY INSTRUCTIONS

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, November 2, 2016
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT	**EXCUSED**
Judge James Blanch, Chair	Keisa Williams, Staff
Mark Field	Karen Klucznik
Sandi Johnson	David Perry
Linda Jones	Judge Michael Westfall
Judge Brendon McCullagh	Scott Young
Steve Nelson	
Jesse Nix	
Nathan Phelps	
Nancy Sylvester, Staff	

1. Welcome **Judge Blanch**

Judge Blanch welcomed everyone to the meeting and each member introduced themselves.

Ms. Johnson moved to approve the minutes from the October 2016 meeting. Mr. Phelps seconded the motion and it passed unanimously.

2. Drug Offense Instructions **Committee**

(a) Innocent Possession

Ms. Johnson stated that the proposed version shifted the burden to the defendant to prove that he was an innocent possessor. She suggested adding language, similar to a self-defense instruction, which clarifies that the burden remains with the State. The committee worked on language to reflect that the burden remains with the State.

Judge McCullagh stated that "illegal substance" should not be used because the substance may not be illegal. He recommended using "controlled substance" because it better defines the substance.

Judge McCullagh stated that the innocent possession instruction is not a defense because "intent to use" is required to convict a defendant of possession of drugs. He stated that the

instruction should begin, "you must decide whether the State has proven that the defendant did not innocently possess the controlled substance." Judge Blanch stated that the elements instruction in drug offenses references the "defense of innocent possession."

Ms. Jones recommended using "substance" instead of "controlled substance" because the substance could be a counterfeit substance. Judge Blanch recommended using "illegal" not "illicit" because the instruction should only cover illegal activity. Ms. Jones asked if *State v. Miller* intended to get to the transitory possession (where someone was in the process of taking adequate measures). Judge Blanch recommended using "defendant was taking adequate measures." Judge McCullagh stated that adequacy would be a factual question determined by the jury.

Ms. Johnson stated that the instruction did not address defendants that have already taken adequate steps to get rid of the substances. Judge Blanch agreed and recommended using "took or was taking." Mr. Field asked if "adequate" also meant "reasonable." Ms. Jones stated that the court in *Miller* used "adequate."

CR _____. Innocent Possession. Approved 11/2/16.

You must decide whether the State has proven that the defendant did not innocently possess the [controlled][chemical][counterfeit] substance. The defendant is not required to prove [he][she] innocently possessed the substance. Rather, the State must prove beyond a reasonable doubt the defendant did not innocently possess the substance. The State has the burden of proof at all times. A person innocently possesses a substance if

1. [he][she] obtained the substance innocently and possessed it with no illegal purpose; and

2. the defendant took or was taking adequate measures to rid [himself] [herself] of possession of the substance as promptly as reasonably possible.

References
State v. Miller, 2008 UT 61.
Utah Code § 58-37-8

Mr. Phelps moved to approve the instruction. Ms. Jones seconded the motion and it passed unanimously.

(b) Special Verdict form for Marijuana

Ms. Johnson recommended using "100 pounds or more of marijuana" as stated in the statute.

SVF Marijuana Possession. Approved 11/2/16.

THE STATE OF UTAH, Plaintiff, -vs- (DEFENDANT'S NAME) Defendant.	: : : : : : :	**SPECIAL VERDICT** Count (#) Case No. (**)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Possession of Marijuana. We also (check only the box that applies):

☐ Unanimously find beyond a reasonable doubt Defendant knowingly possessed 100 pounds or more of marijuana

☐ Do not find beyond a reasonable doubt Defendant knowingly possessed 100 pounds or more of marijuana.

DATED this _____ day of (MONTH), 20(**).

_____
Foreperson

References
Utah Code § 58-37-8(2)(a)(ii) and (2)(b)(i)

Ms. Jones moved to approve the instruction. Mr. Nelson seconded the motion and it passed unanimously.

(c) Drug Related Negligent Driving

Ms. Johnson recommended tabling the discussion on this instruction because the Supreme Court is hearing an appeal on the statute in *State v. Hainsworth*.

3. Committee Note for "Reckless as to Result" Committee

Ms. Johnson stated that the committee note under CR304B is incorrect because recklessness is not applicable for murder, child abuse, and kidnapping. She recommended removing the committee note entirely.

Ms. Johnson moved to approve the modification to the committee note. Mr. Phelps seconded the motion and it passed unanimously.

4. Adjourn Committee

Judge Blanch stated that the committee is finished with the drug offenses. He stated that the committee will next examine instructions on defenses, domestic violence offenses, and stock opening instructions. *The meeting was adjourned at 1:12 p.m.* The next meeting is Wednesday, December 7, 2016.

Tab 2

Utah R. Crim. P. 19(f):

"The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact."

CR105 Role of Judge, Jury and Lawyers [Introduction].

All of us, judge, jury and lawyers, are officers of the court and have different roles during the trial:

- As the judge I will supervise the trial, decide legal issues, and instruct you on the law.
- As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case.
- The lawyers will present evidence and try to persuade you to decide the case in one way or the other.

Neither the lawyers nor I decide the case. That is your role. You are the exclusive judges of all questions of fact. Do not be influenced by what you think our opinions might be. Make your decision based on the law given in my instructions and on the evidence presented in court.

CR202 Juror Duties [Closing].

You have two main duties as jurors.

The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine. You are the exclusive judges of all questions of fact.

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

You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before trial, any instructions I may have given you during the trial, and these instructions. All the instructions are important, and you should consider them as a whole. The order in which the instructions are given does not mean that some instructions are more important than others. Whether any particular instruction applies may depend upon what you decide are the true facts of the case. If an instruction applies only to facts or circumstances you find do not exist, you may disregard that instruction.

Perform your duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way. [You must also not let yourselves be influenced by public opinion.]

CR109B Further admonition about electronic devices [Introduction].

Jurors have caused serious problems during trials around the country by using computers and electronic devises to research issues or share information about a case.~~communication technology~~. You may be tempted to use these devices to investigate the case~~,~~ or to share your thoughts about the trial with others. However, just as you must not read or listen to any news reports about the case or talk to others about it, you must not use computers or any ~~of these~~ electronic devices while you are serving as a juror.

You violate your oath as a juror if you conduct your own investigation~~s~~ or if you communicate about this trial with others, and you may face serious personal consequences if you do. Let me be clear: do not "Google" the parties, witnesses, issues, or counsel; do not "Tweet" or text about the trial; do not use ~~Blackberries or~~ iPhones or other smart phones to gather or send information on the case; do not post updates about the trial on Facebook pages; do not use Wikipedia or other internet information sources, etc. Even using something as seemingly innocent as "Google Maps" or an electronic dictionary to look up terms can result in a mistrial.

Please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends on you reaching your decisions based on evidence presented to you in court, and not on other sources of information.

Post-trial investigations are common and can reveal if you have engaged in ~~disclose these~~ improper activities. If improper activities ~~they~~ are discovered, they will be brought to my attention and the entire case might have to be retried, at substantial cost.

Tab 3

West's Utah Code Annotated
Title 77. Utah Code of Criminal Procedure
Chapter 17. The Trial

U.C.A. 1953 § 77-17-10

§ 77-17-10. Court to determine law; the jury, the facts

Currentness

(1) In a jury trial, questions of law are to be determined by the court, questions of fact by the jury.

(2) The jury may find a general verdict which includes questions of law as well as fact but they are bound to follow the law as stated by the court.

Credits
Laws 1980, c. 15, § 2.

U.C.A. 1953 § 77-17-10, UT ST § 77-17-10
Current through 2016 Third Special Session

End of Document

Tab 4

West's Utah Code Annotated
Title 78a. Judiciary and Judicial Administration (Refs & Annos)
Chapter 2. Judicial Administration
Part 2. General Provisions Applicable to Courts and Judges

U.C.A. 1953 § 78A-2-201
Formerly cited as UT ST § 78-7-5

§ 78A-2-201. Powers of every court

Currentness

Every court has authority to:

(1) preserve and enforce order in its immediate presence;

(2) enforce order in the proceedings before it, or before a person authorized to conduct a judicial investigation under its authority;

(3) provide for the orderly conduct of proceedings before it or its officers;

(4) compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in a pending action or proceeding;

(5) control in furtherance of justice the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it in every matter;

(6) compel the attendance of persons to testify in a pending action or proceeding, as provided by law;

(7) administer oaths in a pending action or proceeding, and in all other cases where necessary in the exercise of its authority and duties;

(8) amend and control its process and orders to conform to law and justice;

(9) devise and make new process and forms of proceedings, consistent with law, necessary to carry into effect its authority and jurisdiction; and

(10) enforce rules of the Supreme Court and Judicial Council.

Credits

Laws 2008, c. 3, § 291, eff. Feb. 7, 2008.

U.C.A. 1953 § 78A-2-201, UT ST § 78A-2-201
Current through 2016 Third Special Session

End of Document

Tab 5

631 P.2d 856
Supreme Court of Utah.

The **STATE** of Utah, Plaintiff and Respondent,
v.
Maximilliano Luis **SISNEROS**,
Defendant and Appellant.

No. 17278.
|
May 19, 1981.

Defendant was convicted in the Third District Court, Salt Lake County, Homer F. Wilkinson, J., of burglary of a nondwelling, and he appealed. The Supreme Court, Hall, J., held that although defendant was under influence of alcohol at time of commission of offense, jury could reasonably conclude that defendant maintained requisite intent to burglarize premises.

Affirmed.

Maughan, C. J., and Stewart, J., concurred in result.

West Headnotes (7)

[1] Burglary
Nature and Elements of Offenses

To be found guilty of burglary of a nondwelling, a person must enter or remain unlawfully in a building, not a dwelling, and do so with intent to commit a theft.

1 Cases that cite this headnote

[2] Criminal Law
Criminal Intent and Malice

A person acts with intent when it is his conscious objective or desire to engage in conduct or to cause the result.

8 Cases that cite this headnote

[3] Criminal Law
Reasonable Doubt

On appeal, to successfully challenge a conviction on the grounds of insufficiency of the evidence, it must appear that when viewing the evidence and all inferences that may reasonably be drawn therefrom, in light most favorable to verdict of the jury, reasonable minds could not believe defendant is guilty beyond a reasonable doubt.

1 Cases that cite this headnote

[4] Burglary
Presumptions and Burden of Proof

When one breaks and enters a building in the nighttime, without consent, an inference may be drawn that he did so to commit larceny.

Cases that cite this headnote

[5] Burglary
Defenses

Fact that nothing was missing when defendant was apprehended in building at night was no defense to burglary charge and did not destroy inference of intent to steal at time of entry.

3 Cases that cite this headnote

[6] Criminal Law
Existence of Specific Intent Essential to Offense

Under the law, a **state** of voluntary intoxication from alcohol is not a defense to a criminal charge unless such intoxication is of such degree or **state** as to negate the existence of the mental **state** which is an element of the offense.

3 Cases that cite this headnote

[7] Criminal Law
Insanity or Other Incapacity

In prosecution for burglary of a nondwelling, issue of intoxication was one for jury's consideration and evidence would support

finding that although defendant was under influence of alcohol at time of commission of the offense, he maintained requisite intent to burglarize the premises. U.C.A.1953, 76-6-202.

5 Cases that cite this headnote

Attorneys and Law Firms

***857** Walter F. Bugden, Jr., Salt Lake City, for defendant and appellant.

David L. Wilkinson, Robert N. Parrish, Salt Lake City, for plaintiff and respondent.

Opinion

HALL, Justice:

Defendant appeals from a conviction of burglary of a non-dwelling. [1]

It is undisputed that in the early morning hours of May 30, 1980, defendant unlawfully entered the Salt Lake Mill and Lumber Company (hereinafter "Company"). He was discovered on the premises by Jack Merrick, a security officer employed by the Company. Merrick scuffled with defendant and eventually controlled him and called the police.

At trial, Merrick testified that he made a routine check of the Company at 1:00 a. m. on May 30, 1980, and that the interior of the business area was in order at that time: the floor was clean, the secretary's desk drawers were shut, and windows were intact. At approximately 2:50 a. m., Merrick returned to the Company for another check. He noticed that there was mud on the floor and that the secretary's desk drawer was open. He proceeded to the president's office where he found defendant standing against the wall as if he were hiding. Merrick drew his pistol and told defendant to "come out." Defendant stepped into the doorway and said, "Kill me." Merrick stepped back and defendant came out of the room and **stated**, "You either kill me or I will kill you if I get that gun." Defendant moved toward Merrick and grabbed him, whereupon Merrick struck defendant on the back of the head with his pistol and knocked him down. The two struggled for about 20 minutes, during which time defendant was struck with the pistol and knocked down several times. In between each of these episodes, defendant shouted profanities at Merrick, threatened to kill Merrick, his family and "ten other people," threatened that a "revolution" was coming, and boasted of how tough he was and of how many penitentiaries he had been in. Defendant was bleeding profusely from the blows to the head and finally sat down on the secretary's chair. Merrick called the police and the Company vice president to report the incident. Following the arrival of the police, Merrick went to an area where the window had been broken and observed broken glass, mud and leaves on the floor inside the office.

Leland Janke, Vice President of the Company, testified that when he had closed the business on the afternoon of May 29, he had closed the drawer to his desk, observed that the secretary's desk drawers were closed, and knew that there were no broken windows in the office. He testified that he was summoned to the Company premises by a phone call from Merrick at about 3:00 a. m. on May 30. Upon his arrival, Janke discovered that several desk drawers were open and that a window in the front of the building was broken. No property was found to be missing. Janke also testified that defendant was not authorized to be in the building.

Officers from the Salt Lake City Police Department testified regarding their investigation of the incident. Officers Barton and Jacobsen arrived at the Company and immediately handcuffed defendant. When ***858** they were met with resistance and hostility, they placed defendant on the floor, face down. Paramedics arrived and treated defendant's head wounds, after which he was transported to jail by Officer Kettenring.

The officers indicated that defendant seemed to be under the influence of alcohol at the time of his arrest. Officer Barton testified that although it was difficult to understand defendant and that he was not responding to questions, defendant was making sense in what he said. Officer Kettenring testified that, in his opinion, defendant was drunk but that his words were clear and understandable, and that defendant responded to questions and followed instructions. Officer Kettenring also testified that although he staggered slightly, defendant had no trouble walking to the jail from

the patrol car and that he appeared to be aware of what was going on around him.

Meredith Hess, employed in the medical dispensary at the Salt Lake County Jail, testified that when defendant arrived at the jail, she was asked to examine him for injuries. In her opinion, defendant's lacerations required medical treatment, but he refused to submit to any treatment. She testified that defendant appeared to be under the influence of intoxicants but that he responded coherently to her questions and requests.

Defendant took the stand and admitted to formerly having been convicted of the crime of burglary. He also testified that he became intoxicated on the night of May 29. He stated that he began to drink with friends at around noon, and that he drank about twelve cans of beer, one-third of a fifth of tequila, and one-third of a fifth of bourbon. At 3:00 p. m., defendant walked to a nearby bar where he drank beer until he was refused further service. He then left with a lady friend who drove her car to a liquor store. There, they purchased a pint of tequila, a pint of "Southern Comfort" and two six-packs of beer. The two sat in the car and drank before going to a "disco" on Redwood Road. Defendant said he didn't remember leaving the disco, or anything that happened thereafter.

Dr. Louis Moench also testified for the defense. Dr. Moench stated that if defendant drank what he said he did on the day in question, he would have been "seriously intoxicated." He further testified that the consumption of such an amount of alcohol would seriously impair one's ability to form intent. The doctor also felt that the lack of ability to form intent was in no way inconsistent with a person's ability to do more simple, "automatic" things, such as turning the handle of a door and opening it, breaking a window, or even driving a car. On cross-examination, Dr. Moench stated that it is possible for a person to be impaired and still to know that which he is doing, as well as to intend that which he is doing.

After weighing the evidence, the jury returned a verdict of guilty. Defense counsel moved for judgment notwithstanding the verdict, which motion was denied. This appeal followed.

[1] To be found guilty of burglary of a non-dwelling, a person must 1) enter or remain unlawfully in a building, not a dwelling, and 2) do so with the intent to commit a theft. Defendant admits that the first element is clearly satisfied in that he forced entry into the building, and that he was not authorized therein. Defendant challenges, however, the sufficiency of the evidence as it relates to his intent to commit a crime. Specifically, defendant claims that the evidence was insufficient to prove his intent to commit theft, although he admits that he unlawfully entered the premises. Furthermore, he contends that his intoxicated condition prevented him from forming the requisite specific intent to commit the crime.

[2] A person acts with intent when it is his conscious objective or desire to engage in the conduct or to cause the result. [2] Obviously, it is difficult to prove directly what ***859** is in a defendant's mind. As was stated in the case of State v. Peterson: [3]

> With respect to the intent: It is true that the State was unable to prove directly what was in the defendant's mind ... and that he in fact denied having any such intent. However, his version does not establish the fact, nor does it even necessarily raise sufficient doubt to vitiate the conviction. If it were so, it would be within the power of a defendant to defeat practically any conviction which depended upon his state of mind. As against what he says, it is the jury's privilege to weigh and consider all of the other facts and circumstances shown in evidence in determining what they will believe. This includes not only what was said and what was done, but also the drawing of reasonable inferences from the conduct shown .... This is in accord with the elementary rule that a person is presumed to intend the natural and probable consequences of his acts. (Citations omitted.) [4]

[3] On appeal, to successfully challenge a conviction on the grounds of insufficiency of the evidence, it must appear that when viewing the evidence (and all inferences that may reasonably be drawn therefrom) in the light most favorable to the verdict of the jury, reasonable minds could not believe the defendant guilty beyond a reasonable doubt. [5]

[4] **[5]** When one breaks and enters a building in the nighttime, without consent, an inference may be drawn that he did so to commit larceny. [6] The fact that nothing was missing when defendant was apprehended is no defense to the burglary charge; [7] nor does it destroy the

inference of intent to steal at the time of entry.[8] On the facts of this case, the jury could reasonably infer that defendant entered the building for the purpose of theft.

[6] Likewise, on the facts presented, the jury could reasonably conclude that defendant's intoxication did not negate his criminal intent. The court's instruction on this issue is consistent with statutory law[9] and reads as follows:

> Under the law, a **state** of voluntary intoxication from alcohol is not a defense to a criminal charge unless such intoxication is of such degree or **state** as to negate the existence of the mental **state** which is an element of the offense.
>
> Evidence of intoxication may thus be taken into consideration by the jury in connection with determining the intent with which any particular act may have been committed.
>
> Being under the influence of alcohol is no excuse for the commission of a crime where it merely makes a person more excited or reckless, so that one does things one might not otherwise have done. To be a defense to such a crime, one must be so under the influence of alcohol that at the time of the alleged offense, he was then and there incapable of forming the necessary intent, namely, having a conscious objective or desire to unlawfully enter the building with the intent to commit a theft.
>
> If from all the evidence you have a reasonable doubt whether the defendant was capable of forming the specific intent to steal the property of the Salt Lake Mill and Lumber Company, then you must find the defendant not guilty of the offense of Burglary.

***860** **[7]** The issue of intoxication was one for the jury's consideration.[10] There was evidence that defendant's condition was such that he could not have formed the requisite intent. There was also evidence that defendant was coherent, understood and followed directions, and was aware of what was going on around him. Although defendant was under the influence of alcohol at the time of the commission of the offense, the jury could reasonably conclude that defendant maintained the requisite intent to burglarize the premises. The jury verdict will therefore not be disturbed.

The conviction and judgment is hereby affirmed.

HOWE and OAKS, JJ., concur.

MAUGHAN, C. J., and STEWART, J., concur in the result.

All Citations

631 P.2d 856

Footnotes

1 In violation of U.C.A., 1953, 76-6-202.
2 U.C.A., 1953, 76-2-103(1).
3 22 Utah 2d 377, 453 P.2d 696 (1969).
4 Id. at 378, 453 P.2d 696.
5 **State** v. Mills, Utah, 530 P.2d 1272 (1975); see also, **State** v. Wilson, Utah, 565 P.2d 66 (1977).
6 **State** v. Hopkins, 11 Utah 2d 363, 359 P.2d 486 (1961); **State** v. Tellay, 7 Utah 2d 308, 324 P.2d 490 (1958).
7 **State** v. Baldwin, 29 Utah 2d 318, 509 P.2d 350 (1973).
8 Mirich v. **State**, Wyo., 593 P.2d 590 (1979).
9 U.C.A., 1953, 76-2-306.
10 Hopt v. People, 104 U.S. 631, 26 L.Ed. 873 (1881).

Tab 6

KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. Kallas, Utah, October 4, 1939

86 Utah 26
Supreme Court of Utah.

STATE
v.
GLEASON.

No. 5498.
|
Jan. 11, 1935.

Appeal from District Court, Salt Lake County; James H. Wolfe, Judge.

John A. Gleason was convicted of subornation of perjury, and he appeals.

Affirmed.

ELIAS HANSEN, J., and STRAUP, C. J., dissenting.

West Headnotes (15)

[1] **Criminal Law**
Perjury and subornation of perjury

Person suborned to commit perjury and suborner are accomplices as to perjury, so as to require proof thereof by two witnesses or one witness and corroborating circumstances, but not as to other elements of crime of subornation, such as inducement or procurement of commission of perjury and perjurer's testimony as to such matters need not be corroborated to sustain conviction. Rev.St.1933, 105-21-21, 105-21-24, 105-32-18.

6 Cases that cite this headnote

[2] **Criminal Law**
Discretion

Conduct of trial is largely under control and within discretion of trial judge, who is more than mere referee or moderator.

Cases that cite this headnote

[3] **Criminal Law**
Remarks and conduct as to argument and conduct of counsel

Trial judge's question to defendant's counsel as to whether witness, whom another witness said he had got for defendant and brought in, was present, and remarks that he understood that defendant would have his witnesses present and that he had waited three times for witnesses *held* justified as pertinent to ordinary progress and expedition of trial.

Cases that cite this headnote

[4] **Criminal Law**
Examination and cross-examination of witnesses

Trial judge, within reasonable bounds, may ask questions of witness for purpose of eliciting truth or clarifying any point otherwise obscure.

1 Cases that cite this headnote

[5] **Criminal Law**
Expressions as to weight and sufficiency of evidence and guilt of accused

Generally, trial judge, in exercise of his right to question witness, should not indulge in extensive examination or usurp counsel's function nor indicate to jury his opinion as to defendant's guilt or weight or sufficiency of evidence by form of question or manner or extent of examination.

6 Cases that cite this headnote

[6] **Criminal Law**
Expressions as to weight and sufficiency of evidence and guilt of accused

Trial judge's questions to witness in trial of attorney for subornation of perjury as to whether he knew or just thought that perjurer, who had testified that she did not know

defendant's client, "went with" latter, *held* not improper or prejudicial to defendant.

Cases that cite this headnote

[7] **Criminal Law**
Objections and exceptions

Generally, trial court's attention must be directed to alleged improper proceedings or incidents of trial by proper objections and his ruling obtained thereon before error can be predicated on them.

Cases that cite this headnote

[8] **Criminal Law**
Weight and Sufficiency of Evidence in General

Weight of evidence *held* for jury.

Cases that cite this headnote

[9] **Criminal Law**
Credibility of Witnesses

Credibility of witnesses is for jury.

Cases that cite this headnote

[10] **Criminal Law**
Opinion or Belief as to Facts

Trial judge should not express or otherwise indicate opinion as to witness' credibility, such matters being exclusively for jury.

Cases that cite this headnote

[11] **Criminal Law**
Guilt of defendant

Trial judge should not express or otherwise indicate opinion as to defendant's guilt, such matters being exclusively for jury.

Cases that cite this headnote

[12] **Perjury**
Subornation of perjury

Essential elements of crime of subornation of perjury are commission of perjury by person alleged to have been suborned and willful procurement or inducement of such person to commit perjury by alleged suborner with knowledge of falsity of testimony.

1 Cases that cite this headnote

[13] **Perjury**
Subornation of perjury

Evidence in trial of attorney for subornation of perjury *held* sufficient to support conviction.

Cases that cite this headnote

[14] **Perjury**
Number of Witnesses or Corroboration

Statutory rule that perjury must be proved by two witnesses or one witness and corroborating circumstances applies in trial for subornation of perjury. Rev.St.1933, 105-21-21.

1 Cases that cite this headnote

[15] **Perjury**
Questions for jury

Evidence in trial of attorney for subornation of perjury *held* sufficient to go to jury.

Cases that cite this headnote

Attorneys and Law Firms

***223** J. Vernon Erickson, of Richfield, for appellant.

Joseph Chez, Atty. Gen., and Zelph S. Calder, Deputy Atty. Gen., for the State.

Opinion

FOLLAND, Justice.

Defendant was convicted of subornation of perjury and appeals. The alleged errors relied on for a reversal of the judgment are these: (1) That the evidence was insufficient

to support the verdict; (2) that the trial judge erroneously "cross-examined certain witnesses of the defendant as to material and immaterial facts *** which indicated to the jury the Court's opinion as to the credibility" of the witnesses to the prejudice of defendant; and (3) that the making of certain remarks by the trial judge "to defendant's counsel was prejudicial to the defendant in the minds of the jury."

The record discloses that defendant, an attorney at law practicing in Salt Lake City, was engaged in the conduct of the defense of one Pete Humphries charged with second degree burglary, who was tried in the district court of Salt Lake county commencing on the 16th of September, 1932. The burglary was alleged to have been committed by Humphries in Salt Lake county on or about the 23d day of July, 1932. Grace Royce testified at the Humphries trial, on behalf of the defendant, that she, together with Pete Humphries and certain other young people including her brother Victor, on the 21st of July, 1932, went from Salt Lake City to Fish Lake in Sevier county and stayed at a certain cabin, known as the Neill cabin, continuously from the 21st of July to and including the 26th of July, 1932, and during all that time Pete Humphries was absent from Salt Lake county, Utah. Victor Royce also testified to the same effect at the Humphries trial. Notwithstanding this attempt to prove an alibi for Humphries, he was convicted by the jury. Grace Royce and Victor Royce were afterwards charged with the crime of perjury, because of their testimony in the Pete Humphries trial and were convicted.

[1] In the present case it is charged that the alibi testimony given at the Humphries trial by Grace Royce was false and untrue, was known by Grace Royce and the defendant John A. Gleason to be false and untrue, and that the defendant "did wilfully, knowingly, unlawfully and feloniously solicit, suborn and procure" Grace Royce to commit the crime of perjury by the giving of such testimony under oath in the Humphries trial. That the alibi story of Grace Royce to the effect that she, Pete Humphries, and the others were at Fish Lake from July 21 to July 26, 1932, was shown to be false and untrue by the testimony of Grace and Victor Royce and also by stipulations of the defendant to the effect that Pete Humphries ***224** was not at Fish Lake between the named dates and that the Neill cabin was occupied by persons other than those mentioned by Grace Royce. All elements of the crime were established by sufficient competent evidence, except the charge that the defendant Gleason had procured Grace Royce to give the false testimony and as to that the case rests on the testimony of Grace Royce. The substance of her testimony follows: She is seventeen years of age. She had not known Pete Humphries prior to the day of his trial, but had known his brother Lee Humphries since June of 1932, and had been in his company several times prior to September 15, 1932. On the evening of September 15th, Lee Humphries called at her home and requested that she and her mother, Florence Neill, accompany him to the home of John A. Gleason. They called for a girl named Nina Morley, who joined the party, and then proceeded to the home of Gleason some time after 9 o'clock where she and her mother were introduced to Gleason whom they had never met before. In introducing them Humphries said, "I brought these people up for witnesses." Gleason asked her if she knew Pete Humphries and she said, "Well I don't know Pete, I have never seen him, I could not identify him I know." He also asked her if she had a cabin at Fish Lake, and she answered, yes that it belonged to her "step dad." Whereupon Gleason said, "We will say you met Pete Humphries on the 18th of July and he came up to see you on the 19th; we will say that he came up to see you and you planned a party for the 24th of July, we will say you went down to Fish Lake on a party on the 21st of July and stayed until the 26th." He took a calendar and showed her what days this would be in July and said, "Now do not get your dates mixed, they are from the 21st to the 26th." The story she was to tell was "that I left home on the morning of the 21st with Victor Royce and Nina Morley and Ike Ernsten and Pete Humphries and myself in a car to go to Fish Lake from Salt Lake, and that we were to return on the night of the 26th. That we could pass the time by going out on the lake and going up to Skougard's to a dance. That he wanted us at Fish Lake, that he wanted me to tell we were at Fish Lake during those days because he wanted it to appear that Pete wasn't in town on those days." She testified Gleason wrote the outlines of the story on a paper and handed it to her. The paper was not produced at the trial. The next day at the Pete Humphries trial she gave evidence under oath of the alibi story outlined above. At the recess of the court, after her cross-examination, Gleason said to her, "I think Thurman knows more about the case than we do; I think he knows more about Fish Lake than we know." This reference was to Allen G. Thurman, who, as assistant district attorney, represented the state in the Pete Humphries trial and had subjected her to cross-examination. It appears that Judge Thurman was at Fish Lake over the 24th of July and had

visited with the persons who were in occupancy of the Neill cabin at that place.

Victor Royce testified he gave evidence at the Pete Humphries trial to the effect that he and Pete Humphries and the other persons named by his sister occupied the Neill cabin at Fish Lake from July 21st to July 26th. Because of such testimony, he had been convicted of perjury and was then serving his sentence in the Utah state prison. He was not at the Gleason home with his sister and the others on the night of the 15th, but the next morning he received from his sister a paper with the outline of the story on it. On cross-examination he testified:
"Q. About eight o'clock that night you talked to Lee Humphries about what your story would be the next day for his brother, didn't you? A. We didn't have a story made up.

Q. Didn't you say you just talked about your story? A. He was trying to think of a story.

Q. When did he have it run up? A. The next morning my sister gave me a paper with the outline of the story on it.

Q. Where is that paper now? A. I don't know."

The defendant, Gleason, took the stand and denied that he had told Grace Royce to testify as she had stated. He said the persons named by Grace and one other, Otto Clegg, had come to him on the night of the 15th of September; that he was told by Grace that Pete Humphries had been with her and others at Fish Lake from the 21st to the 26th of July; and that she would so testify on the morrow.

This testimony was in part corroborated by Otto Clegg who said he was present during the conversation and heard Grace Royce relate the story first to Gleason. Grace Royce and her mother, Mrs. Neill, both testified that Otto Clegg was not present at the Gleason home with them. Mrs. Neill was not examined with respect to what had occurred at the Gleason home. Mrs. John A. Gleason, ***225** wife of the defendant, Earl H. Thompson, and Ada Thompson, his wife, all testified they were at the Gleason home in the kitchen during the time Grace Royce and the others were present with Gleason in the front room; that they overheard parts of the conversation, though not all, and had heard Gleason caution Grace against perjury when she at one time mentioned the 4th of July instead of the 24th as the time of the Fish Lake party. They did not hear him instruct her to testify to the alibi story. Lee Humphries testified he was present during a part of the conversation and did not hear Gleason instruct Grace to testify as she had indicated. Further elaboration of the evidence is unnecessary because, notwithstanding the conflict in the testimony, it was sufficient to go to the jury and support the verdict of guilty unless, as a matter of law, Grace Royce must be corroborated as to the alleged subornation, and further, unless the corroboration of Grace's testimony, if any, is insufficient to connect the defendant with the crime. That the Fish Lake alibi story was concocted by Gleason, and Grace suborned by him to testify to the false alibi, rests alone on the testimony of Grace.
[2] A large part of appellant's brief is devoted to a recitation of the testimony of the defendant with a view of comparing and weighing the evidence and testing the credibility of Grace Royce. With this we are not concerned because credibility of witnesses and weight of the evidence is exclusively for the jury.

It is contended by appellant that the evidence as to subornation does not meet the "required quantum of proof" in that she was not corroborated on this point, apparently on the theory that she and Gleason were accomplices under our statute, R. S. Utah 1933, 105-21-24, defining who are principals, and 105-32-18, which provides that: "A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof."

The statute, with respect to perjury and subornation of perjury, inter alia, provides: "Perjury must be proved by the testimony of two witnesses, or one witness and corroborating circumstances." R. S. Utah 1933, 105-21-21.

It will be noted the statute requires two witnesses, or one witness and corroborating circumstances, as to proof of perjury, but it is silent on the subject of whether corroboration is required as to subornation.
[3] In the crime of subornation of perjury, two essential elements are present: (1) The commission of perjury by the person alleged to have been suborned, and (2) a willful

procuring or inducing such person to commit perjury by the alleged suborner, he knowing of its falsity. As already seen, the fact that perjury was committed is abundantly proved. It only remains to determine whether the alleged procuring of the witness to testify falsely, with knowledge on the part of the defendant of the falsity of the testimony, may be proved by one witness.

The only cases cited by appellant, in support of the view that the testimony of the person who committed the perjury in a prosecution for subornation is not sufficient unless corroborated, are People v. Evans, 40 N. Y. 1; In re Francis, 1 City H. Rec. 121 (N. Y.). People v. Evans, supra, was decided in 1869. This decision was bottomed on the statute of New York which made incompetent as a witness a person who had been convicted of perjury. The witness in that case was a self-confessed perjurer but had not then been convicted of the crime. The perjury and the subornation were sought to be proved by the evidence of this witness alone. The court held that while the witness was not incompetent to testify, because not having been convicted, his uncorroborated testimony was insufficient to support a conviction. The case of In re Francis, supra, is the record of trial in the court of the General Sessions of the Peace for the city and county of New York in the year 1916. The defendant was charged with subornation of perjury. The jury was instructed that while the rule in cases of perjury requires the falsity of the oath to be proved by at least two witnesses in the case of subornation, "where the two witnesses, whose oaths are alleged to be false, confess the perjury, the rule applicable to perjury, or the reason for such rule, does not apply. *** Though the law has pronounced these competent witnesses, the court is bound to say, that it would be wholly unsafe to rely on their testimony unless strongly fortified."

[4] In jurisdictions where, under the recognized rule of evidence, perjury must be proved by two witnesses, or one witness and corroborating circumstances, the same rule extends to proof of the perjury in cases of subornation. ***226** Hammer v. United States, 271 U. S. 620, 46 S.Ct. 603, 70 L. Ed. 1118; Cohen v. United States (C. C. A.) 27 F.(2d) 713.

[5] The doctrine announced by nearly all state and federal courts, where decisions have been rendered, is, in cases of subornation, that the suborned and the suborner are accomplices as to the perjury, and as to that two witnesses are required, or one witness and corroborating circumstances, but as to other elements of the crime such as inducing or procuring the perjury to be committed they are not accomplices, and testimony as to such matters by a person alleged to have been suborned need not be corroborated to sustain a conviction. 21 R. C. L. 276. See note 56 A. L. R. 412.

Probably the leading case on the subject is that of State v. Renswick, 85 Minn. 19, 88 N. W. 22, wherein it was said: "The completed crime of subornation of perjury consists of two essential elements,—the commission of perjury by the person suborned, and the willfully procuring or inducing him to so do by the suborner. Gen. St. 1894, § 6379. As to the first element of the crime, the suborned and the suborner are principals by virtue of the statute (Id. § 6310), and necessarily each is the accomplice of the other; hence this element of the crime cannot be established by the uncorroborated evidence of the suborned (Id. § 5767). But as to the second element of the crime, the suborned is neither a principal nor an accomplice, for legally he cannot be guilty of persuading himself to commit perjury. An indictment of a party for inducing himself to commit a crime would be a legal absurdity. State v. Pearce, 56 Minn. 231, 57 N. W. 652, 1065; State v. Sargent, 71 Minn. 31, 73 N. W. 626; State v. Durnam, 73 Minn. 150, 75 N. W. 1127. The conclusion logically follows that if, in the prosecution of a party for subornation of perjury, it is sought to establish the fact that perjury was committed by the testimony of the person committing it, his testimony must be corroborated as to such fact, because as to the perjury he is an accomplice. But the alleged fact that he was induced to commit the crime by the accused may be established by his uncorroborated testimony if it satisfies the jury beyond a reasonable doubt."

The rule thus announced is approved in both state and federal courts. Cohen v. United States, supra; Commonwealth v. Douglass, 5 Metc. (Mass.) 241; Stone v. State, 118 Ga. 705, 45 S. E. 630, 98 Am. St. Rep. 145; Bell v. State, 5 Ga. App. 701, 63 S. E. 860; State v. Wilhelm, 114 Kan. 349, 219 P. 510; State v. Ruskin, 117 Ohio St. 426, 159 N. E. 568, 56 A. L. R. 403; State v. Smith, 153 Minn. 167, 190 N. W. 48; Bradley v. Commonwealth, 245 Ky. 101, 53 S.W.(2d) 215. In at least two jurisdictions the above rule has been followed where they have statutes similar to R. S. Utah 1933, 105-21-24, defining who are principals, where by statute accomplices are required to be corroborated as provided in R. S. Utah 1933, 105-32-18. State v. Renswick (Minn.) and State v. Stone (Ga.), supra. In some jurisdictions it is held the suborner and

suborned are not accomplices at all, and in a prosecution for subornation of perjury the evidence of one witness, if believed, is sufficient. Strader v. Commonwealth, 240 Ky. 559, 42 S.W.(2d) 736; Conn v. Commonwealth, 234 Ky. 153, 27 S.W.(2d) 702; State v. Richardson, 248 Mo. 563, 154 S. W. 735, 44 L. R. A. (N. S.) 307; State v. White (Mo. Sup.) 263 S. W. 192; State v. Pratt, 21 S. D. 305, 112 N. W. 152; United States v. Thompson (C. C.) 31 F. 331; Boren v. United States (C. C. A.) 144 F. 801.

New York cases in the lower courts hold that a suborner and suborned are joint principals, and therefore accomplices requiring corroboration under statutes similar to ours. People v. Markan, 123 Misc. 689, 206 N. Y. S. 197; People v. Martin, 77 App. Div. 396, 79 N. Y. S. 340; and see, also, State v. Fahey, 3 Pennewill (Del.) 594, 54 A. 690. This, however, is contrary to the decision of this court in State v. Justesen, 35 Utah, 105, 99 P. 456, wherein it was held (citing headnote) that: "Perjury and subornation of perjury are separate and distinct offenses, and one charged with subornation of perjury is not an accessory of the one committing the perjury."

We are inclined therefore to follow the cases which hold that as to the subornation charged the evidence of one witness is sufficient to support a verdict where the jury believed beyond a reasonable doubt that the witness has told the truth. The jury, of course, are the sole judges of the weight of the testimony and credibility of the witnesses.

The second ground urged for reversal is that prejudicial error was committed by the trial judge in "cross-examining" certain witnesses for the defendant. No objection is made that the questions asked by the court elicited testimony that was incompetent, irrelevant, or immaterial, or were otherwise improper if such questions had been asked by counsel for either side. The basis of the objection is that the trial judge ought not to have examined the witnesses at all, and that in asking the questions the judge indicated an opinion with respect to the credibility of the ***227** witnesses examined, or, perhaps, as to the defendant's guilt, all to defendant's prejudice before the jury.

[6] [7] [8] [9] The conduct of a trial is to a large extent under the control and within the discretion of the trial judge who should preside with dignity and impartiality. He is more than a mere referee or moderator. State v. Keehn, 85 Kan. 765, 118 P. 851. He should not express, or otherwise indicate, an opinion as to the credibility of the witness or the guilt of the defendant. Such matters are exclusively for the jury. The practice is well established for the trial judge, within reasonable bounds, to ask questions of any witness who may be on the stand for the purpose of eliciting the truth, or making clear any points that otherwise would remain obscure. 16 C. J. 831; People v. Reid, 72 Cal. App. 611, 237 P. 824. It is generally held that in the exercise of his right to question a witness, the judge should not indulge in extensive examination or usurp the function of counsel. In a criminal case he should not by form of question or manner or extent of examination indicate to the jury his opinion as to the guilt of the defendant or the weight or sufficiency of the evidence. Note 84 A. L. R. 1172; 28 R. C. L. 587. His examination should not be extensive because it is a matter of much difficulty for any person to indulge in an extensive examination of the witness without indicating a train of thought or some feeling with respect to the truth or falsity of the testimony being elicited. His attitude should at all times be fair and impartial so that neither by tone of voice, facial expression, nor manner of propounding a question is bias shown which may prejudice the defendant's right to a fair and impartial trial. A trial judge is within his rights in asking questions for the purpose of eliciting the truth or to clear up an obscurity. People v. Jenkins, 118 Cal. App. 116, 4 P.(2d) 799. But in doing so, sincerity and fairness should characterize his every word and action.

No question is made with respect to the physical demeanor of the judge. It may be assumed therefore there was not anything objectionable in his expression, inflection of voice, or manner of propounding the questions.

[10] Several witnesses were examined by the judge after counsel for each side had finished their examination, but only in one instance was any objection noted by counsel for defendant, and in this instance objection was not made to the form or subject-matter of the question, but merely to the fact that the court undertook to ask any questions at all. We shall first refer to the incident where the objection was made to the examination by the judge. The witness Myron Scott had been fully examined by both counsel when the following occurred:

"The Court: Let me ask you one question, Mr. Scott, that is not quite clear to my mind.

Mr. McKnight: (counsel for defendant) Now, may it please your honor, we shall object to the court cross-examining the witness. We consider that it is improper, prejudicial. By reason of the fact of the superior influence and prestige any court has with the jury, we think it is

not fair and proper. The court is an arbitrator and not a partisan.

The Court: This is not cross-examination. This is just examination. The objection will be overruled.

Mr. McKnight: Note an exception.

The Court: Now, Mr. Scott, you say you volunteered the information that she went with Pete Humphries, you volunteered to Mr. McKnight the information that she went with Pete Humphries. What I wanted to know was whether you knew that she went with Pete Humphries, or whether you just thought so? A. I knew because she told me she did.

The Court: You were not confused as to whether she went with Lee Humphries or Pete Humphries? A. No, because I have met friends of Pete.

The Court: No, just answer that. A. I know it was Pete."

The "she" mentioned in the questions and answers referred to Grace Royce who had testified that she did not know Pete Humphries. For purpose of laying foundation for impeachment, she had been asked by defense counsel if at a certain time and place she had not said to Myron Scott in words and substance, "Yes, I know Pete Humphries, I have been out with him several times." She denied so saying. Scott was called in impeachment and testified he had such a conversation with Grace Royce. The judge's questions seem to have been propounded in all fairness and sincerity for the purposes of clearing up an obscurity with respect to Scott's statement that "she went with Pete Humphries." The answers removed any uncertainty as to whether the witness was testifying from personal knowledge or merely from what the girl had told him. They were in harmony with his previous testimony and in no way tended to cast doubt on his credibility before the jury. Certainly there was not anything in the questions or the manner ***228** of asking them that would indicate to the jury any opinion held by the judge as to the credibility of the witness or guilt of the defendant, or that could in any way prejudice the defendant before the jury.

[11] No objection was made or exception taken to the judge's examination of the witnesses Mrs. John A. Gleason, Earl H. Thompson, and Lee Humphries. Objection to this conduct on the part of the judge is made for the first time in this court. The state has argued that this court cannot review such objection on appeal since the trial court's attention was not called to the matter by either objection or exception. It is the general rule that "before error can be predicated upon proceedings or incidents of the trial which are deemed objectionable the attention of the trial court must be directed to the matter by proper objections and his ruling obtained thereon." State v. Lanos, 63 Utah, 151, 223 P. 1065, 1067. In that case conduct of the trial judge was not involved, but merely conduct of the district attorney to which no objection had been made at the trial. The above rule is a wholesome one and is generally followed. Nevertheless, we hesitate to say that under no circumstances can or should the appellate court review alleged prejudicial conduct of the trial judge in a criminal case when the objection is made for the first time on appeal. Without definitely passing on that question, it is sufficient for the purpose of this case to say that we have read all the testimony of the witnesses in an endeavor to learn whether there was anything in the questioning by the trial judge which could, in any way, be regarded as an abuse of discretion or prejudice to any substantial right of the defendant. We are of the opinion that no such abuse or prejudice is shown. The questions were fair and the testimony given in response thereto not prejudicial. The practice of questioning by a judge is not to be recommended or encouraged because even with the best of intentions a judge in all sincerity may carry his examination too far and unwittingly prejudice a defendant before the jury. The situation here, however, is far from being one calling for a reversal on the ground that the jury was prejudiced against the defendant by the conduct of the judge. People v. Miller, 114 Cal. App. 293, 299 P. 742.

Appellant has strongly relied on the case of State v. Freitag, 53 Idaho, 726, 27 P.(2d) 68, where it was held that the examination of the defendant by the court left the inference the court believed the defendant guilty of the offense charged. That decision, which was by a divided court, places a rather unusual limitation on the right of a trial judge to examine. A comparison of the testimony elicited by the judge in that case with the record before us indicates a clear distinction between the two cases.

That case is also relied on as furnishing support to the view that no objection need be made to the conduct of a trial judge in order to have such conduct reviewed on appeal. The court there based its decision on a statute of Idaho that any "judicial act" in a criminal action occurring

before or after judgment shall be deemed excepted to and need not be embraced in the bill of exceptions. The court held the act of the judge in asking questions to be a judicial act which could, by virtue of the statute, be reviewed without objection or exception made or taken at the trial. Since we have no such statute in this state, the decision is not in point.

[12] The third assignment relates to certain remarks by the trial judge to counsel for the defendant claimed by appellant to have been prejudicial. The discussion out of which this assignment arose took place at about 12 o'clock noon. A witness, Earl H. Thompson, had been examined by counsel with respect to a conversation with defendant immediately prior to taking the witness stand. Counsel for the state asked whether the conversation was pertaining to the case. The witness hesitated to state the conversation when the defendant's attorney said, "Just tell what it was." Whereupon he answered that he told the defendant he had gone out and got a witness for him, a Mr. Lee Humphries. The district attorney then asked, "Did you find him? A. Yes sir. Q. Did you bring him? A. Yes sir." At the close of the examination of this witness by defense counsel, the following occurred:

"The Court: Where is the witness, Mr. Thompson? A. He is going to call me at my home. I told him to call me, I would be at home at twelve o'clock. I didn't think, being as late as it was, it would be necessary for him to go on the stand. He was going to call me at my home when I went home for lunch.

The Court: Then he is not in the building? A. No, sir.

The Court: I understood him to say on the stand he was sent out for a witness and brought him in here.

Mr. McKnight: He didn't say he brought him here. (Record read.)

The Court: 'Did you find him?' 'Yes.' 'Did you bring him here?' 'Yes.' Now, is he here?

***229** Mr. McKnight: Let the record show that we take an exception to the language of the court.

The Court: The court wants to go on with this case, Mr. McKnight and I want to know whether—the witness said on the stand that he brought him and now he says he isn't here.

Mr. McKnight: We take further exception to the remarks of the court as being prejudicial, in the presence of the jury, and we want the record to show that it is now six minutes after twelve o'clock, and that we are willing to produce the witness here any time within five or ten minutes. We will either produce him at two o'clock, or at this time, if the court insists, within five minutes.

The Court: You can also let the record show that I waited twenty minutes to get Mr. Thompson here, and at that time I understood you would have your witnesses here.

Mr. McKnight: Let the record show that we have no means of informing the court just when they would be here, that the witness informed us they would be here at eleven o'clock and we relied upon their statement.

The Court: Well, there is no disposition to cut you off from any of your witnesses, but we must go on with this case, and we can't just simply let the matter run according to the way counsel thinks it ought to be done."

After further discussion, counsel for defendant said he would have the witness in court in five or ten minutes. Thereupon the following occurred:

"The Court: We will take another short recess.

Mr. McKnight: I want the record to show that we take an exception to the adjournment, except to two o'clock, at this time. I see no reason why this case should now run over the noon hour in order to force a witness of the defendant in here.

The Court: This court is running this court room.

Mr. McKnight: May I complete my record? We take exception to the attitude of the court and to the rulings now made as prejudicial to the interests of the defendant in this case. (12:10 P. M. Jury admonished; recess.) (12:25 P. M. Court reconvened; all jurors present; defendant personally present.)

The Court: Have you got your witnesses?

Mr. McKnight: We have no witness here. I would like to ask the court—I haven't had an opportunity to talk with this witness, and I will ask the indulgence of the court that we adjourn until two o'clock to give me an opportunity

—I understand he is a hostile witness. We have done everything to try to get him.

The Court: Well, in that case I don't see any use of holding the jury any longer during the lunch hour."

Later in the case and before defendant rested, defense counsel asked for an additional recess in order to bring in another witness. Then the following occurred:
"The Court: I recessed at twenty-five minutes of four—it is now four o'clock—for twenty-five minutes. The Ness Building isn't more than three or four blocks away. I have three times, Mr. Erickson, been waiting for witnesses.

Mr. Erickson: (Counsel for defendant) I think you have been fair.

The Court: I don't see how I can just keep doing that.

Mr. Erickson: Go ahead, your honor. The testimony is just practically the same as the brother's. We rest."

As we have already stated, the conduct of the case is largely under the control of the presiding judge who has considerable discretion as to matters of procedure and the expedition of the business of the court. The remarks of the judge were pertinent to the matter in hand; that is, the ordinary progress and the expedition of the trial. The court was merely trying to determine whether the witness was available at that time. After repeating what Mr. Thompson had said about bringing the witness "here," he asked counsel, "Now, is he here?" There had already been some delay because of defendant's witnesses being absent from the court when called to testify. Recess had been taken for the purpose of allowing defendant time in which to bring his witness in court. The witnesses in court had been placed under the rule against speaking with each other as to their testimony given or to be given in the cause and undoubtedly the court had the right to learn if the witness were present so that he could be placed under the rule even though time might not permit of examination before the noon recess. We think the remarks were justified under the circumstances and the judge did not transgress against the rule. Almond v. People, 55 Colo. 425, 135 P. 783. That counsel for defendant believed the court had acted fairly is indicated by his remark quoted above. While this remark could not be said to be a withdrawal of the objection and exception to the judge's remarks, and we do not so regard it, it does, however, indicate the court's patience with counsel and counsel's ***230** belief that the defense had not been treated unfairly.

The judgment of conviction is affirmed.

EPHRAIM HANSON and MOFFAT, JJ., concur.

ELIAS HANSEN, Justice.

I dissent. Admittedly, if Grace Royce, the witness alleged to have been suborned, is to be regarded as an accomplice within the meaning of R. S. Utah 1933, 105-21-24, the judgment appealed from must be reversed. There is no evidence which in itself, and without the aid of her testimony, tends to connect the defendant with the commission of the charged offense. There are two lines of authority dealing with the question in hand. One line of cases holds that subornation of perjury is a separate and distinct crime from that of the resulting perjury and that a perjurer, who is persuaded to and does commit perjury, is neither a principal nor an accomplice of the one who suborns the commission of perjury. Cases so holding are collected in the prevailing opinion. I readily concede that one who is persuaded to and does commit perjury is not guilty of the crime of subornation of perjury. The converse, however, is not true under a statute such as our R. S. Utah 1933, 103-1-44. If the accused persuaded Grace Royce to commit perjury and by reason of such persuasion she did commit that crime, there is no escape from the conclusion that the accused was himself guilty of that crime. The provisions of the statute above referred to are clear as to that. The adjudicated cases so hold. Hammer v. U. S., 271 U. S. 620, 46 S.Ct. 603, 70 L. Ed. 1118. Had the accused been charged with and tried for perjury, no one would contend that he could lawfully be convicted of such crime upon the uncorroborated testimony of the perjurer, yet the act of persuading her to commit perjury, if she was so persuaded, and the actual commission thereof, are a part of one transaction. Had the information filed against the accused charged him with having committed perjury, the fact, if it be a fact, that he persuaded Grace Royce to testify falsely would have supported such charge. To hold that because the information characterized the acts which the accused is charged with having committed as being subornation of perjury rather than perjury, relieved the state from the necessity of producing corroborative evidence is to turn shadow into substance. The character or the degree of proof required to sustain a conviction of

the accused may not be said to hang upon so frail a thread as the mere fact that the acts complained of are labeled subornation of perjury rather than perjury. It is evident that the reason for the legislative provisions prohibiting the conviction of an accused upon the uncorroborated testimony of an accomplice is that such testimony is not entitled to full credit. Obviously, the reliability of such testimony would neither be weakened nor strengthened by the nature of the charge filed against the accused; that is, whether the charge be perjury or subornation of perjury. In either event, the perjurer has the same motive for attempting to place a part or the whole blame for her crime upon another. The fact that upon the alleged acts the accused may properly be charged with either perjury or subornation of perjury is a mere incident, but the fact that the prosecuting witness was particeps criminis in the acts relied upon by the state to sustain the conviction here under review is of the very essence of the basis for the statutory requirement that a lawful conviction may not be had upon her uncorroborated evidence. Among the cases from other jurisdictions so holding are: People v. Coffey, 161 Cal. 433, 119 P. 901, 907, 39 L. R. A. (N. S.) 704; People v. Markan, 123 Misc. 689, 206 N. Y. S. 197; People v. Martin, 77 App. Div. 396, 79 N. Y. S. 340. Such is the uniform holding of this court. State v. Wade, 66 Utah, 267, 241 P. 838; State v. Coroles, 74 Utah, 94, 277 P. 203. In those cases it was held, quoting from the case of People v. Coffey, supra, that the true test is that, "if in any crime the participation of an individual has been criminally corrupt, he is an accomplice. If it has not been criminally corrupt, he is not an accomplice." It cannot be successfully maintained that Grace Royce was not criminally corrupt in the crime under review.

The law requiring corroboration of an accomplice is especially applicable to a case where a conviction is sought upon the uncorroborated evidence of a perjurer. It may be argued with plausibility that the mere fact that one has participated in a crime not involving a lack of veracity does not necessarily indicate that such person is unworthy of belief, but not so where the state relies upon the testimony of a perjurer for a conviction. In the latter case the state cannot vouch for the veracity of its witness, but, on the contrary, it must establish as a part of its case the fact that such witness is a perjurer.

Upon principle, as well as upon the authority of the cases from this and other jurisdictions ***231** heretofore cited, I am of the opinion that the judgment should be reversed and a new trial granted.

STRAUP, Chief Justice.

I concur in the dissent. The person committing perjury and the person suborning the commission of it are both directly connected with and involved in the same criminal and unlawful act, both participating and uniting in the commission of a crime growing out of the same transaction, and, under the statute, both indictable and punishable. For further views entertained by me on the question of an accomplice, I refer to that portion of my concurring opinion on such question or subject in the case of State of Utah v. Cragun, filed December 14, 1934 (Utah) 38 P.(2d) 1071.

All Citations

86 Utah 26, 40 P.2d 222

Tab 7

75A Am. Jur. 2d Trial § 714

American Jurisprudence, Second Edition
November 2016 Update

Laura Hunter Dietz, J.D.; Romualdo P. Eclavea, J.D.; Alan J. Jacobs, J.D.; Jack K. Levin, J.D.; Lucas Martin, J.D.; Jeffrey J. Shampo, J.D.; Eric C. Surette, J.D.; and Eleanor L. Grossman, J.D.; Glenda K. Harnad, J.D.; Anne E. Melley, J.D.; and Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.

Trial
VII. Taking Case from Jury
A. In General
1. Propriety of Taking Case from Jury
b. Significance of Jury in Testing Evidence

§ 714 Reasonable minds test of jury question

Topic Summary Correlation Table References

West's Key Number Digest

West's Key Number Digest, Criminal Law 731, 750, 752 to 753.1
West's Key Number Digest, Federal Civil Procedure 2111, 2114.1, 2126.1
West's Key Number Digest, Trial 139.1(2) to 139.1(4), 139.1(5.1)

In general, the court is not justified in withdrawing the case from the jury where there is an issue of fact upon which reasonable minds might disagree. [1] If there is conflicting evidence, and any view that the jury might lawfully take of it will sustain their findings for either party, the facts should not be withdrawn from them. [2] Thus a district court errs in entering judgment as matter of law if a reasonable jury could make findings contrary to the judgment. [3]

A fact finder should take a case from the jury only if facts are so clear that reasonable persons could not disagree as to their evidentiary significance. [4] However, the case may be taken from the jury if no rational jury could find against the moving party. [5]

Footnotes

1 Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 80 S. Ct. 173, 4 L. Ed. 2d 142 (1959); In re Torregano's Estate, 54 Cal. 2d 234, 5 Cal. Rptr. 137, 352 P.2d 505, 88 A.L.R.2d 597 (1960); Pearce v. State, 880 So. 2d 561 (Fla. 2004); Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206 (Iowa Ct. App. 1986); In re Estate of Mapes, 738 S.W.2d 853 (Mo. 1987); Ferdinand v. Agricultural Ins. Co. of Watertown, N. Y., 22 N.J. 482, 126 A.2d 323, 62 A.L.R.2d 1179 (1956); Shields v. Prudential Ins. Co. of America, 6 N.J. 517, 79 A.2d 297, 26 A.L.R.2d 392 (1951); Daughtry v. Cline, 224 N.C. 381, 30 S.E.2d 322, 154 A.L.R. 789 (1944); Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934).
If reasonable minds can differ as to the evidence and inferences legitimately deduced therefrom, a motion for judgment must be denied. Verdicchio v. Ricca, 179 N.J. 1, 843 A.2d 1042 (2004).
As to the duty of the court to withdraw a case from the jury where the evidence is insufficient, see § 718.

2 Bayshore Development Co. v. Bonfoey, 75 Fla. 455, 78 So. 507 (1918).

3 Canutillo Independent School Dist. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 99 F.3d 695, 113 Ed. Law Rep. 1108 (5th Cir. 1996) (involving an insured's claims under the Texas insurance code and deceptive trade practices law).

4 Education Resources Institute, Inc. v. Cole, 2003 PA Super 225, 827 A.2d 493 (2003).

5 J.E.K. Industries, Inc. v. Shoemaker, 763 F.2d 348, 41 U.C.C. Rep. Serv. 83 (8th Cir. 1985).

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75A Am. Jur. 2d Trial § 719

American Jurisprudence, Second Edition
November 2016 Update

Laura Hunter Dietz, J.D.; Romualdo P. Eclavea, J.D.; Alan J. Jacobs, J.D.; Jack K. Levin, J.D.; Lucas Martin, J.D.; Jeffrey J. Shampo, J.D.; Eric C. Surette, J.D.; and Eleanor L. Grossman, J.D.; Glenda K. Harnad, J.D.; Anne E. Melley, J.D.; and Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.

Trial
VII. Taking Case from Jury
A. In General
2. Tests of Sufficiency of Evidence; Definitions and Distinctions
a. In General

§ 719 Common-law tests

Topic Summary Correlation Table References

West's Key Number Digest

West's Key Number Digest, Federal Civil Procedure 2111, 2114.1
West's Key Number Digest, Trial 134, 136(1)

Treatises and Practice Aids

Federal Procedure, L.Ed. §§ 22:1432, 62:785 to 62:788

The common law provides the following three methods by which a party may test the sufficiency of the evidence to support a case in the course of a trial:[1] (1) a demurrer to the evidence;[2] (2) a motion for nonsuit;[3] and (3) a motion for directed verdict.[4]

In addition, in some jurisdictions, the sufficiency of the evidence, and the merits of the action, may be tested by a motion for involuntary dismissal.[5]

Under the common law, the differences in the methods of testing the legal sufficiency of the evidence generally are matters of form rather than of substance.[6] However, it is not to be understood that a motion for a compulsory nonsuit, a motion for a directed verdict, and a demurrer to the evidence are equivalents.[7] When it is said that they are analogous, this only means that for the purpose of each, the evidence must be taken most strongly in favor of the opposite party.[8]

CUMULATIVE SUPPLEMENT

Cases:

A proposition has been established as a matter of law when a reasonable finder of fact could draw only one conclusion from the evidence presented. RAJ Partners, Ltd. v. Darco Const. Corp., 217 S.W.3d 638 (Tex. App. Amarillo 2006).

[END OF SUPPLEMENT]

Footnotes

1 Fagerberg v. Phoenix Flour Mills Co., 50 Ariz. 227, 71 P.2d 1022 (1937); Hopkins v. Nashville, C. & St. L. R. R., 96 Tenn. 409, 34 S.W. 1029 (1896); Thoe v. Chicago, M. & St. P. Ry. Co., 181 Wis. 456, 195 N.W. 407, 29 A.L.R. 1280 (1923).

2 §§ 720, 721, 903 to 906.

3 §§ 722 to 724, 736 to 765.

4 §§ 727 to 735, 782 to 902.

5 §§ 725, 766 to 781.

6 Oscanyan v. Arms Co., 103 U.S. 261, 26 L. Ed. 539, 1880 WL 18888 (1880).

7 Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 879 (1913).

8 Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 879 (1913).

75A Am. Jur. 2d Trial § 817

American Jurisprudence, Second Edition
November 2016 Update

Laura Hunter Dietz, J.D.; Romualdo P. Eclavea, J.D.; Alan J. Jacobs, J.D.; Jack K. Levin, J.D.; Lucas Martin, J.D.; Jeffrey J. Shampo, J.D.; Eric C. Surette, J.D.; and Eleanor L. Grossman, J.D.; Glenda K. Harnad, J.D.; Anne E. Melley, J.D.; and Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.

Trial
VII. Taking Case from Jury
D. Direction of Verdict; Judgment as a Matter of Law
4. Effect of Motion
a. In General

§ 817 Inferences from evidence; facts established by inference

Topic Summary Correlation Table References

West's Key Number Digest

West's Key Number Digest, Trial 175, 176, 178

A motion for a directed verdict effectively admits, to the benefit of the nonmoving party, the truth not only of the facts stated in the evidence adduced, and every fact which the evidence tends to prove, [1] but also all legitimate, [2] favorable, [3] and reasonable inferences drawn therefrom. [4] When ruling on a motion for a directed verdict, the trial court is required to resolve all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought. [5] Accordingly, the trial court properly refused to enter a directed verdict for the defendants, in a personal injury action against the seller and manufacturer of an alleged defective ladder, where there was circumstantial evidence to support an inference that a crack in the ladder existed prior to the accident and was not a result of improper use of the ladder at the time of the accident. [6] Likewise, the trial court did not err in overruling the appellant's motion for a directed verdict in an action against a store for false imprisonment and battery arising out of acts of the store's security guard, where reasonable minds could infer from the evidence that the respondent was intimidated or coerced by the presence of the security guard and that upon his request she accompanied him, and from the respondent's testimony that she felt the guard believed that she was a shoplifter and that she felt she had no choice but to cooperate with him and where she stated that she asked permission to leave so that the fact that she cooperated did not negate the conclusion that her actions were involuntary. [7]

In considering a defendant's motion for a directed verdict, the trial court should cull from the evidence only those reasonable inferences supporting the plaintiff's position, [8] and inferences in favor of the defendant should be rejected. [9]

The facts established by reasonable inferences necessarily are considered in directing a verdict. [10] Thus the effect of a motion for a directed verdict on the issue of liability in an action for damages suffered in an automobile collision resulting allegedly from a motorist's negligence in failing to stop includes a finding of negligence and proximate cause. [11]

CUMULATIVE SUPPLEMENT

Cases:

A defendant, in making his motions for directed verdict to preserve issue for appeal, must anticipate an instruction on lesser included offenses and specifically address the elements of that lesser included offense on which he wishes to challenge the state's proof in his motion. Rules Crim.Proc., Rule 33.1(a, c). Cantrell v. State, 2009 Ark. 456, 343 S.W.3d 591 (2009).

When considering a motion for a directed verdict, the **trial** court must give the benefit of all reasonable inferences to the nonmoving party. Beltran v. Rodriguez, 36 So. 3d 725 (Fla. Dist. Ct. App. 3d Dist. 2010).

On review of a summary-judgment decision, Supreme Court affords the nonmoving party the benefit of all reasonable doubts and inferences. Rules Civ.Proc., Rule 56(c)(3). In re Guite, 2011 VT 58, 24 A.3d 1192 (Vt. 2011).

[END OF SUPPLEMENT]

Footnotes

1 § 815.

2 Gelfo v. Lockheed Martin Corp., 140 Cal. App. 4th 34, 43 Cal. Rptr. 3d 874 (**2d** Dist. 2006), review denied, (Aug. 23, 2006); Castillo v. Chief Alternative, LLC, 140 P.3d 234 (Colo. Ct. App. 2006); Aluminum Shake Roofing, Inc. v. Hirayasu, 110 Haw. 248, 131 P.3d 1230 (2006); Gunter v. Murphy's Lounge, LLC, 141 Idaho 16, 105 P.3d 676 (2005); Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468 (Iowa 2005); Somont Oil Co., Inc. v. A & G Drilling, Inc., 332 Mont. 56, 137 P.3d 536, 2006 MT 90 (Mont. 2006); Potente v. County Of Hudson, 187 N.J. 103, 900 A.2d 787, 18 A.D. Cases 11 (N.J. 2006); Virchow v. University Homes, Inc., 2005 SD 78, 699 N.W.2d 499 (S.D. 2005).

3 School Bd. of Broward County, Florida v. Trintec Const., Inc., 936 So. **2d** 655, 212 Ed. Law Rep. 528 (Fla. Dist. Ct. App. 4th Dist. 2006); Cavens v. Zaberdac, 849 N.E.2d 526 (Ind. 2006); Coon v. American Compressed Steel, Inc., 207 S.W.3d 629 (Mo. Ct. App. W.D. 2006), reh'g and/or transfer denied, (Dec. 19, 2006); Velez v. Goldenberg, 29 A.D.3d 780, 815 N.Y.S.2d 205 (**2d** Dep't 2006); Medlock v. Admiral Safe Co., Inc., 2005 OK CIV APP 72, 122 P.3d 883 (Div. 3 2005).

4 Johns v. Firstar Bank, NA, 2006 WL 741107 (Ky. Ct. App. 2006); Smith v. Foerster-Bolser Const., Inc., 269 Mich. App. 424, 711 N.W.2d 421 (2006); Zinn v. City of Ocean Springs, 928 So. **2d** 915 (Miss. Ct. App. 2006); Coon v. American Compressed Steel, Inc., 207 S.W.3d 629 (Mo. Ct. App. W.D. 2006), reh'g and/or transfer denied, (Dec. 19, 2006); Potente v. County Of Hudson, 187 N.J. 103, 900 A.2d 787, 18 A.D. Cases 11 (N.J. 2006); Tapia v. Dattco, Inc., 32 A.D.3d 842, 821 N.Y.S.2d 124 (**2d** Dep't 2006); White Hat Mgt. L.L.C. v. Ohio Farmers Ins. Co., 167 Ohio App. 3d 663, 2006-Ohio-3280, 856 N.E.2d 991 (9th Dist. Medina County 2006), appeal not allowed, 111 Ohio St. 3d 1493, 2006-Ohio-6171, 857 N.E.2d 1230 (2006); Douglas Medical Center, LLC v. Mercy Medical Center, 203 Or. App. 619, 125 P.3d 1281 (2006); Children's Friend & Service v. St. Paul Fire & Marine Ins. Co., 893 A.2d 222 (R.I. 2006); O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 638 S.E.2d 96 (Ct. App. 2006); Witherspoon, v. Teton Laser Center, LLC, 2007 WY 3, 149 P.3d 715 (Wyo. 2007).

5 State ex rel. Kline v. Berry, 35 Kan. App. **2d** 896, 137 P.3d 500 (2006); Burch v. Burch, 34 Kan. App. **2d** 506, 120 P.3d 799 (2005).

6 Sears, Roebuck & Co. v. McKenzie, 502 So. **2d** 940 (Fla. Dist. Ct. App. 3d Dist. 1987).

7 Clark v. Skaggs Companies, Inc., 724 S.W.2d 545 (Mo. Ct. App. W.D. 1986).

8 Morales v. Town of Johnston, 895 A.2d 721, 207 Ed. Law Rep. 964 (R.I. 2006); Menard & Co. Masonry Bldg. Contractors v. Marshall Bldg. Systems, Inc., 539 A.2d 523 (R.I. 1988).

9 Reserve Ins. Co. v. Johnson, 260 Iowa 740, 150 N.W.2d 632 (1967).

10 Benson v. Bradford Mut. Fire Ins. Corp., 121 Ill. App. 3d 500, 76 Ill. Dec. 774, 459 N.E.2d 689, 47 A.L.R.4th 759 (**2d** Dist. 1984).

As to consideration of evidence, generally, in determining a motion for a directed verdict, see § 734.

11 Benson v. Bradford Mut. Fire Ins. Corp., 121 Ill. App. 3d 500, 76 Ill. Dec. 774, 459 N.E.2d 689, 47 A.L.R.4th 759 (2d Dist. 1984).

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Tab 8

West's Utah Code Annotated
State Court Rules
UtahRules of CriminalProcedure

Utah Rules of Criminal Procedure Rule 18

RULE 18. SELECTION OF THE JURY

Currentness

(a) The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following procedures for selection are not exclusive.

(a)(1) *Strike and replace method.* The court shall summon the number of the jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(a)(2) *Struck method.* The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(a)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(b) The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant. Prior to examining the jurors, the court may make a preliminary statement of

the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

(c) A challenge may be made to the panel or to an individual juror.

(c)(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

(c)(1)(i) A challenge to the panel can be founded only on a material departure from the **procedure** prescribed with respect to the selection, drawing, summoning and return of the panel.

(c)(1)(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or made upon the record. It shall specifically set forth the facts constituting the grounds of the challenge.

(c)(1)(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

(c)(1)(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

(c)(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the **rules** relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense.

(d) A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(e)(1) Want of any of the qualifications prescribed by law.

(e)(2) Any mental or physical infirmity which renders one incapable of performing the duties of a juror.

(e)(3) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.

(e)(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.

(e)(5) Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by the defendant in a **criminal** prosecution.

(e)(6) Having served on the grand jury which found the indictment.

(e)(7) Having served on a trial jury which has tried another person for the particular offense charged.

(e)(8) Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it.

(e)(9) Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

(e)(10) If the offense charged is punishable with death, the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions of the court and the juror's oath in subsection (h).

(e)(11) Because the juror is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense.

(e)(12) Because the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury.

(e)(13) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.

(e)(14) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(f) Peremptory challenges shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(g) The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, and privileges as principal jurors. Except in bifurcated proceedings, an alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict. The identity of the alternate jurors may be withheld until the jurors begin deliberations.

(h) When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

Credits
[Amended effective November 1, 2001; November 1, 2007.]

Rules Crim. Proc., **Rule 18**, UT R RCRP **Rule 18**
Current with amendments received through September 15, 2016.

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Tab 9

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Utah Code Annotated
Title 77. Utah Code of Criminal Procedure
Chapter 1. Preliminary Provisions

U.C.A. 1953 § 77-1-6

§ 77-1-6. Rights of defendant

Currentness

(1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;

(b) To receive a copy of the accusation filed against him;

(c) To testify in his own behalf;

(d) To be confronted by the witnesses against him;

(e) To have compulsory process to insure the attendance of witnesses in his behalf;

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

(g) To the right of appeal in all cases; and

(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;

(b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;

(c) No person shall be compelled to give evidence against himself;

(d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

Credits
Laws 1980, c. 15, § 2.

Codifications C. 1953, § 77-1-5.

U.C.A. 1953 § 77-1-6, UT ST § 77-1-6
Current through 2016 Third Special Session

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Tab 10

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Waine v. Sacchet, 4th Cir.(Md.), January 22, 2004

75 S.Ct. 127
Supreme Court of the United States

Marion L. HOLLAND and
Ethel E. Holland, Petitioners,
v.
UNITED STATES of America.

No. 37.
|
Argued Oct. 20, 21, 1954.
|
Decided Dec. 6, 1954.
|
Rehearing Denied Jan. 31, 1955.

See 348 U.S. 932, 75 S.Ct. 334.

Defendants were convicted, in a prosecution based on net worth method of proof, of willfully attempting to defeat and evade income taxes. The United States District Court for the District of Colorado rendered judgment, and defendants appealed. The United States Court of Appeals for the Tenth Circuit, 209 F.2d 516, affirmed the judgment and the Supreme Court granted certiorari. The Supreme Court, Mr. Justice Clark, held that where Government introduced proof of a likely taxable source from which jury could reasonably find that net worth increases sprang, Government's failure to negative all possible nontaxable sources of the alleged net worth increases was not fatal to conviction.

Judgments affirmed.

West Headnotes (28)

[1] **Internal Revenue**
Presumptions and burden of proof

In civil actions for recovery of deficiencies, determinations of the Commissioner of Internal Revenue have prima facie validity.

8 Cases that cite this headnote

[2] **Criminal Law**
In prosecutions for particular offenses

In an income tax evasion prosecution, the Government must always prove the criminal charge beyond a reasonable doubt.

34 Cases that cite this headnote

[3] **Internal Revenue**
Instructions

Internal Revenue
Judgment, sentence, punishment, and review

In income tax evasion prosecutions based on net worth method of proof, charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and inferences available both for and against the accused, and reviewing courts should bear constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.

106 Cases that cite this headnote

[4] **Internal Revenue**
Computation in general

Internal Revenue
Net worth method

Internal Revenue Code provision that net income shall be computed in accordance with method of accounting regularly employed in keeping taxpayer's books refers to methods such as cash receipts or accrual method, which allocate income and expenses between years, and did not prevent Government, in income tax evasion prosecution of taxpayers who had kept books, from employing net worth method of proof. 26 U.S.C.A. s 41.

99 Cases that cite this headnote

[5] **Internal Revenue**
Admissibility of evidence

To protect the revenue from those who do not render true accounts, the Government must be free to use all legal evidence available to it in determining whether taxpayer's books accurately reflect his financial history.

21 Cases that cite this headnote

[6] **Internal Revenue**
Opening net worth

In an income tax evasion prosecution based on net worth method of proof, it is essential that there be established, with reasonable certainty, an opening net worth, to serve as a starting point from which to calculate future increases in taxpayer's assets.

60 Cases that cite this headnote

[7] **Internal Revenue**
Opening net worth

In income tax evasion prosecution based on net worth method of proof, evidence on issue whether taxpayers had had, at opening of period in question, certain stores of money and securities, supported jury's finding that taxpayers' opening net worth, the starting point from which future increases were calculated, had been no greater than that with which Government had credited them. 26 U.S.C.A. s 145.

64 Cases that cite this headnote

[8] **Federal Civil Procedure**
Criminal rules

The Supreme Court will formulate rules of evidence and procedure to be applied in federal prosecutions where it appears necessary to maintain proper standards for the enforcement of federal criminal law in the federal courts.

5 Cases that cite this headnote

[9] **Federal Courts**
Supervisory jurisdiction;writs in aid of jurisdiction

Federal Courts
Scope and Extent of Review

It is not for the Supreme Court to prescribe investigative procedures, but it is within the province of the courts to pass upon the sufficiency of evidence to convict.

2 Cases that cite this headnote

[10] **Internal Revenue**
Net worth method, in general

In an income tax evasion prosecution based on net worth method of proof, the cogency of Government's proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt.

20 Cases that cite this headnote

[11] **Internal Revenue**
Net worth issues

When a taxpayer-defendant, in an income tax evasion prosecution based on net worth method of proof, furnishes leads, reasonably susceptible of being checked, which, if true, would establish taxpayer's innocence, and the Government fails to show investigation into validity of such leads, the trial court may consider them as true and the Government's case insufficient to go to jury. 26 U.S.C.A. s 145.

380 Cases that cite this headnote

[12] **Internal Revenue**
Opening net worth

In income tax evasion prosecution based on net worth method of proof, wherein taxpayers furnished certain leads as to sources of income sufficient to produce amounts which they claimed to have held at opening of period, although Government had failed to check or disprove some of the leads, evidence was sufficient to sustain conviction even if taxpayers' contentions as to the unchecked leads were assumed to be true. 26 U.S.C.A. s 145.

160 Cases that cite this headnote

[13] Internal Revenue
Net worth method

In an income tax evasion prosecution based on net worth method of proof, Government must produce evidence supporting the inference that the taxpayer's net worth increases are attributable to currently taxable income.

51 Cases that cite this headnote

[14] Internal Revenue
False Returns or Statements and Attempts to Defeat Tax;Evasion

Where United States, in income tax evasion prosecution based on net worth method of proof, introduced proof of a likely taxable source from which jury could reasonably find that net worth increases sprang, that United States failed to negative all possible nontaxable sources of the alleged net worth increases was not fatal to conviction. 26 U.S.C.A. s 145.

192 Cases that cite this headnote

[15] Internal Revenue
Net worth method, in general

For purposes of obtaining conviction, based on net worth method of proof for income tax evasion, increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income, but proof of a likely source from which jury could reasonably find that the net worth increases sprang, is sufficient. 26 U.S.C.A. s 145.

66 Cases that cite this headnote

[16] Internal Revenue
Net worth method

In an income tax evasion prosecution based on net worth method of proof, the Government may not disregard taxpayer's explanations reasonably susceptible of being checked, but where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within knowledge of the defendant. 26 U.S.C.A. s 145.

224 Cases that cite this headnote

[17] Internal Revenue
Net worth method, in general

In an income tax evasion prosecution based on net worth method of proof, the Government must prove every element of the offense beyond a reasonable doubt, though not to a mathematical certainty.

56 Cases that cite this headnote

[18] Internal Revenue
Net worth method, in general

The settled standards of the criminal law are applicable to prosecutions for the income tax evasion based on net worth method of proof just as to prosecutions for other crimes.

Cases that cite this headnote

[19] Internal Revenue
Net worth method

Once the Government, in an income tax evasion prosecution based on net worth method of proof, has established its case, the defendant remains quiet at his peril.

42 Cases that cite this headnote

[20] Internal Revenue
Motive, intent, and willfulness

Willfulness, as a necessary element for conviction of willful evasion of income taxes, involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income. 26 U.S.C.A. s 145.

149 Cases that cite this headnote

[21] **Internal Revenue**
Motive, intent, and willfulness

In income tax evasion prosecution based on net worth method of proof, evidence on issue whether taxpayers had underreported large amounts of income and whether they had failed to include all of their income in their books and records was sufficient to support inference of willfulness and to support conviction. 26 U.S.C.A. s 145.

342 Cases that cite this headnote

[22] **Internal Revenue**
Judgment, sentence, punishment, and review

In income tax evasion prosecution based on net worth method of proof, instructions were not so erroneous and misleading as to constitute grounds for reversal. 26 U.S.C.A. s 145.

7 Cases that cite this headnote

[23] **Criminal Law**
Necessity of instructions in general

Where the jury is properly instructed on the standards for reasonable doubt, an additional instruction on circumstantial evidence, requiring that such evidence must be such as to exclude every reasonable hypothesis other than that of guilt, is confusing and incorrect.

908 Cases that cite this headnote

[24] **Criminal Law**
Degree of proof

Circumstantial evidence which convinces jury beyond a reasonable doubt is sufficient to sustain conviction.

442 Cases that cite this headnote

[25] **Criminal Law**
Doubt which would influence action in private affairs

Criminal Law
Reasonable doubt

Instruction, given in income tax evasion prosecution, defining reasonable doubt as the kind of doubt which jurymen in more serious and important affairs of their own lives might be willing to act upon, should have been in terms of the kind of doubt that would make a person hesitate to act, rather than kind on which he would be willing to act, but, taken as a whole, the instructions correctly conveyed concept of reasonable doubt to jury. 26 U.S.C.A. (I.R.C.1939) § 145.

416 Cases that cite this headnote

[26] **Criminal Law**
Elements and incidents of offense

Where jury, in income tax evasion prosecution, was fully and correctly instructed on every element of the crime, refusal to give instructions on the wording of the statute under which taxpayers were indicted was correct. 26 U.S.C.A. (I.R.C.1939) § 145.

8 Cases that cite this headnote

[27] **Criminal Law**
Application of law to facts

Jury's duty to apply law to facts in income tax evasion prosecution, implies application of a general standard to the specific physical facts as found by the jury.

1 Cases that cite this headnote

[28] **Criminal Law**
Application of law to facts

In prosecution for income tax evasion, instructions defined meanings of standards such as willfulness in no greater particularity than necessary, and did not invade jury's function of applying law to the facts. 26 U.S.C.A. (I.R.C.1939) § 145.

7 Cases that cite this headnote

Attorneys and Law Firms

****129** Messrs. ***123** Sumner M. Redstone, Peyton Ford, Washington, D.C., for petitioners.

Mr. Marvin E. Frankel, Washington, D.C., for respondent.

Opinion

***124** Mr. Justice CLARK delivered the opinion of the Court.

Petitioners, husband and wife, stand convicted under s 145 of the Internal Revenue Code[1] of an attempt to evade and defeat their income taxes for the year 1948. The prosecution was based on the net worth method of proof, also in issue in three companion cases[2] and ****130** a number of other decisions here from the Courts of Appeals of nine circuits. During the past two decades this Court has been asked to review an increasing number of criminal cases in which proof of tax evasion rested on this theory. We have denied certiorari because the cases involved only questions of evidence and, in isolation, presented no important questions of law. In 1943 the Court did have occasion to pass upon an application of the net worth theory where the taxpayer had no records. United States v. Johnson, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546.

In recent years, however, tax-evasion convictions obtained under the net worth theory have come here with increasing frequency and left impressions beyond those of the previously unrelated petitions. We concluded that the method involved something more than the ordinary use of circumstantial evidence in the usual criminal case. Its bearing, therefore, on the safeguards traditionally ***125** provided in the administration of criminal justice called for a consideration of the entire theory. At our last Term a number of cases arising from the Courts of Appeals brought to our attention the serious doubts of those courts regarding the implications of the net worth method. Accordingly, we granted certiorari in these four cases and have held others to await their decision.

In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an 'opening net worth' or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income. In addition, it asks the jury to infer willfulness from this understatement, when taken in connection with direct evidence of 'conduct, the likely effect of which would be to mislead or to conceal.' Spies v. United States, 317 U.S. 492, 499, 63 S.Ct. 364, 368, 87 L.Ed. 418.

Before proceeding with a discussion of these cases, we believe it important to outline the general problems implicit in this type of litigation. In this consideration we assume, as we must in view of its widespread use, that the Government deems the net worth method useful in the enforcement of the criminal sanctions of our income tax laws. Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use.

***126** **[1]** **[2]** One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy. The application of such an assumption raises serious legal problems in the administration of the criminal law. Unlike civil actions for the recovery of deficiencies, where the determinations of the Commissioner have prima facie validity, the prosecution must always prove the criminal charge beyond a reasonable doubt. This has led many of our courts to be disturbed by the use of the net worth method, particularly in its scope and the latitude which it allows prosecutors. ****131** E.g., Demetree v. United States, 5 Cir., 1953, 207 F.2d 892, 894; United States v. Caserta, 3 Cir., 1952, 199 F.2d 905, 907; United States v. Fenwick, 7 Cir., 177 F.2d 488.

But the net worth method has not grown up overnight. It was first utilized in such cases as Capone v. United States, 7 Cir., 1931, 51 F.2d 609 and Guzik v. United States, 7 Cir., 1931, 54 F.2d 618, to corroborate direct proof of specific unreported income. In United States v. Johnson, supra, this Court approved of its use to

support the inference that the taxpayer, owner of a vast and elaborately concealed network of gambling houses upon which he declared no income, had indeed received unreported income in a 'substantial amount.' It was a potent weapon in establishing taxable income from undisclosed sources when all other efforts failed. Since the Johnson case, however, its horizons have been widened until now it is used in run-of-the-mine cases, regardless of the amount of tax deficiency involved. In each of the four cases decided today the allegedly unreported income comes from the same disclosed sources as produced the taxpayer's reported income and in none is the tax deficiency anything like the deficiencies in Johnson, Capone or Guzik. The net worth method, it seems, has evolved from the final volley to the first shot in the Government's ***127** battle for revenue, and its use in the ordinary income-bracket cases greatly increases the chances for error. This leads us to point out the dangers that must be consciously kept in mind in order to assure adequate appraisal of the specific facts in individual cases.

1. Among the defenses often asserted is the taxpayer's claim that the net worth increase shown by the Government's statement is in reality not an increase at all because of the existence of substantial cash on hand at the starting point. This favorite defense asserts that the cache is made up of many years' savings which for various reasons were hidden and not expended until the prosecution period. Obviously, the Government has great difficulty in refuting such a contention. However, taxpayers too encounter many obstacles in convincing the jury of the existence of such hoards. This is particularly so when the emergence of the hidden savings also uncovers a fraud on the taxpayer's creditors.

In this connection, the taxpayer frequently gives 'leads' to the Government agents indicating the specific sources from which his cash on hand has come, such as prior earnings, stock transactions, real estate profits, inheritances, gifts, etc. Sometimes these 'leads' point back to old transactions far removed from the prosecution period. Were the Government required to run down all such leads it would face grave investigative difficulties; still its failure to do so might jeopardize the position of the taxpayer.

2. As we have said, the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth. There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, ***128** the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.

3. Although it may sound fair to say that the taxpayer can explain the 'bulge' in his net worth, he may be entirely honest and yet unable to recount his financial history. In addition, such a rule would tend to shift the burden of ****132** proof. Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Government's case by showing loose business methods or losing the jury through his apparent evasiveness. Of course, in other criminal prosecutions juries may disbelieve and convict the innocent. But the courts must minimize this danger.

4. When there are no books and records, willfulness may be inferred by the jury from that fact coupled with proof of an understatement of income. But when the Government uses the net worth method, and the books and records of the taxpayer appear correct on their face, an inference of willfulness from net worth increases alone might be unjustified, especially where the circumstances surrounding the deficiency are as consistent with innocent mistake as with willful violation. On the other hand, the very failure of the books to disclose a proved deficiency might indicate deliberate falsification.

5. In many cases of this type, the prosecution relies on the taxpayer's statements, made to revenue agents in the course of their investigation, to establish vital links in the Government's proof. But when a revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth. Moreover, the prosecution may pick and choose from the taxpayer's statement, ***129** relying on the favorable portion and throwing aside that which does not bolster its position. The problem of corroboration, dealt with in the companion cases of Smith v. United States, 348 U.S. 147, 75 S.Ct. 194, and United States v. Calderon, 348 U.S. 160, 75 S.Ct. 186, therefore becomes crucial.

6. The statute defines the offense here involved by individual years. While the Government may be able to prove with reasonable accuracy an increase in net worth over a period of years, it often has great difficulty in relating that income sufficiently to any specific prosecution year. While a steadily increasing net worth may justify an inference of additional earnings, unless that increase can be reasonably allocated to the appropriate tax year the taxpayer may be convicted on counts of which he is innocent.

[3] While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. Cf. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 489, 71 S.Ct. 456, 465, 95 L.Ed. 456. Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.

With these considerations as a guide, we turn to the facts.

***130** The indictment returned against the Hollands embraced three counts. The first two charged Marion L. Holland, the husband, with attempted evasion of his income tax for the years 1946 and 1947. He was found not guilty by thejury on both of these counts. The third count charged Holland and his wife with attempted evasion in 1948 of the tax on $19,736.74 not reported by them in their joint return. The jury found both of them guilty. Mrs. Holland was fined $5,000, while her husband was sentenced to two years' imprisonment and fined $10,000.

****133** The Government's opening net worth computation shows defendants with a net worth of $19,152.59 at the beginning of the indictment period. Shortly thereafter, defendants purchased a hotel, bar and restaurant, and began operating them as the Holland House. Within three years during which they reported $31,265.92 in taxable income, their apparent net worth increased by $113,185.32.[3] The Government's evidence indicated that, during 1948, the year for which defendants were convicted, their net worth increased by some $32,000, while the amount of taxable income reported by them totaled less than one-third that sum.

Use of Net Worth Method Where Books Are Apparently Adequate.

[4] **[5]** As we have previously noted, this is not the first net worth case to reach this Court. In United States v. Johnson, supra (319 U.S. 503, 63 S.Ct. 1240), the Court affirmed a tax-evasion conviction on evidence showing that the taxpayer's expenditures had exceeded his 'available declared resources.' Since Johnson and his concealed establishments had destroyed ***131** the few records they had, the Government was forced to resort to the net worth method of proof. This Court approved on the ground that 'To require more * * * would be tantamount to holding that skilful concealment is an invincible barrier to proof', 319 U.S. at pages 517—518, 63 S.Ct. at page 1240. Petitioners ask that we restrict the Johnson case to situations where the taxpayer has kept no books. They claim that s 41 of the Internal Revenue Code,[4] expressly limiting the authority of the Government to deviate from the taxpayer's method of accounting, confines the net worth method to situations where the taxpayer has no books or where his books are inadequate. Despite some support for this view among the lower courts, see United States v. Riganto, D.C., 121 F.Supp. 158, 161, 162; United States v. Williams, 3 Cir., 208 F.2d 437, 437—438; Remmer v. United States, 9 Cir., 205 F.2d 277, 286, judgment vacated on other grounds, 347 U.S. 227, 74 S.Ct. 450, we conclude that this argument must fail. The provision that the 'net income shall be computed * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer', refers to methods such as the cash receipts or the accrual method, which allocate income and expenses between years. United States v. American Can Co., 280 U.S. 412, 419, 50 S.Ct. 177, 179, 74 L.Ed. 518. The net worth technique, as used in this case, is not a method of accounting different from the one employed by defendants. It is not a method of accounting at all, except insofar as it calls upon taxpayers to account for their unexplained income. Petitioners' accounting system was appropriate ***132** for their business purposes; and, admittedly, the Government did not detect any

specific false entries therein. Nevertheless, if we believe the Government's evidence, as the jury did, we must conclude that the defendants' books were more consistent than truthful, and that many items of income had disappeared before they had even reached the recording stage. Certainly Congress never intended to make s 41 a set of blinders which prevents the Government from looking beyond the self-serving declarations in a taxpayer's books. 'The United States has relied for the collection of its income tax largely upon the taxpayer's ****134** own disclosures * * *. This system can function successfully only if those within and near taxable income keep and render true accounts.' Spies v. United States, 317 U.S. 495, 63 S.Ct. 366. To protect the revenue from those who do not 'render true accounts', the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history.

Establishing a Definite Opening Net Worth.

[6] We agree with petitioners that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset. The Government's net worth statement included as assets at the starting point stock costing $29,650 and $2,153.09 in cash.[5] The Hollands claim that the Government failed to include in its opening net worth figure an accumulation of $113,000 ***133** in currency and 'hundreds and possibly thousands of shares of stock' which they owned at the beginning of the prosecution period. They asserted that the cash had been accumulated prior to the opening date, $104,000 of it before 1933, and the balance between 1933 and 1945. They had kept the money, they claimed, mostly in $100 bills and at various times in a canvas bag, a suitcase, and a metal box. They had never dipped into it until 1946, when it became the source of the apparent increase in wealth which the Government later found in the form of a home, a ranch, a hotel and other properties. This was the main issue presented to the jury. The Government did not introduce any direct evidence to dispute this claim. Rather it relied on the inference that anyone who had had $104,000 in cash would not have undergone the hardship and privation endured by the Hollands all during the late 20's and throughout the 30's. During this period they lost their cafe business; accumulated $35,000 in debts which were never paid; lost their household furniture because of an unpaid balance of $92.20; suffered a default judgment for $506.66; and were forced to separate for some eight years because it was to their 'economical advantage.' During the latter part of this period, Mrs. Holland was obliged to support herself and their son by working at a motion picture house in Denver while her husband was in Wyoming. The evidence further indicated that improvements to the hotel, and other assets acquired during the prosecution years, were bought in installments and with bills of small denominations, as if out of earnings rather than from an accumulation of $100 bills. The Government also negatived the possibility of petitioners' accumulating such a sum by checking Mr. Holland's income tax returns as far back as 1913, showing that the income declared in previous years was insufficient to enable defendants to save any appreciable ***134** amount of money. The jury resolved this question of the existence of a cache of cash against the Hollands, and we believe the verdict was fully supported.

[7] As to the stock, Mr. Holland began dabbling in the stock market in a small way in 1937 and 1938. His purchases appear to have been negligible and on borrowed money. His only reported income from stocks was in his tax returns for 1944 and 1945 when he disclosed dividends of $1,600 and $1,850 respectively. While the record is unclear on this point, it appears that during the period from 1942 to 1945 he pledged considerable stock as collateral ****135** for loans. There is no evidence, however, showing what portions of this stock Mr. Holland actually owned at any one time, since he was trading in shares from day to day. And, even if we assume that he owned all the stock, some 4,550 shares, there is evidence that Mr. Holland's stock transactions were usually in 'stock selling for only a few dollars per share.' In this light, the Government's figure of approximately $30,000 is not out of line. In 1946 Holland reported the sale of about $50,000 in stock, but no receipt of dividends; nor were dividends reported in subsequent years. It is reasonable to assume that he sold all of his stock in 1946. In fact, Holland stated to the revenue agents that he had not 'fooled with the stock market' since the beginning of 1946; that he had not owned any stocks for two or three years prior to 1949; that he had saved about $50,000 from 1933 to 1946, and that in 1946 he had $9,000 in cash with the balance

of his savings in stocks.[6] The Government's evidence, bolstered by the admissions of petitioners, provided ***135** convincing proof that they had no stock other than the amount included in the opening net worth statement. By the same token, the petitioners' argument that the Government failed to account for the proceeds of stock sold by them before the starting date must also fail. The Government's evidence fully justified the jury's conclusion that there were no proceeds over and above the amount credited to petitioners.

The Government's Investigation of Leads.

[8] **[9]** **[10]** **[11]** So overwhelming, indeed, was the Government's proof on the issue of cash on hand that the Government agents did not bother to check petitioners' story that some of the cash represented proceeds from the sales of two cafe s in the 20's; and that in 1933 and additional portion of this $113,000 in currency was obtained by exchanging some $12,000 in gold at a named bank. While sound administration of the criminal law requires that the net worth approach—a powerful method of proving otherwise undetectable offenses—should not be denied the Government, its failure to investigate leads furnished by the taxpayer might result in serious injustice. It is, of course, not for us to prescribe investigative procedures,[7] but it is within the province of the courts to pass upon the sufficiency of the evidence to convict. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the ***136** taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he ****136** had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done.

[12] In this case, the Government's detailed investigation was a complete answer to the petitioners' explanations. Admitting that in cases of this kind it 'would be desirable to track to its conclusion every conceivable line of inquiry,' the Government centered its inquiry on the explanations of the Hollands and entered upon a detailed investigation of their lives covering several states and over a score of years. The jury could have believed that Mr. Holland had received moneys from the sale of cafe s in the twenties and that he had turned in gold in 1933 and still it could reasonably have concluded that the Hollands lacked the claimed cache of currency in 1946, the crucial year. Even if these leads were assumed to be true, the Government's evidence was sufficient to convict. The distant incidents relied on by petitioners were so remote in time and in their connection with subsequent events proved by the Government that, whatever petitioners's net worth in 1933, it appears by convincing evidence that on January 1, 1946, they had only such assets as the Government credited to them in its opening net worth statement.

***137** *Net Worth Increases Must be Attributable to Taxable Income.*

[13] Also requisite to the use of the net worth method is evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income.

The Government introduced evidence tending to show that although the business of the hotel apparently increased during the years in question, the reported profits fell to approximately one-quarter of the amount declared by the previous management in a comparable period;[8] that the cash register tapes, on which the books were based, were destroyed by the petitioners; and that the books did not reflect the receipt of money later withdrawn from the hotel's cash register for the personal living expenses of the petitioners and for payments made for restaurant supplies. The unrecorded items in this latter category totaled over $12,500 for 1948. Thus there was ample evidence that not all the income from the hotel had been included in its books and records. In fact, the net worth increase claimed by the Government for 1948 could

have come entirely from the unreported income of the hotel and still the hotel's total earnings for the year would have been only 73% of the sum reported by the previous owner for the comparable period in 1945.

[14] **[15]** **[16]** But petitioners claim the Government failed to adduce adequate proof because it did not negative all the possible nontaxable sources of the alleged net worth increases—gifts, loans, inheritances, etc. We cannot agree. The Government's proof, in our view, carried with it the negations the petitioners urge. Increases in net ***138** worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient. In the Johnson case, where there was no direct evidence of the source of the taxpayer's income, this Court's conclusion that the taxpayer 'had large, unreported income was reinforced by proof * * * that (for certain years his) private expenditures * * * exceeded his available declared resources.' This was sufficient to support 'the finding that he had some unreported income which was properly attributable to his earnings * * *.' ****137** United States v. Johnson, 319 U.S. at page 517, 63 S.Ct. at page 1240. There the taxpayer was the owner of an undisclosed business capable of producing taxable income; here the disclosed business of the petitioners was proven to be capable of producing much more income than was reported and in a quantity sufficient to account for the net worth increases. Any other rule would burden the Government with investigating the many possible nontaxable sources of income, each of which is as unlikely as it is difficult to disprove. This is not to say that the Government may disregard explanations of the defendant reasonably susceptible of being checked. But where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant. See Rossi v. United States, 289 U.S. 89, 91—92, 53 S.Ct. 532, 533, 77 L.Ed. 1051.

The Burden of Proof Remains on the Government.

[17] **[18]** **[19]** Nor does this rule shift the burden of proof. The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The settled standards of the criminal law are applicable to net worth cases just as to prosecutions for other crimes. Once the Government has established its ***139** case, the defendant remains quiet at his peril. Cf. Yee Hem v. United States, 268 U.S. 178, 185, 45 S.Ct. 470, 472, 69 L.Ed. 904. The practical disadvantages to the taxpayer are lessened by the pressures on the Government to check and negate relevant leads.

Willfulness Must be Present.

[20] **[21]** A final element necessary for conviction is willfulness. The petitioners contend that willfulness 'involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.' This is a fair statement of the rule. Here, however, there was evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners' part to include all of their income in their books and records. Since, on proper submission, the jury could have found that these acts supported an inference of willfulness, their verdict must stand. Spies v. United States, supra, 317 U.S. at pages 499—500, 63 S.Ct. 368.

The Charge to the Jury.

[22] **[23]** **[24]** Petitioners press upon us, finally, the contention that the instructions of the trial court were so erroneous and misleading as to constitute grounds for reversal. We have carefully reviewed the instructions and cannot agree. But some require comment. The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, Garst v. United States, 4 Cir., 180 F. 339, 343; Anderson v. United States, 5 Cir., 30 F.2d 485—487; Stutz v. United States, 5 Cir., 47 F.2d 1029, 1030; Hanson v. United States, 6 Cir., 208 F.2d 914, 916, but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction ***140** on circumstantial evidence is confusing and incorrect, United States v. Austin-Bagley Corp., 2 Cir., 31 F.2d 229, 234, certiorari denied, 279 U.S. 863, 49 S.Ct. 479, 73 L.Ed. 1002; United States v. Becker, 2 Cir., 62 F.2d 1007, 1010; 1 Wigmore, Evidence (3d ed.), ss 25—26.

Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In **138 both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

[25] Even more insistent is the petitioners' attack, not made below, on the charge of the trial judge as to reasonable doubt. He defined it as 'the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon.' We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, see Bishop v. United States, 71 App.D.C. 132, 107 F.2d 297, 303, rather than the kind on which he would be willing to act. But we believe that the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some. A definition of a doubt as something the jury would act upon would seem to create confusion rather than misapprehension. 'Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury,' Miles v. United States, 103 U.S. 304, 312, 26 L.Ed. 481, and we feel that, taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury.

*141 [26] [27] [28] Petitioners also assign as error the refusal of the trial judge to give instructions on the wording of the criminal statute under which they were indicted, even though the judge fully and correctly instructed the jury on every element of the crime. The impossibility of pointing to any way in which defendants' rights were prejudiced by this, assuming it was error, is enough to indicate that the trial judge was correct, see United States v. Center Veal and Beef Co., 2 Cir., 162 F.2d 766, 771. There is here no question of the jury's duty to apply the law to the facts. That operation implies the application of a general standard to the specific physical facts as found by the jury. The meanings of standards such as willfulness were properly explained by the trial judge in no greater particularity than necessary, and thus the jury's function was not invaded.

In the light of these considerations the judgment is affirmed.

Affirmed.

All Citations

348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, 54-2 USTC P 9714, 46 A.F.T.R. 943, 1954-2 C.B. 215

Footnotes

1 26 U.S.C. s 145, 26 U.S.C.A. s 145. Penalties. '(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony * * *.'

2 Friedberg v. United States, 348 U.S. 142, 75 S.Ct. 138; United States v. Calderon, 348 U.S. 160, 75 S.Ct. 186; Smith v. United States, 348 U.S. 147, 75 S.Ct. 194. Because of the extensive factual backgrounds they require, and the significant differences in the problems they present, the cases are treated in separate opinions.

3 This is a corrected figure takin g into account certain nontaxable income and nondeductible expenses of defendants.

4 26 U.S.C., 26 U.S.C.A. 'Part IV—Accounting Periods and Methods of Accounting. s 41. General rule
'The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * *.'

5 As of this time, petitioners' liabilities were listed as $12,650.50.

6 'Q. In other words, to summarize this whole thing: you had a net worth of $157,000 at January 1, 1946, which consisted of $104,000 which you had since December 22, 1933, and the balance of $9,000 in currency, and your investment in securities—or the value of your securities.
'A. Yes.' (R. 303.)

7 This court will formulate rules of evidence and procedure to be applied in federal prosecutions where it appears necessary to maintain 'proper standards for the enforcement of the federal criminal law in the federal courts.' McNabb v. United States, 318 U.S. 332, 341, 63 S.Ct. 608, 613, 87 L.Ed. 819.

8 The record indicates that the income of the hotel as reported for 1946 was approximately 12 1/2% of that reported by the previous owner in 1945; in 1947 the ratio was 12%; and in 1948 it was 26%.

Tab 11

164 F.3d 1323
United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Mesa RITH, Defendant–Appellant.

No. 97–4138.
|
Jan. 19, 1999.

Defendant was convicted by the United States District Court for the District of Utah, J. Thomas Greene, J., of possession of sawed-off shotgun. Defendant appealed. The Court of Appeals, Murphy, Circuit Judge, held that: (1) defendant's denial of permission for police to search house, in which he was living with his parents, did not revoke earlier consent to search given by his father; (2) father could consent to search of defendant's bedroom in house; (3) defendant was not in custody when he made first inculpatory statement, precluding need to provide *Miranda* warnings; (4) statements made between time he was placed in custody until *Miranda* warnings were given were voluntary, precluding claim that statements given after warnings were administered were inadmissible as fruit of poisonous tree; (5) certificate of official from Bureau of Alcohol, Tobacco and Firearms, that he could find no record of registration of sawed-off shotgun in National Firearms Registration and Transfer Record (NFRTR), was admissible over Confrontation Clause claim; (6) evidence was sufficient to convict; and (7) trial court's admonition to jury not to be swayed by sentiment was not defective jury instruction.

Affirmed.

West Headnotes (31)

[1] Criminal Law
Construction in favor of government, state, or prosecution

Criminal Law
Questions of Fact and Findings

On appeal of conviction, the trial court's findings of fact are accepted by the Court of Appeals unless clearly erroneous, with the evidence viewed in the light most favorable to the government.

Cases that cite this headnote

[2] Criminal Law
Review De Novo

On appeal of conviction, issues of law are reviewed de novo.

Cases that cite this headnote

[3] Searches and Seizures
Scope and duration of consent; withdrawal

Generally, consent to a search given by someone with authority cannot be revoked by a co-occupant's denial of consent, even if that denial is clear and contemporaneous with the search. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[4] Searches and Seizures
Scope and duration of consent; withdrawal

Denial of consent to search house for presence of firearms, made by resident who was 18–year–old son of owner, did not revoke owner's earlier consent to search. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[5] Searches and Seizures
Persons Giving Consent

A third party has authority to consent to a search of property if that third party has either (1) mutual use of the property by virtue of joint access, or (2) control for most purposes over it. U.S.C.A. Const.Amend. 4.

42 Cases that cite this headnote

[6] **Searches and Seizures**
Questions of law or fact

Determination of whether third party consenting to search of defendant's property was empowered to consent, due to having mutual use of property by virtue of joint access, was a fact-intensive inquiry which required findings by a court that the third party entered the premises or room at will, without the consent of the subject of the search. U.S.C.A. Const.Amend. 4.

34 Cases that cite this headnote

[7] **Searches and Seizures**
Persons Giving Consent

Determination of whether third party consenting to search of defendant's property was empowered to consent, due to having control over property, is normative inquiry dependent upon whether the relationship between the defendant and the third party was the type which created a presumption of control for most purposes over the property by the third party. U.S.C.A. Const.Amend. 4.

19 Cases that cite this headnote

[8] **Searches and Seizures**
Family members

Relationships which give rise to a presumption of control of property, allowing for third party consents to searches of property, include parent-child relationships. U.S.C.A. Const.Amend. 4.

4 Cases that cite this headnote

[9] **Searches and Seizures**
Joint occupants

A simple co-tenant relationship does not create a presumption of control allowing one co-tenant to consent to search of other co-tenant's property; actual access would have to be shown. U.S.C.A. Const.Amend. 4.

3 Cases that cite this headnote

[10] **Searches and Seizures**
Persons Giving Consent

In determining whether a particular relationship raises a presumption of control for most purposes, so as to allow for third party consent to search of property, authority to search is premised on a practical understanding of the way parties have access to and share the searched property. U.S.C.A. Const.Amend. 4.

22 Cases that cite this headnote

[11] **Searches and Seizures**
Consent, and validity thereof

While husband-wife or parent-child relationships give rise to a presumption of control for most purposes over the property, so as to allow for third party consents to search of property, that presumption may be rebutted by facts showing an agreement or understanding between the defendant and the third party that the latter must have permission to enter the defendant's room. U.S.C.A. Const.Amend. 4.

33 Cases that cite this headnote

[12] **Searches and Seizures**
Family members

Father's consent to search of 18–year–old son's bedroom could not be supported on grounds that parents had joint access to bedroom; there were no findings that parents visited with son in his room, cleaned his room, or otherwise went into son's room uninvited. U.S.C.A. Const.Amend. 4.

7 Cases that cite this headnote

[13] **Searches and Seizures**
Family members

There was unrebutted presumption that parents of 18–year–old son controlled his room, located within parents' house, owned by parents, supporting police search of room following receipt of consent of father; son was

not paying rent and there was no evidence of any agreement on part of parents not to enter room. U.S.C.A. Const.Amend. 4.

6 Cases that cite this headnote

[14] **Criminal Law**
Review De Novo
Criminal Law
Admission, statements, and confessions

The determination of whether a suspect was in custody, so as to trigger requirement that he receive *Miranda* warning before inculpatory statements could be admitted into evidence, is reviewed de novo, though Court of Appeals defers to the district court's findings of historical fact and credibility determinations.

1 Cases that cite this headnote

[15] **Criminal Law**
Particular cases or issues

Resident of house, suspected of possessing illegal weapons, was not in custody of police, for purposes of triggering requirement that he be read his *Miranda* rights before inculpatory statements would be admissible, until he was confronted with sawed-off shotgun found after police followed his directions for locating gun, even though five officers were present, he was told to sit down at kitchen table because detective had questions for him, and he was not told he need not answer questions; suspect was not handcuffed, officers did not draw weapons, and there was no harassment or lengthy interrogation.

9 Cases that cite this headnote

[16] **Criminal Law**
Review De Novo
Criminal Law
Admission, statements, and confessions

The question of voluntariness of a confession is reviewed by the Court of Appeals de novo, crediting the district court's findings of fact unless clearly erroneous.

2 Cases that cite this headnote

[17] **Criminal Law**
What constitutes voluntary statement, admission, or confession

Determination of whether a defendant's incriminating statements were made voluntarily must be assessed from the totality of the circumstances, looking both at the characteristics of the defendant and the details of the interrogation.

10 Cases that cite this headnote

[18] **Criminal Law**
What constitutes voluntary statement, admission, or confession

The essence of voluntariness is whether the government obtained the statements by physical or psychological coercion such that the defendant's will was overborne.

22 Cases that cite this headnote

[19] **Criminal Law**
What constitutes voluntary statement, admission, or confession

Factors to be considered in determining whether defendant's incriminating statement was voluntary include (1) the age, intelligence, and education of the defendant, (2) the length of any detention, (3) the length and nature of the questioning, (4) whether the defendant was advised of his or her constitutional rights, and (5) whether the defendant was subjected to physical punishment.

16 Cases that cite this headnote

[20] **Criminal Law**
Two-step interrogation technique; warnings

Inculpatory statements made by resident of house, suspected of possessing illegal weapons, after he was taken into custody but before he was given *Miranda* warnings, were voluntary, and similar statements made

after receiving warnings were consequently admissible over claim that they were fruit of poisonous tree; at no point was resident threatened with or subjected to physical punishment, questioning lasted only 45 minutes and was conducted in comfort of his home, and there was no sign of susceptibility to coercion due to age, intelligence or education.

16 Cases that cite this headnote

[21] Criminal Law
Review De Novo

Court of Appeals would review de novo claim that admission of certificate from Bureau of Alcohol, Tobacco and Firearms official, that there was no record of registration of sawed-off shotgun found in possession of defendant charged with sawed-off shotgun possession, violated defendant's Sixth Amendment confrontation rights, and would also review de novo trial court's finding that certificate was reliable. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[22] Criminal Law
Use of documentary evidence

Sixth Amendment confrontation rights of defendant, charged with possessing saw-off shotgun, were not violated by admission of certificate of official from Bureau of Alcohol, Tobacco and Firearms, that there was no record of defendant registering shotgun; Confrontation Clause did not require that government make official available, and defendant could have called official as witness. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[23] Criminal Law
Use of documentary evidence

In determining whether certificate from official, that there was no public record of matter, was sufficiently trustworthy to allow for admission over Sixth Amendment confrontation objection without requiring testimony of official, factors to be considered are whether cross-examination of the declarant would be of marginal utility, when the testimony concerns the results of a mechanically objective test whether notes were taken contemporaneously with the performance of the test and a supervisor reviewed the tester's methodology, and whether the database from which the evidence comes is open to the public, increasing the probability that any errors will be found and corrected. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 803(10), 28 U.S.C.A.

2 Cases that cite this headnote

[24] Criminal Law
Use of documentary evidence

Records of National Firearms Registration and Transfer Record (NFRTR) were sufficiently trustworthy to allow admission, over Sixth Amendment confrontation violation claim, of certificate of Bureau of Alcohol, Tobacco and Firearms (ATF) official that there was no record of sawed-off shotgun registered to defendant charged with illegal possession of sawed-off shotgun, even though defendant introduced statement from ATF branch chief that error rate on inquiries to NFRTR was approximately 50%; subsequent improvements to NFRTR had reduced error rate to no more than 1.5%, and nothing would be gained from calling official issuing certificate, as he would likely not remember details of particular case in light of hundreds of information requests he handled. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 803(10), 28 U.S.C.A.

3 Cases that cite this headnote

[25] Criminal Law
Review De Novo

A challenge to the sufficiency of the evidence to convict is reviewed by the Court of Appeals de novo.

1 Cases that cite this headnote

[26] Criminal Law
Inferences or deductions from evidence

In reviewing a challenge to the sufficiency of the evidence to convict, the Court of Appeals evaluates sufficiency by considering the collective inferences to be drawn from the evidence as a whole.

Cases that cite this headnote

[27] Internal Revenue
Weight and sufficiency of evidence in general

Evidence supported conviction for possessing sawed-off shotgun, despite defendant's claim that he did not know length of barrel; barrel was over four inches shorter than minimum allowed, shotgun barrel was shorter than barrel of rifle defendant also possessed, and defendant admitted he knew shotgun was sawed-off. 26 U.S.C.A. § 5861(d).

2 Cases that cite this headnote

[28] Criminal Law
Review De Novo

The propriety of a jury instruction to which an objection was made at trial is reviewed de novo.

Cases that cite this headnote

[29] Criminal Law
Instructions in general

Conviction will not be reversed, due to faulty jury instruction, absent substantial doubt that the jury was fairly guided.

Cases that cite this headnote

[30] Criminal Law
Appeals to sympathy or prejudice

Trial judge did not improperly instruct jury, in criminal action charging possession of sawed-off shotgun, by admonishing jury that it was not to be swayed by "sympathy, prejudice, or public opinion"; instruction did not mean that jurors could not allow themselves to be swayed against defendant only, but rather meant that they should not be swayed by sympathy, prejudice, or public opinion in favor of either party.

Cases that cite this headnote

[31] Criminal Law
Instructions as to Duties of Jury

A criminal defendant is not entitled to have the jury instructed that it can, despite finding the defendant guilty beyond a reasonable doubt, disregard the law.

5 Cases that cite this headnote

Attorneys and Law Firms

***1326** L. Ronald Jorgensen, Sandy, UT, for Appellant.

Leshia M. Lee–Dixon, Assistant United States Attorney (David J. Schwendiman, United States Attorney, with her on the brief), United States Attorney's Office, Salt Lake City, UT, for Appellee.

Before BRORBY, McKAY, and MURPHY, Circuit Judges.

Opinion

MURPHY, Circuit Judge.

A jury found Mesa Rith guilty of unlawful possession of an unregistered sawed-off shotgun in violation of 26 U.S.C. § 5861(d). Rith challenges his conviction on the following grounds: (1) he revoked the consent his parents had given to search the house and, even if valid, their consent did not extend to his bedroom; (2) all incriminating statements should have been suppressed because they were involuntary, he was in custody for purposes ***1327** of *Miranda,* and some statements constituted "fruit of the poisonous tree"; (3) his Sixth Amendment right of confrontation was violated by the admission of a certificate showing nonregistration in the National Firearms Registration and Transfer Record; (4)

the evidence was insufficient to support a conviction; and (5) the trial judge erred by instructing the jury that they not be "governed by sympathy, prejudice, or public opinion." This court exercises jurisdiction under 28 U.S.C. § 1291 and **affirms** the judgment of the district court.

I. Background

Officer Mikkel Roe of the West Valley Police Department was dispatched to a residence in West Valley City, Utah. Officer Roe was informed en route that Sam Rith and his wife were concerned about firearms they had seen their son carry into their home. The address to which Officer Roe was dispatched was the residence of friends of the Riths, a few blocks away from the Rith family home. Sam Rith told Officer Roe that he and his wife had seen their son, Mesa Rith ("Rith"), carry guns into their home and conceal one in the garbage can outside the home. Fearful of guns and afraid that their son was involved in a gang, the Riths requested that Officer Roe check the home and ascertain if the guns were stolen. Officer Roe requested that Detective Terry Chen join him because Detective Chen had experience as a gang task force officer. Upon Detective Chen's arrival, Sam Rith again gave permission to the officers to search his home for the guns. Fearing confrontation with his son, Sam Rith declined to accompany the officers during the search. Instead, he gave the officers a house key so that no damage would be done to the house in the event they were not otherwise allowed entry. During his discussion with the officers, Sam Rith told the officers that Mesa Rith was eighteen years of age and was not paying rent.

When the officers arrived at the Rith home, they encountered Rith on the porch talking to two Midvale, Utah police officers who were conducting an unrelated investigation. Detective Chen indicated Rith's father had informed them that Rith had brought guns into the house and that they were there to search for the guns. Rith told the officers that they could not search the house and he asked them for a search warrant. When Officer Chen showed Rith the house key Rith said, "Okay, come in."

Detective Chen spoke with Rith in the kitchen, told him again that they knew he had brought illegal guns into the house, repeated that they had permission to be there, and asked Rith where the guns were hidden. Rith told the officers that he only had one gun and that it was in his bedroom, downstairs, under the mattress. Officer Roe, Detective Chen, and a Midvale officer searched the bedroom and found a loaded sawed-off shotgun underneath Rith's mattress. They also found in Rith's open closet a shotgun round, a BB gun, and a checkbook for an account in someone else's name.

Detective Chen returned to the kitchen and confronted Rith with the shotgun. Rith stated that he knew it was illegal to possess a sawed-off shotgun and that the guns were probably stolen by the person who had given them to him. Officer Roe, who had gone outside and found a rifle in the garbage can, returned to the kitchen and read Rith his *Miranda* rights. After Officer Roe confirmed that Rith understood his rights, Rith repeated that he knew it was illegal to possess a sawed-off shotgun and that the guns were probably stolen. The officers then arrested Rith for possession of stolen property and illegal weapons.

Testimony received during trial indicated that the barrel of the sawed-off shotgun measured 13 and 3/4 inches and its overall length was 21 and 3/4 inches, each 4 and 1/4 inches less than the lawful length. Evidence also showed that no firearm was registered to Mesa Rith in the National Firearms Registry and Transfer Records.

II. Consent to Search the Rith Home

Rith argues that the evidence seized by the police during the search should have been suppressed for two reasons: (1) Rith revoked his parents' consent to search the home; and (2) the evidence failed to show that Rith's parents had authority to consent to a search of his bedroom.

***1328** **[1]** **[2]** The trial court's findings of fact are accepted by this court unless clearly erroneous, with the evidence viewed in the light most favorable to the government. *See United States v. McAlpine,* 919 F.2d 1461, 1463 (10th Cir.1990). Issues of law, such as whether consent was valid under the Fourth Amendment, are reviewed *de novo. See United States v. Flores,* 48 F.3d 467, 468 (10th Cir.1995).

A. Rith's Parents' Consent Was Not Revocable

[3] **[4]** Generally, consent to a search given by someone with authority cannot be revoked by a co-occupant's denial of consent, even if that denial is clear and

contemporaneous with the search. In *United States v. Matlock,* the Supreme Court held that mutual use of property carries with it the risk that just one of the occupants might permit a search of the common areas. 415 U.S. 164, 172 n. 7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Applying *Matlock,* this court has stated that "[i]f common authority is established, the person whose property is searched is unjustified in claiming an expectation of privacy in the property because that person cannot reasonably believe that the joint user will not, under certain circumstances, allow a search *in her own right.*" *McAlpine,* 919 F.2d at 1463 (emphasis added).

Rith argues that his claim to privacy is stronger because he, not his parents, was present at the time he refused to consent to the immediately ensuing search. According to Rith, consent by a third party to search is valid "only where the defendant [is] physically or constructively absent." To support this claim, Rith refers the court to a sentence in *Matlock* which states that "the consent of one who possesses common authority over premises or effects is valid as against the *absent, nonconsenting person* with whom that authority is shared." *Matlock,* 415 U.S. at 170, 94 S.Ct. 988 (emphasis added). The language and structure of the *Matlock* opinion refute such an interpretation. The language to which Rith refers is embedded in a discussion of cases in which the Court addressed issues previously undecided. Concluding its discussion of these cases, the Court stated its holding:

> These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Id. at 171, 94 S.Ct. 988. This unequivocal holding is unencumbered by the Court's earlier reference to the "absent, nonconsenting person." Furthermore, *Matlock* is uniformly interpreted as allowing a person with shared authority to grant effective consent to search the common premises despite the objections of the subject of the search. *See, e.g., United States v. Morning,* 64 F.3d 531, 534–36 (9th Cir.1995); *Lenz v. Winburn,* 51 F.3d 1540, 1548 (11th Cir.1995); *United States v. Donlin,* 982 F.2d 31, 33 (1st Cir.1992); *United States v. Bradley,* 869 F.2d 417, 419 (8th Cir.1989); *J.L. Foti Constr. Co. v. Donovan,* 786 F.2d 714, 716–17 (6th Cir.1986); *United States v. Bethea,* 598 F.2d 331, 335 (4th Cir.1979).

Under *Matlock* and its interpretive progeny, Rith had no expectation of privacy that negated his parents' consent to a search of their home. To hold otherwise would undermine the gravamen of *Matlock:* "any of the co-habitants has the right to permit the inspection *in his own right* and ... the others have assumed the risk that one of their number might permit the common area to be searched." *Matlock,* 415 U.S. at 171 n. 7, 94 S.Ct. 988 (emphasis added).

B. Rith's Parents Had Authority to Consent to a Search of Rith's Bedroom

That Rith's parents were authorized to grant effective consent to the search of their home does not fully resolve Rith's challenge. It is the government's burden to establish by a preponderance of the evidence that Rith's parents had authority to consent to the search of Rith's bedroom. *See Illinois v. Rodriguez,* 497 U.S. 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); *McAlpine,* 919 F.2d at 1463. In order to have authority to grant effective consent, *Matlock* requires "mutual use of the property by persons generally ***1329** having joint access or control for most purposes." 415 U.S. at 172 n. 7, 94 S.Ct. 988.

Rith urges this court to use the D.C. Circuit's interpretation of *Matlock.* [1] In *United States v. Whitfield,* the D.C. Circuit required proof both of mutual use and joint access in order for the third party to have authority to consent to a search. 939 F.2d 1071, 1074 (D.C.Cir.1991). Applying this test to the facts, the *Whitfield* court held that the police had sufficient basis to believe that a mother generally had joint access to her twenty-nine year old son's bedroom because the room was unlocked and because the mother lived in the house. *See id.* But, the court held, there was insufficient proof of mutual use of the bedroom, such as evidence that the mother cleaned her son's room, visited with him there, stored possessions in his room, watched television there, or made any use of the room. *See id.* The court declined to find that there was mutual use merely because a parent-child relationship existed and concluded that there was no evidence to negate

the defendant's exclusive use of his bedroom. *See id.* at 1075.

The Tenth Circuit applied *Matlock* in *McAlpine. See* 919 F.2d at 1463. The issue was whether a woman held against her will in the defendant's residence for two months possessed the authority to consent to a search of his residence. The court essentially restated *Matlock* 's test: "the government bears the burden of proving by a preponderance of the evidence that the consenter had mutual use of the property searched by virtue of her joint access to it, or control for most purposes over it." *Id.* at 1463. Applying this test, the court found that the captive woman had authority to consent because she slept in the back room where the guns were found and she had personal possessions throughout the trailer. *See id.* at 1464; *see also United States v. Iribe,* 11 F.3d 1553, 1556 (10th Cir.1993) (employing same standard as *McAlpine* and finding that by virtue of being a co-resident, the third party had joint access to the house).

[5] **[6]** This panel clarifies the test used in *McAlpine* and rejects Rith's argument that the *Whitfield* test be used. Rather than requiring mutual use from joint access and control, the *McAlpine* test is disjunctive: a third party has authority to consent to a search of property if that third party has either (1) mutual use of the property by virtue of joint access, or (2) control for most purposes over it. [2] Mutual use of property by ***1330** virtue of joint access is a fact-intensive inquiry which requires findings by a court that the third party entered the premises or room at will, without the consent of the subject of the search. For example, in *McAlpine,* a woman held captive by the defendant in his home had authority to consent to the search simply by virtue of her joint access. Uncontradicted evidence showed that she was free to access the rooms of the home because she slept where the guns were found and her personal effects were found throughout the residence.

[7] Unlike the fact-intensive inquiry of mutual use, control for most purposes of property is a normative inquiry dependent upon whether the relationship between the defendant and the third party is the type which creates a presumption of control for most purposes over the property by the third party. [3] If a relationship creates such a presumption of control and is unrebutted, the third party has authority to consent to a search of the property.

[8] **[9]** Relationships which give rise to a presumption of control of property include parent-child relationships and husband-wife relationships. *See, e.g., United States v. Ladell,* 127 F.3d 622, 624 (7th Cir.1997) ("A third-party consent is also easier to sustain if the relationship between the parties—parent to child here, spouse to spouse in others—is especially close."); *United States v. DiPrima,* 472 F.2d 550, 551 (1st Cir.1973) ("[E]ven if a minor child, living in the bosom of a family, may think of a room as 'his,' the overall dominance will be in his parents."). In contrast, a simple co-tenant relationship does not create a presumption of control and actual access would have to be shown. *See United States v. Duran,* 957 F.2d 499, 505 (7th Cir.1992) ("Two friends inhabiting a two-bedroom apartment might reasonably expect to maintain exclusive access to their respective bedrooms without explicitly making this expectation clear to one another."); *United States v. Heisman,* 503 F.2d 1284, 1287 (8th Cir.1974) (although defendant's room did not have a door or a lock, co-tenant did not have authority to consent to a search of defendant's private areas). The difference between a husband-wife or parent-child relationship and a co-tenant relationship is that a husband-wife or parent-child relationship raises a presumption about the parties' reasonable expectations of privacy in relation to each other in spaces typically perceived as private in a co-tenant relationship. [4] *See, e.g., Ladell,* 127 F.3d at 624 ("Third-party consents to search the property of another are based on a reduced expectation of privacy in the premises or things shared with another.").

[10] **[11]** Two caveats are important. First, in determining whether a particular relationship raises a presumption of control for most purposes, *McAlpine* admonishes that authority to search is premised on a "practical understanding" of the way parties have access to and share the searched property. *See McAlpine,* 919 F.2d at 1463. Second, while husband-wife or parent-child ***1331** relationships give rise to a presumption of control for most purposes over the property, that presumption may be rebutted by facts showing an agreement or understanding between the defendant and the third party that the latter must have permission to enter the defendant's room. For example, evidence that the defendant paid rent to the third party would tend to show a landlord-tenant relationship. *See Stoner v. California,* 376 U.S. 483, 489–90, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); *see also DiPrima,* 472 F.2d at 551 (noting that payment of rent may weigh in favor of defendant's claim of exclusive

right to room). Other examples include a lock on the bedroom door or an agreement, explicit or implicit, that the third party never enter a particular area. *See, e.g., Morning,* 64 F.3d at 536 ("A defendant cannot expect sole exclusionary authority unless he lives alone, or at least has a special and private space within the joint residence."); *United States v. Kinney,* 953 F.2d 863, 866 (4th Cir.1992) (third party did not have authority to consent to search of defendant's locked closet).

[12] In this case, there are insufficient factual findings that Rith's parents had joint access to his bedroom to support a conclusion of their authority to consent to a search of the room. There are no findings that Rith's parents visited with him in his room, cleaned his room, or otherwise went into Rith's room uninvited. Furthermore, the district court chose not to infer, on the basis of their knowledge of hidden guns in his room, that Rith's parents had access.

[13] The government has, however, shown that Rith lived with his parents and was not paying rent. Although Rith was eighteen years old, these facts raise a presumption of control for most purposes by Rith's parents over the entire home and thus they could have accessed Rith's room without his consent. There is no evidence to rebut this presumption: no lock on Rith's bedroom door; no agreement with Rith's parents that they not enter his room without his consent; no payment of rent. Because the presumption of control is unrebutted, Rith's parents had authority to consent to the search of Rith's bedroom. [5]

III. Suppression of Incriminating Statements

Rith argues that the statements he made both before and after being read his *Miranda v. Arizona* rights should have been suppressed. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Because the statements that Rith made after being confronted with the sawed-off shotgun but before he was read his *Miranda* rights were suppressed, Rith's argument is directed to the statements made before he was confronted with the sawed-off shotgun and those made after he was confronted with the shotgun and *Mirandized.* Rith claims that he was in police custody prior to being read his *Miranda* rights and, even though he was eventually read these rights, the proximity of his suppressed pre-*Miranda* incriminating statements to his post-*Miranda* incriminating statements renders the latter "fruit of the poisonous tree." He also argues that all of his statements were involuntary, in violation of the Fifth Amendment.

Upon their entry into the Rith home, the officers requested that Rith's brothers wait in the living room. They asked Rith to sit at the kitchen table because Detective Chen wanted to speak with him. Detective Chen stated to Rith that he "knew that [Rith] had brought some illegal guns into the house" and he repeated that the police had permission from Rith's parents to search the house for the guns. Officer Chen then asked Rith where the guns were located. Rith stated that he had "only one gun" and that it was in his bedroom under the mattress. He proceeded to tell the police which bedroom was his.

The officers returned to the kitchen and confronted Rith with the sawed-off shotgun. Prior to receiving his *Miranda* warning, Rith responded affirmatively to Detective Chen's ***1332** question whether he knew that the possession of an illegal sawed-off shotgun was a federal offense. He then told the officers that the guns, given to him by a friend, were probably stolen. Officer Roe proceeded to advise Rith of his *Miranda* rights, and Rith again identified the source of the guns and indicated that he thought them stolen. The officers then arrested Rith, approximately forty-five minutes after their initial entry.

The district court concluded that the totality of the circumstances established Rith was not in custody until after he had been confronted with the shotgun. *See United States v. Rith,* 954 F.Supp. 1511, 1517–18 (D.Utah 1997). The district court affirmed the magistrate judge's recommendation that the incriminating statements made after Rith was confronted with the shotgun but before he was *Mirandized* should be suppressed. *See id.* at 1518. The district court then ruled that the statements Rith made after being *Mirandized* were voluntary and therefore admissible. *See id.*

[14] In *Miranda,* the Supreme Court stated that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In a subsequent case, the Court clarified that a determination of whether an individual was in custody must be made on the totality of the circumstances, and the ultimate inquiry "is simply whether

there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (quoting *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977)). The determination of custody is reviewed *de novo,* though this court defers to the district court's findings of historical fact and credibility determinations. *See United States v. Erving L.,* 147 F.3d 1240, 1246 (10th Cir.1998).

[15] This court agrees with the district court's conclusion that under the totality of the circumstances, Rith was not in police custody until the point at which he was confronted with the illegal shotgun. Rith was questioned while at home and the officers had authority to be there, despite Rith's desires to the contrary. *See Erving L.,* 147 F.3d at 1247 (noting that suspects are less likely to be found to have been in custody for *Miranda* purposes if they were interviewed in their own homes). The district court found that the officers did not draw their weapons, handcuff Rith, or otherwise impose physical restraint upon him. *See Rith,* 954 F.Supp. at 1517. The officers' questions were not harassing or especially prolonged. Granted, there were five officers in the home at the time of the questioning; Rith was asked to sit at the kitchen table because Detective Chen had some questions to ask; and he was not told that he did not have to answer the questions. None of these factors, alone or aggregated, however, overcomes our conclusion that a reasonable person in Rith's position would have felt free to leave. The officers' presence, conduct, and questioning did not rise to the level of a restraint of freedom of movement of the degree associated with a formal arrest.

Rith next argues that his post-*Miranda* incriminating statements were involuntary because of their proximity to his pre-*Miranda,* albeit suppressed, incriminating statements. In particular, Rith points to this court's decision in *United States v. Perdue,* in which, he argues, this court held that incriminating statements made after the defendant was given his *Miranda* rights were involuntary because of the proximity of those statements to incriminating statements made before he was given his *Miranda* rights. 8 F.3d 1455 (10th Cir.1993).

Perdue, however, is inapposite because of the Supreme Court's decision in *Oregon v. Elstad.* 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). In *Elstad,* the Court held that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.* at 313, 105 S.Ct. 1285. The Court also noted with approval that "[o]f the courts that have considered whether a properly warned confession must be suppressed because it was preceded by an unwarned but ***1333** clearly voluntary admission, the majority have ... recognized that [the] requirement of a break in the stream of events is inapposite." *Id.* at 310, 105 S.Ct. 1285 (citations omitted).

The *Perdue* court expressly declined to apply *Elstad* because the defendant's first confession in *Perdue* was involuntary. *See Perdue,* 8 F.3d at 1468 n. 7. Thus, the *Perdue* court properly considered the effect of the first coerced confession on the voluntariness of the second confession. *See id.* at 1467–68. *Perdue* is relevant here only if Rith's pre-*Miranda* incriminating statements were involuntary; otherwise, *Elstad* applies and Rith may not avail himself of the fruit-of-the-poisonous-tree argument.

[16] **[17]** **[18]** **[19]** The question of voluntariness is reviewed *de novo,* crediting the district court's findings of fact unless clearly erroneous. *See United States v. Glover,* 104 F.3d 1570, 1580 (10th Cir.1997). Whether a defendant's incriminating statements were made voluntarily must be assessed from the totality of the circumstances, looking both at the characteristics of the defendant and the details of the interrogation. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The essence of voluntariness is whether the government obtained the statements by physical or psychological coercion such that the defendant's will was overborne. *See Miller v. Fenton,* 474 U.S. 104, 116, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). Five factors are considered: "(1) the age, intelligence, and education of the defendant; (2) the length of [any] detention; (3) the length and nature of the questioning; (4) whether the defendant was advised of [his or] her constitutional rights; and (5) whether the defendant was subjected to physical punishment." *Glover,* 104 F.3d at 1579.

[20] At no point during the search was Rith threatened with or subjected to physical punishment by the officers; the questioning lasted no longer than forty-five minutes; and Rith was in the comfortable surroundings of his home. The record contains no evidence to suggest that

Rith was susceptible to coercion because of his age, intelligence, or education. In fact, as the district court noted, Rith displayed his fortitude by demanding that the officers show him a search warrant before they could enter the house. *See Rith,* 954 F.Supp. at 1518. That Rith was not advised of his constitutional right is not at all dispositive and is but one factor to consider among others. The totality of the circumstances leads to the conclusion that all of Rith's incriminating statements were voluntary. [6]

Because we conclude that all of Rith's statements were voluntary, *Elstad* compels the conclusion that the administration of *Miranda* warnings prior to Rith's second set of incriminating statements met the requirements of the Constitution. Rith's fruit-of-the-poisonous-tree argument fails and the incriminating statements were properly admitted.

IV. Sixth Amendment Right to Confrontation and Hearsay

26 U.S.C. § 5861(d) makes it unlawful for any person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record [NFRTR]." In its effort to prove that Rith failed to register the sawed-off shotgun in his possession, the government introduced into evidence a document signed by Bureau of Alcohol, Tobacco and Firearms [ATF] Specialist David Marshall stating that "after a diligent search of the ... [NFRTR], I have found no evidence that the firearm or firearms described below are registered to, or have been acquired by lawful manufacture, importation, or making by, or transfer to Mesa (NMN) Rith." Affixed to the document was a sealed certificate signed by Acting Chief of the National Firearms Act Branch Denise Brown certifying that David Marshall signed in his official capacity and that his signature was genuine.

Rith objected to the admission of this document [hereinafter "ATF certificate"] as hearsay and violative of the Confrontation Clause of the United States Constitution. The trial judge overruled his objection and received the certificate into evidence under ***1334** Federal Rule of Evidence 803(10). [7] At the close of his case, Rith moved to dismiss the indictment pursuant to Rule 29, Federal Rules of Criminal Procedure, arguing that the government failed to meet its burden of proving the nonregistration of the weapon. After considering Rith's arguments and supporting documents, the trial judge denied the motion and submitted the matter to the jury. On appeal, Rith argues that his Sixth Amendment right to confront his accusers was denied by the admission of the ATF certificate. Rith's argument is two-fold: first, he was denied the opportunity to question the signatory, David Marshall; and second, the NFRTR lacks the reliability required by the Confrontation Clause.

[21] Because Rith raises a constitutional claim, review of the trial court's admission of the ATF certificate is *de novo. See Bennett v. National Transp. Safety Bd.,* 66 F.3d 1130, 1136 (10th Cir.1995). The trial court's finding of reliability is also reviewed *de novo. See United States v. Joe,* 8 F.3d 1488, 1492 (10th Cir.1993).

A. Inability to Cross–Examine the Declarant

[22] The Sixth Amendment provides that "the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. A literal reading of the Confrontation Clause would seem to preclude all hearsay from being introduced as evidence against a criminal defendant. Nevertheless, the Supreme Court has declined to impose such a reading. In *White v. Illinois* the Court stated that "unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." 502 U.S. 346, 354, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). The *White* Court proceeded to hold that it was unnecessary to prove unavailability of declarants of spontaneous declarations [8] and statements made in the course of receiving medical care. [9] *See id.* at 356–57, 112 S.Ct. 736. Because the ATF certificate was not the product of a judicial proceeding, the government's decision to introduce the ATF certificate into evidence without putting Mr. Marshall on the stand is not assailable for failure to make him available or prove him unavailable. *See also Earnest v. Dorsey,* 87 F.3d 1123, 1130 n. 5 (10th Cir.) (citing *White* for its limitation of availability requirement), *cert. denied,* 519 U.S. 1016, 117 S.Ct. 527, 136 L.Ed.2d 414 (1996).

Additionally, there is no evidence in the record that the defendant did not have the opportunity to employ his Sixth Amendment right of Compulsory Process [10] to subpoena Mr. Marshall. In deciding that there is little

benefit in imposing an unavailability rule for out-of-court statements not made in the course of a prior judicial proceeding, the Court stated that "[m]any declarants will be subpoenaed by the prosecution or defense, regardless of any Confrontation Clause requirement, while the Compulsory Process Clause and evidentiary rules permitting a defendant to treat witnesses as hostile will aid defendants in obtaining a declarant's live testimony." *White,* 502 U.S. at 355, 112 S.Ct. 736; *see also United States v. Inadi,* 475 U.S. 387, 397–400, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986) (holding that unavailability ***1335** of co-conspirators need not be proved if "the defendant himself can call and cross-examine such declarants").

Some circuits, including the Tenth Circuit, have followed the Court's cue and held that there is no violation of the Confrontation Clause when the defendant neglected to exercise rights that would have enabled him to confront the witnesses against him. *See, e.g., United States v. Jackson,* 88 F.3d 845, 847 n. 2 (10th Cir.1996) (noting that the excited utterance admitted into evidence did not violate the defendant's Sixth Amendment right of confrontation in part because the defendant could have called the declarant as a witness and cross-examined him (citing *Inadi,* 475 U.S. at 397–98 & n. 8, 106 S.Ct. 1121)); *Reardon v. Manson,* 806 F.2d 39, 42 (2d Cir.1986) ("[I]t has become settled that, at least in those borderline cases where the likely utility of producing the witness is remote, the Sixth Amendment's guarantee of an opportunity for effective cross-examination is satisfied where the defendant himself had the opportunity to call the declarant as a witness."). *But see Simmons v. United States,* 440 F.2d 890, 891 (7th Cir.1971) (holding that it is the government's burden to produce the declarant when the opportunity to cross-examine the declarant is essential to the defendant's right of confrontation).

Because the admission of the ATF certificate does not implicate the Sixth Amendment's limited requirement of availability, and because the defendant could have called Mr. Marshall as a witness, Rith's Sixth Amendment right of confrontation was not denied by the failure of the government to call Mr. Marshall as a witness.

B. Reliability of the NFRTR Database

The second basis of Rith's Sixth Amendment challenge is that his right to confront his accusers was violated because the ATF certificate, admitted under 803(10), does not embody the sufficient guarantees of reliability that the Confrontation Clause requires. Out-of-court testimony satisfies the requirements of the Sixth Amendment if it constitutes a "firmly rooted hearsay exception" or demonstrates particularized guarantees of trustworthiness. *See White,* 502 U.S. at 356–57 & n. 8, 112 S.Ct. 736. Because this court concludes that the ATF certificate demonstrates particularized guarantees of trustworthiness, we need not address whether 803(10) constitutes a firmly rooted hearsay exception.

Rith contends that the NFRTR is not endowed with particularized guarantees of trustworthiness. Upon his objection to the admissibility of the ATF certificate, he submitted to the trial judge a set of discovery documents obtained from the government on March 22, 1996. [11] These documents include statements made by Tom Busey, then chief of the National Firearms Act Branch of the Bureau of Alcohol, Tobacco, and Firearms during an October 18, 1995 training session for ATF inspectors and other investigative employees. Busey described the process by which ATF specialists search the NFRTR database for registration of Title II weapons. To support his claim of unreliability, Rith points to Busey's statements that sometimes information is missed "because there's only so many minutes in an hour and so many hours in a day," and because of error in inputting the serial numbers and conducting the search of the suspect's name or the registration number. Busey also stated that "when I came in a year ago, our error rate was between 49 and 50 percent."

In *Idaho v. Wright* the Supreme Court stated that " 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances." 497 U.S. 805, 819, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). Though "courts have considerable leeway in their consideration of appropriate factors," the relevant circumstances are those "that surround the making of the statement and that render the declarant particularly worthy of belief," such that "the test of cross-examination would be of marginal utility." *Id.* at 819–22, 110 S.Ct. 3139.

[23] The following factors are appropriate to test the trustworthiness of 803(10) evidence: [12] whether cross-examination of ***1336** the declarant would be of marginal utility, *id.* at 819–20, 110 S.Ct. 3139; whether the testimony concerns the results of a mechanically objective test, the notes were taken contemporaneously with the

performance of the test, and a supervisor reviewed the tester's methodology, *see Minner v. Kerby,* 30 F.3d 1311, 1314–15 (10th Cir.1994); and whether the database from which the evidence comes is open to the public, increasing the probability that any errors will be found and corrected, *see United States v. Metzger,* 778 F.2d 1195, 1203 (6th Cir.1985).

[24] The record establishes that the NFRTR database has sufficient guarantees of trustworthiness to satisfy the Sixth Amendment. According to Busey's statements, a quality review team was instituted in 1994 and succeeded in reducing the critical-error rate to below three percent. [13] Additionally, the ATF discovery documents contain a copy of an audit performed by the Audit Services Division of the Department of the Treasury. The results of this February 7, 1996, audit show that the critical-error rate of the database is no more than 1.5%. Furthermore, the accuracy of the registration check is buttressed by a second-level review by a branch chief.

In addition to the reliability of the NFRTR, there is little to be gained from cross-examining Marshall. If the essence of cross-examination is that the declarant's memory, perception, bias, and narration will be tested, there is little likely benefit from cross-examination of an inspector who was hired for his skills and ability to perform the job of inspecting the NFRTR database and who does not personally know the defendant or any of his associates. *See Minner,* 30 F.3d at 1315 (discussing value of cross-examining police chemist in cocaine possession prosecution). Furthermore, Marshall undoubtedly conducts hundreds of registration searches in a year. It is unlikely that he would have any recollection of the Rith search and, consequently, he would be able to testify only as to his general search method. *See id.* (holding that unavailability need not be proved when chemist would likely not recall individual test and could testify only as to standard laboratory procedure); *Reardon,* 806 F.2d at 41 (same). Cross-examination would be of marginal utility in this instance.

The cases that Rith cites to support his claim are inapposite because the defendants were able to argue that the evidence was deficient as it applied to them. In *United States v. Robinson* the files upon which the testimony was based were incomplete, resulting in a casual or partial search. 544 F.2d 110, 114–15 (2d Cir.1976). In *United States v. Yakobov* the defendant's name was drastically misspelled on the ATF certificate, undermining any claim of "diligence" in the search. 712 F.2d 20, 24 (2d Cir.1983). In both cases the courts' conclusions are unremarkable: evidence of a deficiency specific to the defendant in the search method or database may constitute sufficient evidence of unreliability. *See, e.g., id.* (holding that " 'if, *in a particular instance,* the circumstances indicate a lack of trustworthiness, the evidence should be excluded' " (quoting *Robinson,* 544 F.2d at 110) (emphasis added)).

***1337** Here Rith alleges no defect in the NFRTR database search as it pertained to him. General claims of unreliability, particularly those that rely upon outdated information, are not sufficient to raise a constitutional deficiency. *See also United States v. Regner,* 677 F.2d 754, 758–59 (9th Cir.1982) (holding defendant's claim that "possible motives" by a foreign government to lie were not cognizable absent some evidence of actual bias toward the defendant).

Seven other circuits allow the admission of the absence of public record or entry testimony to prove the nonexistence of some matter in the face of Confrontation Clause claims. Six of these circuits have specifically allowed the admission of NFRTR certificates. *See United States v. Hale,* 978 F.2d 1016, 1020–21 (8th Cir.1992) (NFRTR); *Metzger,* 778 F.2d at 1202 (NFRTR); *United States v. Herrera–Britto,* 739 F.2d 551, 552 (11th Cir.1984) (foreign certificate of nonregistration); *United States v. Cruz,* 492 F.2d 217, 220 (2d Cir.1974) (NFRTR); *United States v. Mix,* 446 F.2d 615, 622–23 (5th Cir.1971) (NFRTR); *Warren v. United States,* 447 F.2d 259, 262 (9th Cir.1971) (NFRTR); *United States v. Thompson,* 420 F.2d 536, 544–45 (3d Cir.1970) (NFRTR).

For the foregoing reasons, the admission of the ATF certificate into evidence did not constitute a violation of Rith's Sixth Amendment right of confrontation.

V. Sufficiency of the Evidence

[25] **[26]** Rith argues the evidence was insufficient to support a conviction because the government failed to prove Rith's knowledge that the shotgun barrel was less than eighteen inches in length. A challenge to the sufficiency of the evidence is reviewed *de novo,* and this court evaluates "the sufficiency of the evidence by 'consider[ing] the collective inferences to be drawn from the evidence as a whole.' " *United States v. Wilson,* 107

F.3d 774, 778 (10th Cir.1997) (quoting *United States v. Hooks,* 780 F.2d 1526, 1532 (10th Cir.1986)). Here there must have been some evidence from which the jury could find or reasonably infer that Rith knew (1) the length of the barrel of the shotgun was less than eighteen inches, or (2) the overall length of the shotgun was less than twenty-six inches. *See* 26 U.S.C. § 5845(a).

[27] Rith testified that he did not know the length of his shotgun, though he handled it several times. But he also testified to knowing that the gun was a sawed-off shotgun, and that the shotgun was much shorter than the rifle. Rebecca Bobich, the ATF agent who measured Rith's shotgun, testified that the length of the barrel was 13 and 3/4 inches, 4 and 1/4 inches shorter than the legal length. Additionally, Rith stated that he knew it was illegal to have a sawed-off shotgun.

From the evidence presented, the jury could have reasonably concluded that Rith knew the shotgun was under the legal length. Not only was Rith's shotgun observably shorter than the legal length, Rith testified to knowing that the shotgun was sawed off and that it was considerably shorter than the rifle. *See United States v. Mains,* 33 F.3d 1222, 1229 (10th Cir.1994) (holding that intent requirement was met because defendant handled gun and knew it was sawed off, and gun was visibly shorter than legal length); *United States v. Moore,* 97 F.3d 561, 564 (D.C.Cir.1996) (holding that jury could have inferred that defendant knew rifle was under the legal length simply by observing the 13 and 1/16 inch weapon). Although Rith testified to not knowing the length of the shotgun, it is not our role to evaluate the credibility of witnesses and weigh conflicting evidence. *See United States v. Ramirez,* 63 F.3d 937, 945 (10th Cir.1995). This court concludes that the evidence was sufficient to support the conviction.

VI. Jury Instructions

Finally, Rith argues that his case should be remanded because the trial judge erred in instructing the jury that they are not "to be governed by sympathy, prejudice, or public opinion." Rith argues that this instruction "misled the jury into believing that they must convict, regardless of mercy or leniency."

[28] **[29]** The propriety of a jury instruction to which an objection was made at trial is reviewed *de novo.* The conviction will not ***1338** be disturbed, however, absent a " 'substantial doubt that the jury was fairly guided.' " *United States v. Smith,* 13 F.3d 1421, 1424 (10th Cir.1994) (quoting *United States v. Mullins,* 4 F.3d 898, 900 (10th Cir.1993)).

[30] The trial judge's admonition to the jury that it was not to be swayed by "sympathy, prejudice, or public opinion" did not mean that the jurors may not be swayed against the defendant only; it meant that they should not be swayed by sympathy, prejudice, or public opinion in favor of either party. The remainder of the instruction verifies its balance and propriety: "The defendant and the public expect you will carefully and impartially consider all of the evidence in this case, follow the law as I'm stating it to you, and reach a just verdict."

[31] To the extent the defendant's appeal seeks to require courts to facilitate jury nullification, the law is clear: a criminal defendant is not entitled to have the jury instructed that it can, despite finding the defendant guilty beyond a reasonable doubt, disregard the law. *See United States v. Grismore,* 546 F.2d 844, 849 (10th Cir.1976). The jury's role is to apply the law to the facts of the case. The trial judge instructed the jury appropriately.

VII. Conclusion

The judgment of the district court is accordingly **AFFIRMED** in all respects.

All Citations

164 F.3d 1323, 51 Fed. R. Evid. Serv. 197, 1999 CJ C.A.R. 1296

Footnotes

1 Though not mentioned by Rith, the Second and Fourth Circuits have also interpreted *Matlock.* In *United States v. Davis,* the Second Circuit established the following test to meet the requirements of *Matlock:* the third party (1) had access to the area searched, and (2) a common authority over the area, a substantial interest in the area, or permission to gain

access to the area. 967 F.2d 84, 87 (2d Cir.1992). Using this test, the Southern District of New York in *United States v. Perez* concluded that a father had authority to consent to a search of his son's bedroom and the closed containers therein, even though the son had been the sole occupant and user of the bedroom for four years, the father did not use the bedroom for any purpose, and he had never accessed the personal effects in his son's closet. 948 F.Supp. 1191, 1201 (S.D.N.Y.1996). The determining factor for the court was that the father led the officers into the room and removed a suitcase from his son's closet, indicating that he had "at a minimum, permission to gain access to the bedroom." *Id.* at 1200. The court also noted that there was no evidence the son had ever prohibited his father from examining the contents of his bedroom. *See id.*

Unlike the Second and D.C. circuits, the Fourth Circuit requires proof that the third party has common authority over, general access to, or mutual use of the premises under circumstances that make it reasonable to believe that the third party has the right to permit a search. *See United States v. Block,* 590 F.2d 535, 539–40 (4th Cir.1978). The *Block* court held that a mother had both the actual authority and a reasonable appearance of authority to consent to a search of the bedroom of her twenty-three year old son flowing from the "normal free access that heads of household commonly exercise in respect of the rooms of family member occupants." *See id.* at 541. The court held, however, the mother did not have the authority to consent to the search of her son's footlocker, albeit in his bedroom, because there is a greater expectation of privacy in a locked container. *See id.*

2 *United States v. Falcon* interpreted *Matlock* differently than *McAlpine,* but for the following reasons this court declines to follow *Falcon.* 766 F.2d 1469, 1474 (10th Cir.1985). The *Falcon* court stated that *Matlock* required "the consenting party [to have] *both* access to the area *and* either a substantial interest in or common authority over the property." *See id.* (emphasis added). This language, however, is dicta and creates no binding precedent. Critically, the defendant in *Falcon* conceded that the third party had authority to consent to a search. The issue in *Falcon* was whether valid consent to search is distinguishable from valid consent to seize. Citing Supreme Court precedent, the court held that for purposes of valid third-party authority, there is no distinction between the two. Consequently, though seemingly part of the analysis, the *Matlock* discussion is gratuitous.

Rith relies upon *United States v. Salinas–Cano* in support of his effort to have the Tenth Circuit adopt the *Whitfield* test. 959 F.2d 861 (10th Cir.1992). *Salinas–Cano* stated that *Matlock* requires "both shared use and joint access or control of a container in order to support third party consent." *See id.* at 864. We construe this language and *Salinas–Cano* generally to be consistent with *McAlpine* 's interpretation of *Matlock* in the disjunctive.

3 Although the *McAlpine* court stated that the appropriate *Matlock* inquiry is the relationship between the consenter and the property searched, not the relationship between the consenter and the defendant, the court conceded that "the character of the relationship between the consenter and the defendant may bear upon the nexus between the consenter and the property." 919 F.2d 1461, 1464 (10th Cir.1990).

4 Consistent with *Matlock* 's admonition that this inquiry into authority to consent to a search does not rely upon notions of property law, a relationship giving rise to a presumption of control cannot be premised on the general proprietary interest in the home of one of the parties. *See Matlock,* 415 U.S. at 172 n. 7, 94 S.Ct. 988. Thus, a mortgage or lease in the parents' name would not be sufficient to confer authority to consent to a search of a child's bedroom. *See, e.g., Maxwell v. Stephens,* 348 F.2d 325, 336 (8th Cir.1965) (finding that mother had authority to consent to a search independent of her proprietary interest in the house).

5 Because Rith's parents had actual authority to consent to the search of his bedroom, analysis of apparent authority to consent is unnecessary. *See Illinois v. Rodriguez,* 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (holding that Fourth Amendment is not violated when officers enter without a warrant if they reasonably, albeit erroneously, believe that the third party has authority to consent to the entry).

6 The district court suppressed the first of Rith's incriminating statements merely because he had not been given the *Miranda* warnings, not because the statements were otherwise involuntarily given.

7 Federal Rule of Evidence 803(10) allows for the admission of evidence showing an absence of public record or entry if the record, report, statement, or data compilation was "regularly made and preserved by a public office or agency," and is accompanied by either a certification in accordance with Rule 902 or testimony that a "diligent search failed to disclose the record, report, statement, or data compilation or entry." Rule 902(2) provides for self-authentication of documents not under seal.

The ATF certificate meets the requirements of the 803(10) exclusion from the hearsay rule. Congress ensured that the NFRTR was "regularly made and preserved by a public office or agency" with 26 U.S.C. § 5841, which requires the Secretary of the Treasury to "maintain a central registry of all firearms in the United States.... This registry shall be known as the National Firearms Registration and Transfer Record." The ATF document was accompanied by certification

which fulfilled the requirements of 902(2). The trial court's admission of the ATF certificate over the defendant's hearsay objection was proper.

8 *See* Fed.R.Evid. 803(2).

9 *See* Fed.R.Evid. 803(4).

10 "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor...." U.S. Const. amend. VI.

11 Rith did not offer his exhibit into evidence.

12 The government urges us to employ the *Dutton v. Evans* "four-part analysis" to determine the reliability of the evidence. 400 U.S. 74, 88–89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (the statement contained no express assertion about past facts; the declarant was in a position to have personal knowledge of the matters in the statement; the possibility that the declarant's statement was founded on faulty recollection is extremely remote; and the circumstances surrounding the making of the statement were such that the possibility of misrepresentation was unlikely). *Dutton* 's factors are neither talismanic nor appropriate here. The Supreme Court itself has expressly declined to "endorse a mechanical test" for determining reliability. *See Idaho v. Wright,* 497 U.S. 805, 822, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). The *Dutton* factors are tailored to ascertain the reliability of a co-conspirator's statement, viewed by courts as inherently unreliable. *Cf. Wright,* 497 U.S. at 805, 110 S.Ct. 3139 (identifying factors tailored to assess reliability of statements made by child witnesses in child sexual abuse cases). Here we have a public official who has a legally enforceable duty to make the out-of-court statement. *Cf. Warren v. United States,* 447 F.2d 259, 262 (9th Cir.1971) (holding that presumption of trustworthiness in an ATF nonregistration certificate is warranted because "the declarant has a legally enforceable duty to maintain accurate records").

13 In his remarks, Busey noted that the total error rate was lower than eight percent but that the critical-error rate was below three percent. A critical error, in contrast to a common error, is one in which a person's name is misspelled, presumably thwarting a diligent search for a registration under that person's name. A common error "is an error in the database entry, but it doesn't affect a lookup."

End of Document

Tab 12

CR ____. Unjustified Use of Force.

(Approved by Subcommittee)

The defendant did not have a duty to retreat from the force or threatened force when [he/she] was in a place where [he/she] had lawfully entered or remained. However, the defendant was not justified in using force if [he/she] [*include those which apply*]:

1. initially provoked the use of force against [himself/herself] with the intent to use force as an excuse to inflict bodily harm upon another person;
2. was attempting to commit, was committing, or was fleeing after the commission or an attempt to commit [*name of a felony offense*] described as Count __ [*if the alleged felony is uncharged, the court may need to provide a description of the elements*]; or
3. was the aggressor or was engaged in a combat by agreement, unless:
   a. the defendant withdrew from the encounter,
   b. effectively communicated to the other person his intent to do so, and
   c. the other person still continued the use of unlawful force.]

[*Include the following if supported by the evidence:* "Combat by agreement" does not include:

1. voluntarily entering into a relationship,
2. remaining in an ongoing relationship, or
3. entering or remaining in a place where one has a legal right to be.]

References
Utah Code § 76-2-402(2) and (3)

CR ____. Reasonable Belief.

(Approved by Subcommittee)

To decide whether it was reasonable for the defendant to believe that force or a threat of force was necessary to defend [*himself/herself or a third person*] against another person's imminent use of unlawful force, you may consider, but are not limited to, the following factors:

1. the nature of the danger;
2. the immediacy of the danger;
3. the probability that the unlawful force would result in death or serious bodily injury;
4. prior violent acts or violent propensities of the other person; and
5. any pattern of abuse or violence in the relationship of the parties.

References
Utah Code § 76-2-402(1)
Utah Code § 76-2-402(5)

CR ____. Use of Force Not Intended or Likely to Cause Death or Serious Bodily Injury in Defense of Habitation.

(Approved by Subcommittee)

A person is justified in using force against another, not including force which is intended or likely to cause death or serious bodily injury, when and to the extent that he reasonably believes that the force is necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation.

References
Utah Code § 76-2-405(1)
State v. Karr, 2015 UT App 287, 364 P.3d 49

CR ____. Use of Force Intended or Likely to Cause Death or Serious Bodily Injury in Defense of Habitation.

(Approved by Subcommittee)

It is a defense in this case if the defendant's use of force was legally justified. If the defendant's conduct was legally justified, you must enter a verdict of not guilty.

The use of force intended or likely to cause death or serious bodily injury is justified when and to the extent the defendant reasonably believed force was necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation only if: [*include 1, 2, or both 1 and 2 as applicable:*]

1. the defendant believes that:
   a. the entry was made or attempted in a violent or stealthy manner, and
   b. the defendant reasonably believed that:
      1) the entry was attempted or made for a violent purpose, and
      2) force was necessary to prevent the entry or attempted entry;

or

2. the defendant reasonably believed that:
   a. the entry was made or attempted for the purpose of committing a felony in the habitation, and
   b. force was necessary to prevent the commission of the felony.

References

Utah Code § 76-2-405(1)(a-b)
State v. Karr, 2015 UT App 287, 364 P.3d 49

CR ____. Use of Force to Prevent or Terminate Another Person's criminal interference with real property or personal property.

(Approved by Subcommittee)

It is a defense in this case if the defendant's use of force was legally justified. If the defendant's conduct was legally justified, you must enter a verdict of not guilty.

The use of force, other than deadly force, is justified when and to the extent the defendant reasonably believed force was necessary to prevent or terminate another person's criminal interference with real property or personal property if the property:

1. was lawfully in the defendant's possession;
2. was lawfully in the possession of a member of the defendant's immediate family; or
3. belonged to a person whose property the defendant had a legal duty to protect.

In determining whether the defendant's use of force was reasonable, you must consider any relevant facts proven in this case. In addition, you must consider:

1. the apparent or perceived extent of the damage to the property;
2. property damage previously caused by the other person;
3. threats of personal injury or damage to property that have been made previously by the other person; and
4. any patterns of abuse or violence between the defendant and the other person.

References

Utah Code § 76-2-406

Tab 13

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 2. Principles of Criminal Responsibility (Refs & Annos)
Part 4. Justification Excluding Criminal Responsibility

U.C.A. 1953 § 76-2-402

§ 76-2-402. Force in defense of person--Forcible felony defined

Currentness

(1)(a) A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force.

(b) A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2)(a) A person is not justified in using force under the circumstances specified in Subsection (1) if the person:

(i) initially provokes the use of force against the person with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(ii) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(iii) was the aggressor or was engaged in a combat by agreement, unless the person withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

(b) For purposes of Subsection (2)(a)(iii) the following do not, by themselves, constitute "combat by agreement":

(i) voluntarily entering into or remaining in an ongoing relationship; or

(ii) entering or remaining in a place where one has a legal right to be.

(3) A person does not have a duty to retreat from the force or threatened force described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(a)(iii).

(4)(a) For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape

of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person, and arson, robbery, and burglary as defined in Title 76, Chapter 6, Offenses Against Property.

(b) Any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony.

(c) Burglary of a vehicle, defined in Section 76-6-204, does not constitute a forcible felony except when the vehicle is occupied at the time unlawful entry is made or attempted.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

(a) the nature of the danger;

(b) the immediacy of the danger;

(c) the probability that the unlawful force would result in death or serious bodily injury;

(d) the other's prior violent acts or violent propensities; and

(e) any patterns of abuse or violence in the parties' relationship.

Credits

Laws 1973, c. 196, § 76-2-402; Laws 1974, c. 32, § 6; Laws 1991, c. 10, § 5; Laws 1994, c. 26, § 1; Laws 2010, c. 324, § 126, eff. May 11, 2010; Laws 2010, c. 361, § 1, eff. May 11, 2010.

U.C.A. 1953 § 76-2-402, UT ST § 76-2-402
Current through 2016 Third Special Session

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Tab 14

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 2. Principles of Criminal Responsibility (Refs & Annos)
Part 4. Justification Excluding Criminal Responsibility

U.C.A. 1953 § 76-2-405

§ 76-2-405. Force in defense of habitation

Currentness

(1) A person is justified in using force against another when and to the extent that he reasonably believes that the force is necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation; however, he is justified in the use of force which is intended or likely to cause death or serious bodily injury only if:

(a) the entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation and he reasonably believes that the force is necessary to prevent the assault or offer of personal violence; or

(b) he reasonably believes that the entry is made or attempted for the purpose of committing a felony in the habitation and that the force is necessary to prevent the commission of the felony.

(2) The person using force or deadly force in defense of habitation is presumed for the purpose of both civil and criminal cases to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry is unlawful and is made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony.

Credits
Laws 1973, c. 196, § 76-2-405; Laws 1985, c. 252, § 1.

U.C.A. 1953 § 76-2-405, UT ST § 76-2-405
Current through 2016 Third Special Session

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Tab 15

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 2. Principles of Criminal Responsibility (Refs & Annos)
Part 4. Justification Excluding Criminal Responsibility

U.C.A. 1953 § 76-2-406

§ 76-2-406. Force in defense of property--Affirmative defense

Currentness

(1) A person is justified in using force, other than deadly force, against another when and to the extent that the person reasonably believes that force is necessary to prevent or terminate another person's criminal interference with real property or personal property:

(a) lawfully in the person's possession;

(b) lawfully in the possession of a member of the person's immediate family; or

(c) belonging to a person whose property the person has a legal duty to protect.

(2) In determining reasonableness under Subsection (1), the trier of fact shall, in addition to any other factors, consider the following factors:

(a) the apparent or perceived extent of the damage to the property;

(b) property damage previously caused by the other person;

(c) threats of personal injury or damage to property that have been made previously by the other person; and

(d) any patterns of abuse or violence between the person and the other person.

Credits
Laws 1973, c. 196, § 76-2-406; Laws 2010, c. 377, § 1, eff. May 11, 2010.

U.C.A. 1953 § 76-2-406, UT ST § 76-2-406
Current through 2016 Third Special Session

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Tab 16

364 P.3d 49
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Adam **KARR**, Appellant.

No. 20130878–CA.
|
Nov. 27, 2015.

Synopsis

Background: Defendant was convicted in the Third District Court, Salt Lake Department, James T. Blanch, J., of murder and obstruction of justice. Defendant appealed.

Holdings: The Court of Appeals, Davis, J., held that:

[1] **State** could defeat presumption that defendant was justified in using deadly force in defense of his habitation by showing that entry was lawful or not made with force, violence, stealth, or felonious purpose, and

[2] error in jury instructions explaining how **State** could rebut presumption was harmless.

Affirmed.

J. Frederic Voros, J., concurred in result and filed opinion in which Stephen L. Roth, J., concurred in part.

Stephen L. Roth, J., concurred and filed opinion.

West Headnotes (6)

[1] Criminal Law
Instructions

Claims of erroneous jury instructions present questions of law that are reviewed for correctness.

Cases that cite this headnote

[2] Criminal Law
Errors favorable to defendant

Any error in instructing jury that the presumption of reasonableness applied in murder trial in which defendant asserted that he was justified in using force in defense of his habitation was harmless, where error benefitted defendant. West's U.C.A. § 76–2–405.

Cases that cite this headnote

[3] Criminal Law
Compulsion or necessity;justification in general

The statute providing that a person is justified in using force in defense of habitation is an affirmative defense. West's U.C.A. § 76–2–405.

Cases that cite this headnote

[4] Criminal Law
Compulsion or necessity;justification in general

Criminal Law
Particular facts

Once the presumption that a defendant was justified in using deadly force in defense of habitation applies, the **State** may defeat it by showing that the entry was lawful or not made with force, violence, stealth, or felonious purpose. West's U.C.A. § 76–2–405.

Cases that cite this headnote

[5] Criminal Law
Instruction as to evidence

Error in jury instruction explaining that the **State** can rebut the presumption that defendant was justified in using deadly force in defense of his habitation by showing either that the victim's entry or attempted entry was not made for purposes of assaulting or committing a felony or that defendant's actions were unreasonable or unnecessary was harmless in murder trial; **State** did not

rely on "committing a felony language," and State sought to rebut presumption by showing that defendant's beliefs and actions were not reasonable. West's U.C.A. § 76–2–405(1)(a, b).

Cases that cite this headnote

[6] Criminal Law

Prejudice to rights of party as ground of review

Only harmful and prejudicial errors constitute grounds for granting a new trial.

1 Cases that cite this headnote

Attorneys and Law Firms

***49** Teresa L. Welch, Salt Lake City, and John B. Plimpton, for Appellant.

Sean D. Reyes and Jeanne B. Inouye, Salt Lake City, for Appellee.

Judge JAMES Z. DAVIS authored this Opinion, in which Judge STEPHEN L. ROTH concurred. [1] Judge J. FREDERIC VOROS JR. concurred in the result, with opinion, in which Judge STEPHEN L. ROTH concurred in part, with opinion.

Opinion

DAVIS, Judge:

¶ 1 Adam Karr appeals from his convictions of murder and obstruction of justice. We affirm.

***50** BACKGROUND

¶ 2 Karr's convictions stem from a fight that occurred during a party at the home Karr shared with his brother (Brother). [2] The victim (Victim) arrived at the party as a guest of Karr and Brother's mutual friend. Victim became increasingly "obnoxious" and "belligerent" as the night wore on. Karr and Brother eventually asked Victim to leave, but Victim resisted. When Victim did leave, he returned minutes later to retrieve the liquor he brought to the party. While Victim waited for someone to bring him his liquor, he began making threats against Brother that Karr overheard. After Victim got his alcohol back, a fight broke out among Victim, Karr, and Brother during which Brother restrained Victim while Karr stabbed Victim seven times. Victim ultimately died from his injuries. Karr was charged with one count of murder and one count of obstructing justice.

¶ 3 Karr's defense at trial centered around his right to use force to defend his home pursuant to Utah Code section 76–2–405. The jury received instructions on Karr's defense of habitation theory and returned with guilty verdicts. Karr appeals.

ISSUE AND STANDARD OF REVIEW

[1] ¶ 4 Karr raises several arguments on appeal focusing on the accuracy of the defense of habitation jury instruction. "Claims of erroneous jury instructions present questions of law that we review for correctness." *State v. Jeffs,* 2010 UT 49, ¶ 16, 243 P.3d 1250. [3]

ANALYSIS

[2] **[3]** ¶ 5 Karr argues that the jury instructions undermined the presumption of reasonableness he was entitled to under the defense of habitation statute. [4] We reject Karr's argument but recognize that the relevant jury instruction, Instruction 36, does contain errors. Those errors, however, are harmless. *See State v. Young,* 853 P.2d 327, 347 (Utah 1993) ("Even if [a] defendant can show that the instructions given by the trial court were in a technical sense incorrect, he has [to also] show[ ] that the instructions prejudiced him."). We address each issue in turn.

I. Karr's Claims of Error Are Without Merit.

¶ 6 The defense of habitation statute provides,

> (1) A person is justified in using force against another when and to the extent ***51** that he reasonably believes

> that the force is necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation; however, he is justified in the use of force which is intended or likely to cause death or serious bodily injury only if:
>
> (a) the entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation and he reasonably believes that the force is necessary to prevent the assault or offer of personal violence; or
>
> (b) he reasonably believes that the entry is made or attempted for the purpose of committing a felony in the habitation and that the force is necessary to prevent the commission of the felony.
>
> (2) The person using force or deadly force in defense of habitation is presumed for the purpose of both civil and criminal cases to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry is unlawful and is made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony.

Utah Code Ann. § 76–2–405 (LexisNexis 2012).

¶ 7 This court has explained that "[w]hile not a model of clarity"—subsection (1) of the statute "speaks of reasonable beliefs and subsection (2) of reasonable action and reasonable fear—the thrust of subsection (2) is to vest persons who defend their habitation under circumstances described in subsection (1) with the presumption that their beliefs and actions were reasonable." ***State*** *v. Moritzsky,* 771 P.2d 688, 691 (Utah Ct.App.1989).

¶ 8 Two of the jury instructions provided at **Karr's** trial mirror the statutory language; Instruction 34 recites subsection (1) of the statute, and Instruction 35 recites subsection (2). Following those two instructions is Instruction 36, which reads,

> However, even though the defendant is entitled to the presumption that his actions were reasonable,[5] the **state** may rebut that presumption by showing either that the entry was not made for the purposes of assaulting or offering personal violence to any person in the residence or for the purpose of committing a felony, or by showing that the defendant's actions were not reasonable or necessary....

¶ 9 **Karr** argues that Instruction 36 "significantly undermined the presumption of reasonableness [he] was entitled to under" subsection (2) of the statute. According to **Karr**,

> Instruction 36 told the jury to find [him] guilty if the prosecution proved any one of the following four facts: (1) [Victim's] entry was not made for the purpose of assaulting or offering personal violence to any person in the residence; or (2) [Victim's] entry was not made for the purpose of committing a felony; or (3) [**Karr's**] actions were not reasonable; or (4) [**Karr's**] actions were not necessary.

¶ 10 **Karr** acknowledges that the **State** is entitled to rebut the presumption of reasonableness contained in the statute but argues that the **State** must do so exclusively by showing that **Karr's** belief that he needed to use deadly force to prevent the entry was unreasonable. According to **Karr**, a showing that Victim's entry was lawful rebuts the availability of the defense as a whole, not the presumption of reasonableness a defendant is entitled to once the unlawfulness of the entry is supported by the evidence. **Karr's** argument implies that once a fact like the unlawfulness of the entry is supported by the evidence, thereby "triggering" the availability of the defense and the presumption of reasonableness contained therein, that fact cannot be rebutted.

[4] ¶ 11 We disagree with **Karr's** interpretation of the defense of habitation statute. "When we interpret statutes, unless a statute is ambiguous, we look exclusively to a statute's ***52** plain language to ascertain the statute's meaning." *Prince v. Bear River Mut. Ins. Co.,* 2002 UT 68, ¶ 21, 56 P.3d 524. The defense of habitation statute indicates that the presumption is available if two

conditions are met: (1) the victim's entry was unlawful and (2) the victim's entry was "made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony." *See* Utah Code Ann. § 76–2–405(2) (LexisNexis 2012); *Moritzsky,* 771 P.2d at 692. Thus, once the presumption applies, the **State** may defeat it by refuting the defendant's evidence that either of the two presumption-creating elements exist, i.e., by showing that the entry was (1) lawful or (2) not made with force, violence, stealth, or felonious purpose. *See* Utah Code Ann. § 76–2–405(2). Our case law also provides that once the presumption is triggered, the **State** may rebut it by proving "that in fact defendant's beliefs and actions under subsection (1) were not reasonable." [6] *Moritzsky,* 771 P.2d at 691; *see also* Utah Code Ann. § 76–2–405(1)(a)–(b) (describing the defendant's beliefs and actions under subsection (1) as pertaining to whether "the entry [was] attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation"; whether "the entry [was] made or attempted for the purpose of committing a felony in the habitation"; and whether force was necessary to prevent the unlawful entry, assault, offer of violence, or commission of a felony). Thus, we reject **Karr's** argument that the only means by which the **State** could rebut the presumption was by showing that **Karr's** beliefs were not reasonable.

¶ 12 Moreover, the method the **State** used to rebut the presumption was to show that **Karr's** beliefs and actions were unreasonable—precisely the method **Karr** argues the **State** was required to use. The **State** focused on evidence indicating that Victim was neither inside the house nor attempting to reenter at the time of the stabbing and that Victim's intent in remaining by the entryway was to get his alcohol back. Indeed, **Karr** recognized in his opening brief that evidence showing that Victim's entry was, in fact, not "attempted or made for the purpose of assaulting" anyone in the home, *see* Utah Code Ann. § 76–2–405(1)(a), "might be relevant to deciding whether [his] belief was reasonable." (Emphasis omitted.) As the **State** asserted in closing argument, **Karr's** use of deadly defensive force "has to be only to the extent that is necessary to stop [Victim] from coming back in the house, ... not just to get his alcohol, but from coming back in the house to fight, beat up, cause a felony, to do something." The **State** acknowledged that Victim may have acted inappropriately during the party but argued that Victim's "actions are not on trial" and that Victim's alleged threats of future harm do not provide a reasonable basis to use deadly force. The prosecutor **stated**, "You can't kill people because you think they're going to do something in the future. You can't kill people because of what they did [earlier], no matter how bad it was."

¶ 13 In closing argument, the prosecutor also pointed out that several eyewitnesses testified that the fight occurred outside the house and that any blood found inside the house could have been tracked inside from other partygoers' feet; that various eyewitnesses testified about Victim's desire to get his alcohol before leaving; that Victim was unarmed; and that Victim did not throw the proverbial "first punch" or even try to fight back. Additionally, although it is undisputed that Victim was behaving "obnoxiously" and "belligerently," the record contained evidence that Brother had Victim restrained in a headlock on the front porch before and while **Karr** stabbed him repeatedly. In other words, because the evidence indicated that Victim was already outside the home and restrained prior to **Karr's** use of deadly force, it follows that Victim was neither attempting to reenter the home nor attempting to commit an assault in the home prior to **Karr's** use of deadly force, rendering unreasonable **Karr's** fear of imminent peril and his belief that deadly force was necessary.

***53** II. Instruction 36 Contains Harmless Errors.

[5] ¶ 14 Instruction 36 explains that the **State** can rebut the presumption by showing either (1) that Victim's entry or attempted entry was not made for purposes of assaulting or committing a felony or (2) that **Karr's** actions were unreasonable or unnecessary. Instruction 36's focus on the purpose of Victim's entry does not track the statute or case law applying it. But whether the victim entered the home for the purpose of assaulting someone or committing a felony *is* relevant to the reasonableness of the defendant's fears and beliefs at the time of the victim's entry. *See* Utah Code Ann. § 76–2–405(1)(a)–(b). Nonetheless, whether **Karr** believed that Victim entered or attempted to enter his home for the purpose of committing a felony, rather than an assault, was not at issue in this case. *See Green v. Louder,* 2001 UT 62, ¶ 17, 29 P.3d 638 (ruling that a trial court errs when giving a jury instruction that is "inconsistent with the evidence presented at trial"). Additionally, Instruction 36 focused

only on the reasonableness of Karr's action, when it should have directed the jury to consider Karr's "beliefs *and* actions." *See State v. Moritzsky,* 771 P.2d 688, 691 (Utah Ct.App.1989) (emphasis added). For these reasons, we consider Instruction 36 to be technically incorrect.

[6] ¶ 15 Nonetheless, "[o]nly harmful and prejudicial errors constitute grounds for granting a new trial." *See State v. Young,* 853 P.2d 327, 347 (Utah 1993). The errors here are harmless. The State did not rely on the "committing a felony" language, *see State v. DeAlo,* 748 P.2d 194, 198 (Utah Ct.App.1987) (ruling that the erroneous inclusion of a "superfluous" jury instruction was "harmless"), and we are not convinced that the omission of the words "and beliefs" in Instruction 36 had an effect on the outcome of the trial where the State sought to rebut the presumption by showing that both Karr's beliefs and actions were not reasonable. *See supra* ¶¶ 12–13; *see also Green,* 2001 UT 62, ¶ 17, 29 P.3d 638 (explaining that an error in a jury instruction is harmless if "we are not convinced that without this instruction the jury would have reached a different result").

¶ 16 In sum, although Instruction 36 could have been clearer, we reject Karr's claims of error in the instruction and are not convinced that any errors in the instruction were prejudicial. *See State v. Campos,* 2013 UT App 213, ¶ 64, 309 P.3d 1160 ("[I]f taken as a whole they fairly instruct the jury on the law applicable to the case, the fact that one of the instructions, standing alone, is not as accurate as it might have been is not reversible error." (alteration in original) (citation and internal quotation marks omitted)). Accordingly, the trial court did not err when it gave the jury Instruction 36. [7]

CONCLUSION

¶ 17 Instruction 36 did not undermine Karr's entitlement to the presumption of reasonableness provided by subsection (2) of the defense of habitation statute. Accordingly, the instruction did not prejudice Karr. We affirm Karr's convictions.

VOROS, Judge (concurring):

¶ 18 I concur in the result. I agree with the majority that, on the facts before the jury, the instructional errors were harmless. I write to urge the legislature to consider clarifying the defense-of-habitation statute and in particular its presumption of reasonableness. *See* Utah Code Ann. § 76–2–405 (LexisNexis 2012).

¶ 19 Subsection (1) of section 405 defines the defense of habitation. It consists of a single sentence of 157 words. The subsection's proviso specifies when deadly force may be used in defense of one's habitation. Such force may be used in either of two circumstances. *See id.* § 76–2–405(1)(a) and (b).

¶ 20 The first circumstance occurs when three elements are all present. *See* ***54** *id.* § 76–2–405(1)(a). The first element includes three alternative sub-elements ("the entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth"). *Id.* The second element contains two alternative sub-elements, each of which includes two alternative sub-sub-elements (the defendant reasonably believes that the entry is either "attempted or made" for either "assaulting or offering personal violence to any person ... dwelling ... or being in the habitation"). *Id.* The third element requires only a single showing ("the force is necessary to prevent the assault or offer of personal violence"). *Id.*

¶ 21 The second circumstance occurs when two elements are both present. *See id.* § 76–2–405(1)(b). The first element includes two alternative sub-elements ("the entry is made or attempted for the purpose of committing a felony in the habitation"). *Id.* The second element requires a single showing (the defendant reasonably believes "that the force is necessary to prevent the commission of the felony").

¶ 22 The complexity of subsection 405(1) renders the defense of habitation difficult to apply in practice. By my calculation, subsection 405(1)'s one sentence creates 24 possible permutations for establishing the defense of habitation.

¶ 23 Subsection 405(2)'s presumption of reasonableness further complicates the analysis. *See* Utah Code Ann. § 76–5–405(2) (LexisNexis 2012). That subsection lists five facts that, if established, trigger the rebuttable presumption of two facts: (1) that the actor "acted reasonably" and (2) that the actor "had a reasonable fear of imminent peril of death or serious bodily injury" (the presumed facts). *Id.* The first presumed fact roughly

correlates to the elements of the defense of habitation in subsection (1), which requires that the defendant acted while "reasonably believing" certain things. But it does not track the text of the defense of habitation as defined in subsection (1).

¶ 24 Similarly, the second presumed fact loosely correlates to certain elements of the defense of habitation, such as whether the defendant "reasonably believes" the victim entered for the purpose of "offering personal violence to any person" (whatever that means). But again, it does not track the text of any element of the defense of habitation and in fact seems aimed at establishing an element of the related—but nevertheless distinct—defense-of-person statute. *See id.* § 76–2–402(1)(b) ("A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use of unlawful force, or to prevent the commission of a forcible felony.").

¶ 25 In short, subsection 405(1) creates a complex matrix of elements necessary to establish the defense of habitation, and subsection 405(2) creates a presumption that permits certain facts to be presumed. But the presumed facts only approximate, not duplicate, elements of the defense of habitation. For these reasons, I urge the legislature to consider amending this section to the extent it deems appropriate.

¶ 26 Of course, while legislatures enact statutes, courts apply them in live cases, and we have one before us. Like the majority, I believe the appeal turns on prejudice. **Karr** explicates well the flaws in Instruction 36—flaws that (I believe) derive from the defense-of-habitation statute's complexity as catalogued above. That said, Instruction 36 instructed the jury that "defendant is entitled to the presumption that his actions were reasonable." It then described how the prosecution could rebut that presumption. That description was, as **Karr** contends, wrong. I agree with **Karr's** contention that "to rebut the presumption of reasonableness under § 76–2–405(2), the prosecution must show that it was unreasonable for the defendant to believe that deadly force was necessary."

¶ 27 For reasons explained in the majority opinion, demonstrated in the **State's** brief, and apparent on the record, I conclude that the prosecution did show, beyond a reasonable doubt, that **Karr** could not have reasonably believed that deadly force was necessary here. Uncontroverted trial testimony established ***55** that Victim, after partying for some time, stepped out momentarily then stepped back inside to retrieve some liquor; that **Karr** quarreled with Victim, who was drunk; that **Karr** stabbed Victim outside on the porch; that **Karr** stabbed Victim, who was unarmed, seven times; that Brother restrained Victim during the stabbing; and that Victim did not resist. In contrast, **Karr's** own version of events, as reported to police, evolved over time. First he said he was not present at the house where the stabbing occurred; then that he acted in defense of Brother; then that Victim attacked him with a knife; and finally that when he saw Victim go for Brother, he "snapped."

¶ 28 On this record, the instructional errors do not undermine my confidence in the jury's verdict. I accordingly concur in the result.

ROTH, Judge (concurring):

¶ 29 I concur in the lead opinion. In addition, I join Judge Voros in "urg [ing] the legislature to consider clarifying the defense-of-habitation statute and in particular the presumption of reasonableness." *See supra* ¶ 18. I do so for the reasons he has cogently **stated** in his concurrence.

All Citations

364 P.3d 49, 801 Utah Adv. Rep. 25, 2015 UT App 287

Footnotes

1 Judge James Z. Davis participated in this case as a member of the Utah Court of Appeals. He retired from the court on November 16, 2015, before this decision issued.

2 "In reviewing a jury verdict, we view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." ***State*** *v. Dunn,* 850 P.2d 1201, 1205 (Utah 1993).

3 We reject the **State's** claims that **Karr** has not adequately preserved his arguments for our review.

4 **Karr** also contends that the trial court erroneously "instructed the jury to determine whether the evidence triggered the presumption of reasonableness because the court was obligated to determine that issue itself." This is not what occurred;

Instruction 36 affirmatively instructed the jury that the presumption applied. **Karr** alternatively argues that the trial court "erred when it failed to instruct the jury on the evidentiary threshold sufficient to trigger the presumption." However, because the court instructed the jury that the presumption applied, there was no need for the court to also instruct the jury on the evidentiary threshold necessary to trigger the presumption. Although we believe the trial court may have erred by instructing the jury that the presumption applied, *see* ***State*** *v. Patrick,* 2009 UT App 226, ¶ 19, 217 P.3d 1150 (explaining that "the statutory presumption of reasonableness" is "preclude [d]" by a finding that the victim's entry was lawful), the error benefited **Karr** and accordingly is not a prejudicial error warranting reversal, *see* ***State*** *v. Lafferty,* 749 P.2d 1239, 1255 (Utah 1988) ("An error is prejudicial only if we conclude that absent the error, there is a reasonable likelihood of a more favorable outcome for the defendant."). **Karr** also discusses at length the characterization of the defense of habitation as an evidentiary presumption versus an affirmative defense. Our case law settles any dispute as to the nature of the rights provided by the defense of habitation statute; it is an affirmative defense. *See, e.g., Patrick,* 2009 UT App 226, ¶ 18, 217 P.3d 1150 (referring to a defense of habitation argument as a "justification defense"); *Salt Lake City v. Hendricks,* 2002 UT App 47U, para. 2, 2002 WL 257553 (referring to the language in the defense of habitation statute as "appropriate for an affirmative defense"); ***State*** *v. Moritzsky,* 771 P.2d 688, 691 n. 2 (Utah Ct.App.1989) (identifying what a defendant relying on the defense of habitation statute must do "[t]o mount a successful affirmative defense of this sort").

5 Instruction 37 adds, "In the context of defense of habitation, the facts and circumstances constituting reasonableness must be judged not from the actor's subjective viewpoint, but rather from the viewpoint of a person of ordinary care and prudence in the same or similar circumstances."

6 This refutes **Karr's** argument that the "beliefs" at issue in subsection (2) of the statute are not the same as those referenced in subsection (1).

7 Because we have determined that only one error occurred below—that Instruction 36 erroneously, but harmlessly, contained the "committing a felony" language and omitted the words "and beliefs"—we necessarily reject **Karr's** cumulative error argument. *See generally* ***State*** *v. Dunn,* 850 P.2d 1201, 1229 (Utah 1993) (explaining the cumulative error doctrine). Likewise, we need not address **Karr's** argument that a reversal and new trial on his murder conviction requires a reversal and new trial on his obstruction of justice conviction.

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