

1986

# West Valley City v. Kenneth H. Risløw : Brief of Respondent

Utah Court of Appeals

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## Recommended Citation

Brief of Respondent, *West Valley City v. Risløw*, No. 860332 (Utah Court of Appeals, 1986).

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WEST VALLEY CITY,	)	
Plaintiff/Respondent,	)	BRIEF OF RESPONDENT
vs	)	
KENNETH H. RISLOW,	)	Case No. 860332
Defendant/Appellee,	)	Priority No. 2

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APPEAL FROM THE THIRD JUDICIAL  
DISTRICT COURT OF SALT LAKE COUNTY,  
THE HON. JUDITH BILLINGS, PRESIDING

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**FILED**  
DEC 22 1986

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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### **ISSUE PRESENTED FOR APPEAL**

The issue presented by this appeal is whether failure to make a single objection, when viewed in light of the entire record, constitutes ineffective assistance of counsel.

### **STATEMENT OF THE FACTS**

On May 4, 1985, the Defendant entered the ZCMI store at the Valley Fair Mall in West Valley City. He was seen by Katherine Loveless, secretary to the personnel manager. She described his attire as jogging shorts, athletic-type shirt, and a utility belt around his waist. When asked if she noticed anything peculiar about him, she said his jogging shorts were hiked up and that he was exposed. When asked to explain "exposed" she stated, "His private parts were showing for all the world to see." (TT p.36 11 21-22.) This was apparently the case, as she later described young women in the credit line giggling and older ladies making an audible intake of break (breath). (TT p.42, 11 16-19.)

Ms. Loveless was shown a picture of the Defendant which he said depicted his attire on May 4, 1985. This photograph was taken by Lyn Horton. (TT p.117, 11 9-16.) According to the Defendant, he had to deliberately arrange his clothing in order to make the bulge in his undershorts visible below the jogging shorts he wore in the photograph. (TT p.94, 11 1-12.) When Ms. Loveless compared what she saw in the photograph with what she saw on May 4, she stated the shorts were hiked up a lot more than

they were in the photograph. (TT p.38, 11 22-24.) This was before the Defendant came out of the men's room, when his shorts were hiked up even higher. (TT p.41 11 15-22.)

Following Ms. Loveless' testimony, the City called Stewart Poore. Mr. Poore testified he saw an astonished look on Ms. Loveless' face and that she told him a man had just walked by while partially exposed. (TT p.52, 11 3-10.) Mr. Poore also noticed the Defendant was exposed (Id., at 11 17-10.) Mr. Poore stated the Defendant's shorts were hiked up much higher than depicted in the photograph (TT p.53, 11 14-18), and noted the reaction of persons near the credit office (TT p.55, 11 13-16).

The City next called Scott Longson. He also testified the Defendant was exposed. (TT p.76 11 3-8.) Following his testimony, the City called Ann Zupon. She stated what called her attention to the Defendant was the fact he was exposing himself. (TT p.73, 11 22-23.) She also testified people in the credit line saw him (TT p.74, 11 10), and that the problem was worse when he exited the men's room. (Id., at 11 14-18). The City called no further witnesses and rested.

As its first witness, the defense called the Defendant, Kenneth Rislow. He stated he did not know any of his private parts were exposed to public view. (TT p. 89, 11 12-16.)

On cross-examination, the Defendant stated the undershorts he was wearing had elastic around the leg which was very tight. (TT p.91, 11 16-18.) He stated that when a police officer approached him, he was not hanging out and did not have to adjust

himself. (TT p.91, 11 19-25; p.92, 11 1-2.) It was his contention that he was never exposed, but people must have mistaken the shorts for his private parts. (TT p.92, 11 3-9.)

Following the Defendant's testimony, several character witnesses testified as to their opinion of his moral character and the Defendant's reputation for truthfulness and honesty. The City called the Defendant's ex-wife in rebuttal. She testified that the Defendant had lied to her constantly (TT p.121, 11 2-12), and that he had registered a vehicle in New Jersey rather than pay Utah State taxes on it. (TT p.122, 11 7-12.) She also testified that he did not have a good reputation for telling the truth. (TT p.124, 11 6-9.)

The City also recalled Ms. Loveless as a rebuttal witness. She was shown the undershorts the Defendant said he was wearing and asked if it were possible it was the shorts she had seen. She replied, "No way." (TT p.132, 11 2-5.)

At the conclusion of rebuttal testimony and the reading of the instructions, the case was submitted to the jury.

#### **SUMMARY OF ARGUMENT**

The issue in this case is whether failure to object to an improper statement made by the Prosecutor during rebuttal constitutes ineffective assistance of counsel.

The City submits that the lack of an objection was a tactical decision and that evidence of guilt was such that making the objection or the absence of the Prosecutor's statement would

not have made the outcome different. Therefore, it cannot be said Appellant's trial counsel was ineffective.

#### ARGUMENT

VIEWS IN THE CONTEXT OF THE ENTIRE RECORD, THE  
LACK OF AN OBJECTION TO THE PROSECUTOR'S REBUTTAL  
ARGUMENT WAS A TACTICAL DECISION, AND THE VERDICT  
WAS NOT EFFECTED BY THE ARGUMENT

Defendant bases his ineffective assistance argument on the lack of a single objection. This Court, in Codianna v Morris, 660 P.2d 1101 (Utah 1983), reaffirmed the test used to determine whether or not counsel has been ineffective. Two elements were identified, a subjective element and an objective element. The subjective element, willingness to identify with the interest of the accused, and the objective element, competency, are both necessary. Three factors are used to make the determination regarding the objective element. First, the Defendant must prove to the level of demonstrable reality that the representation is inadequate. Second, a legitimate exercise in judgment regarding strategy or tactics does not constitute ineffective assistance. Third, any deficiency must be prejudicial. That is, but for the error it must be reasonably likely there would have been a different result. Codianna, supra at 1109.

The Defendant argues that he has met the first portion of the test because trial counsel did not object to the Prosecutor's statement during rebuttal. It is true that statement invited the jurors to consider matters they would not be justified in considering. An objection to the statement would have been



sustained. But, while the presence of the statement and the lack of an objection is a demonstrable reality, that is not sufficient to meet the test. As this Court stated in Codianna, "Counsel need not recognize and raise every possible objection in order to meet the competence standard." *Id.* at 1113. It is the record as a whole which must be reviewed and establish the "demonstrable reality." State v. Andreason, 718 P.2d 403 (Utah 1986) at 402-403.

The Defendant also argues the decision not to object could not have been a tactical decision. This is not the case. Trial counsel had observed the jury's reaction throughout the day. He was in the best position to assess the impact of the remark in context of the entire trial. As the district court noted in its first memorandum decision, "In view of the several objections of defense counsel (many of which were over-ruled) before the remarks of the prosecutor in closing argument, defense counsel may reasonably have determined that it was in his client's best interest not to object. (Tr., pp 120, 121, 122, 123, 127, 128, 129, 130, 131). Defense counsel may have felt that the jury would have reacted adversely to the appellant if another objection was made and overruled. Furthermore, the failure to object may have been based upon defense counsel's reasonable hope that the jury would not focus on the remarks, and upon a reasonable belief that an objection would only focus their attention on matters which they should not consider. It appears, therefore, that defense counsel's decision not to object to the

Prosecutor's remarks was a legitimate exercise of professional judgment, and it is speculative whether or not such decision constituted an inadequate assistance by counsel." Memorandum decision of Judge Judith Billings, attached as Appendix "A".

The City submits it is proper to defer to the trial attorney (State v. Lairby, 699 P.2d 1187 (Utah 1984) at 1204. A copy of P.1204 is attached as Appendix "B". The City respectfully refers the Court to footnote 19.), who had identified himself with the interests of his client, made numerous objections, actively cross-examined witnesses, called several witnesses on his clients behalf, and fully participated in the trial consistent with the ethics of the profession. The second prong has not been met. .

The third prong of the test is whether or not a deficiency was prejudicial. The Codianna Court defined prejudice as an error without which there would be a reasonable likelihood the result would have been different. This is similar to the test which was set forth in State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973).

The first part of the Valdez test is met in the case at bar. The prosecutor's remark did suggest something other than the Defendant's guilt was before the jury. The second part of the test, that the jurors were probably influenced, cannot be met.

In State v. Andreason, supra this Court applied the test set forth in Valdez. In Andreason, this Court held because of the marginal nature of the evidence on intent, there was a reasonable likelihood the remark affected the jury. Andreason, supra at 403.

The instant case is distinguishable from Andreason.

The evidence in Andreason was clearly circumstantial. No one was ever seen bypassing the electrical meters. No one was seen using tools in the new warehouse. No tests were ever made to determine if the outlets in the warehouse were receiving live voltage through the meter. Witnesses testified power was brought in by extension cord from outside sources. Outside lighting at another building was obtained through bypassing the meter, but no direct evidence was introduced on who had done that. A formula was used to compute the amount of power used without any direct evidence of use of the tools. Andreason, supra at 401. This Court concluded there was no direct evidence of guilt. Id. at 403.

The evidence of guilt in the instant case is much stronger. There can be no question that the Defendant was exposed. The evidence on that point was overwhelming. His genitals were seen by four store employees. Two of them testified people in the credit area also saw his genitals.

The instant case is similar to Andreason in that in both the evidence on intent is circumstantial. Proof of intent usually is circumstantial. State v. Smith, 46 UAR 20 (1986) at 21. But unlike Andreason, the evidence in the case at bar is strong. The Defendant's own testimony clearly implies his intent.

The Defendant identified a photograph of himself which he said depicted his appearance and dress the day he was arrested. He contended what the people in the store saw was his

undershorts. His testimony regarding the photograph bears directly on his intent.

"A What are you asking, sir?

Q That he saw the red shorts and though that that was you?

A He saw the brownish-red shorts, sir--

Q Brownish-red shorts.

A --and thought that--and the very tight brownish-red shorts and thought that was me.

Q And in fact, sir, when you were--when you had this picture taken in Portland that we've marked as Plaintiff's Exhibit 1, you were wearing those red shorts, weren't you?

A That correct.

Q And in fact, they're partially visible there, aren't they?

A That's correct.

Q And--

A Deliberately, sir.

Q Deliberately?

A That's correct.

Q In other words, you had to make an effort to get your shorts out around so that part of you would hang out of there; isn't that correct?

A It's correct, sir, that I was illustrating the point that they were visible from the shorts, that the

shorts were moved." (TT p.93 11 14-25; p. 94, ii 1-12.

The Defendant's own testimony was that he had to deliberately pull his jogging shorts up so the undershorts could be seen in the photograph. Both Ms. Loveless and Mr. Poore testified that the jogging shorts were hiked up much higher on May 4, 1985, than they were in the photograph. (TT p.38, 11 22-24; p. 53, 11 14-18). Both Ms. Loveless and Ms. Zupon testified that the jogging shorts were even higher when the Defendant exited the men's room. (TT p.41, 11 15-22; p. 74, 11 1-10). Even if it had been undershorts that everyone saw, there is only one logical conclusion to come to regarding how the jogging shorts came to be hiked up as high they were: The Defendant deliberately pulled them up.

The Defendant's contention it was not his genitalia which were exposed is simply not credible. In contrast to the testimony that he was exposed, the Defendant testified he did not know he was exposed. (TT p.89, 11 12-16). He also stated that the undershorts he claimed to have worn were very tight. (TT p.91, 11 16-18' p. 92 1 9). Surely the Defendant would have known if his private parts were outside of those tight shorts. Ms. Loveless testified there was "no-way" it was the shorts she had seen. (TT p.132, 11 2-5). The jury properly concluded that he was exposed and that he deliberately exposed himself.

Defendant also argues negative character evidence was improperly introduced by the City during rebuttal. The City submits the evidence that the Defendant lied to his former wife

and registered a vehicle in New Jersey to avoid paying Utah Taxes. (TT p.121, 11 2-12; p. 122, 11 7-12) was properly received.

In State v. Miller, 709 P.2d 350 (Utah 1985) this Court held the introduction of specific instances of conduct as part of Defendant's case in chief was prohibited by the Utah Rules of Evidence. Whether or not specific instances of conduct would be proper as rebuttal evidence was not addressed in Miller. Prior to the present rules taking effect, this Court ruled that specific instances of conduct were appropriate rebuttal evidence. State v. Green, 578 P.2d 512 (Utah 1978) at 514. The City submits that under the present rules, (Rule 404 and 405) there are instances where specific instances of conduct are proper rebuttal.

In United States v. Johnson, 634 F.2d 735 (1980), (attached as Appendix "E") the Fourth Circuit Court of Appeals stated that Rule 404(b) made extrinsic acts evidence inadmissible solely to prove the Defendant is a bad character likely to commit the crime charged. They also stated such acts were admissible for other purposes, such as those set forth by the rule, but that the list was illustrative, not exclusive. *Id.*, at 737.

The Johnson Court dealt with facts somewhat like those in the case at bar. Johnson's defense in her income tax evasion trial was inadvertance. She testified to that end and brought in several local witnesses who testified to her truthfulness, honesty and compassion, as well as the busy nature of her medical

practice. Id., at 736

To rebut this evidence, the government called an auditor who testified at length about his investigation of her books. He stated her books showed Johnson reported four times as many services per patient as other Virginia doctors, and that she had billed for services she had not performed. The Johnson Court held this testimony was admissible. Id., at 736, 737.

After commenting on the discretion granted a trial judge under Rule 404(b), the Court noted,

"Particularly where, as here, a defendant in a criminal case by her own testimony and that of others has deliberately sought as the primary means of defense to depict herself as one whose essential philosophy and habitual conduct in life is completely at odds with the possession of a state of mind requisite to guilt of the offense charged, that defendant may have been considered in effect to have forfeited any protection that the first sentence of the Rule might otherwise have provided against the type of "other act" evidence here challenged."

Johnson, supra at 737, 738

The City submits the Defendant's evidence raised two issues: 1) his moral character, that is, that his philosophy and habitual conduct were at odds with exposing himself; and 2) his credibility as a witness. The City suggests that by so doing, he placed himself outside the protection afforded him in Rule 404.

The Eighth Circuit Court of Appeals has ruled on this issue. In United States v. Gustafson, 728 F.2d 1078 (1984), (attached as Appendix "D") they addressed the question of admission of other wrongs or acts. They stated that Rule 404(b) is one of inclusion

allowing admission of other crimes, wrongs or acts relevant to an issue in the trial. They stated that the trial court has broad discretion in deciding whether or not to admit such evidence and would only be reversed when it is clear such evidence has no bearing on any of the issues involved in the trial. (Id., at 1083). A review of the record makes it clear the trial court did not abuse its discretion in allowing evidence haring on the issues raised by the Defendant.

The Defendant placed his moral character and his character for truthfulness and veracity in issue by testifying and calling character witnesses. When the prosecutor asked Mrs. Richards, the Defendant's ex-wife, if he had lied to her, defense counsel objected. The court overruled the objection, stating, "I think in light of the character evidence that's been received, that this is proper rebuttal." (TT p. 121, ll 7-8.) Mrs. Richards stated that he had lied on numerous occasions, that he had registered a vehicle in New Jersey to avoid paying Utah State taxes on it, and that he had a poor reputation for truthfulness and veracity. (TT pp. 121-124.) The trial Court properly allowed rebuttal evidence consisting of relevant specific instances of conduct. The City submits under the standards of Green, Johnson and Gustafson, *supra*, there was no abuse of discretion.

When the entire record and the circumstances of the case are considered, it is clear the remarks of the prosecutor did not effect the verdict. Evidence that the Defendant was exposed was



overwhelming. The evidence also showed there was only one way the Defendant's shorts could have been high enough to facilitate the exposure: he did it deliberately. Even though an improper argument was made, and assuming improper rebuttal testimony was admitted, the evidence was such that it is not reasonably likely the result would have been different.

#### CONCLUSION

Based on the foregoing, the City submits that trial counsel was effective and competent and respectfully moves this Court to affirm the conviction and remand the case to the circuit court.

DATED this \_\_\_\_\_ day of December, 1986.

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R. SPENCER ROBINSON  
Assistant City Prosecutor

APPENDIX "A"

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

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WEST VALLEY CITY,	:	MEMORANDUM DECISION
Plaintiff/Respondent,	:	CIVIL NO. CRA-86-9
vs.	:	
KENNETH H. RISLOW,	:	
Defendant/Appellant.	:	

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This is an appeal from the Fifth Circuit Court, West Valley Department from a conviction, by jury, with the Honorable Tyrone E. Medley presiding, for the offense of lewdness, a Class B Misdemeanor, in violation of Section 13-9-702 of the West Valley Revised Ordinances. Appellant seeks a reversal of his conviction and a new trial. This Court, having reviewed the record and the Memoranda submitted by counsel for both parties, enters its Memorandum Decision in this case, as follows.

I. FACTUAL BACKGROUND

The appellant was charged in West Valley City with the offense of lewdness, a Class B Misdemeanor. The incident occurred at the ZCMI department store located at the Valley Fair Mall in West Valley City. West Valley City claimed that the defendant entered the store wearing jogging shorts, hiked up considerably to one side, and that appellant's genitalia were fully and obviously exposed to all present. The City alleged that the appellant

entered the store, stood for a few moments in a line at the credit department, then walked through the toy department, returned to the credit department area, leaned up against a bus schedule stand for a few moments, and then went into the restroom. Upon leaving the restroom, there was testimony that the appellant's exposure was worse than it had been prior to entering the restroom. Appellant, on the other hand, claims that the exposure did not occur at all, that he was wearing tight-fitting undershorts under his jogging shorts, and that the witnesses testifying as to his exposure must have been mistaken as to what they saw.

At the trial of this matter, the appellant called three character witnesses to testify as to his general good character and truthfulness. In rebuttal, the prosecutor called the appellant's ex-wife. During the course of the direct examination of appellant's ex-wife, the prosecutor asked questions regarding specific instances of the appellant's conduct bearing on his character and truthfulness. Over the objection of appellant's counsel, the trial court allowed appellant's ex-wife to testify that appellant had lied to her on several occasions, that on one specific occasion the defendant had registered an automobile in New Jersey in order to avoid the Utah State taxes, and that he was somewhat recalcitrant regarding the payment of income taxes during their marriage. (Tr., pp 121-22). Further testimony of appellant's ex-wife to the effect that he had physically hurt her, and that

people were afraid of him was stricken, and the jury was instructed to disregard such testimony. (Tr., pp 122-24). Appellant contends that the court erred in allowing testimony of specific instances bearing on the appellant's character. Respondents, however, argue that such evidence was proper where the appellant's character was brought into issue by the appellant calling character witnesses in his own behalf.

Appellant further contends that the court also erred in allowing the following remarks by the prosecutor in his closing argument:

Counsel finally says that he's [appellant] guilty of being a slop, not lewdness. I'm sorry, it's more than that. It's much more than that. Do you want people walking into the stores where you shop, dressed in that fashion, dangling their genitalia and you're going to find them not guilty? See, that presumption of innocence just went out the window. It's now time for you to decide this case. If you want these people walking around in your stores where you shop, then you're going to find him not guilty. If you want to put a stop to it, you're going to find him guilty. You raised your hand, an obligation, you swore that you would well and truly try this case. I am asking you to do what you agreed to do. (Tr., p 173).

In addition to claiming error in allowing these remarks, appellant contends that the failure of defense counsel at trial to object to the prosecutor's statements amounted to a denial of appellant's right to effective assistance of counsel.

Appellant raises three issues on this appeal: (1) Did the Circuit Court err in allowing the prosecutor to introduce evidence of specific conduct and/or other wrongs by appellant in order to show his bad character?; (2) Was appellant denied his right to a fair trial because of alleged improper remarks in his closing argument?; and (3) Was he denied his rights under state and federal law to effective assistance of counsel?

## II. OPINION

### A. Evidence of Specific Instances.

The admissibility of character evidence at trial is controlled by Rules 404 and 405 of the Utah Rules of Evidence. Rule 404 provides for the conditions under which evidence of a person's character may be received in evidence.

Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same. . . .

It is clear that the prosecution may properly offer evidence as to the character of the accused in order to rebut character evidence offered by the accused on his own behalf. The defendant placed his moral character and his character for truthfulness and veracity in issue when he called character witnesses to

testify in his behalf. The appellant further opened the door to allow the prosecution to offer evidence as to appellant's character when the appellant took the stand to testify as a witness. Rule 608, Utah Rules of Evidence.

Although the prosecution was free to offer evidence as to the appellant's character, the admissibility of such evidence was not without limit. Rule 405 of the Utah Rules of Evidence provides that:

(a) Reputation or opinion. In all cases in which evidence of character or trait of character of a person is admissible, proof may be made by testimony as to the reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

The above language controls the methods in which the prosecution in this case could properly offer evidence of the appellant's character. Evidence of specific instances of appellant's conduct was properly admissible only on cross-examination or in the event that the appellant's character was an essential element of the charge of lewdness.

In State v. Miller, 21 Utah Adv. Rpt. 8 (10/29/85), the Utah Supreme Court discussed the operation of Rules 404 and

405. In that case, the defendant in a criminal trial offered evidence of specific instances regarding his good character. The trial court, however, refused to allow such evidence. On appeal, the Utah Supreme Court stated that although character evidence may be admissible under Rule 404, counsel seeking to offer such evidence must deal with the restrictions set forth in Rule 405. Id. at 10. As seen above, Rule 405 provides that specific instances of conduct may only be admitted into evidence during cross-examination or where the person's character is an essential element of the charge against him. Since the evidence sought to be offered by the defendant was not on cross-examination, and since the defendant's character was not "an element of the crime of sexually abusing a child," the Supreme Court held that the exclusion of specific instances of conduct was proper under Rule 405.

Respondent relies upon language found in State v. Green, 578 P.2d 512 (Utah 1978). The Green case, however, was written before the adoption of Rules 404 and 405 of the current Utah Rules of Evidence. In view of this fact, this Court relies upon the Utah Supreme Court's interpretation of the operation of Rules 404 and 405 as set forth in State v. Miller, 21 Utah Adv. Rpt. 8 (10/29/85).

In the instant case, the evidence and testimony objected to by respondents was brought out on direct testimony of the

prosecution's rebuttal witness. (Tr., pp 119-24). The character of the appellant was not an essential element in proving the crime of lewdness, West Valley Revised Ordinances, Section 13-9-702, nor was it an "essential element" of appellant's defenses that the incident never occurred and he lacked the requisite intent. Evidence of appellant's character is not required to establish these defenses. In view of these circumstances, the trial court erred in admitting evidence of specific instances of appellant's prior conduct, although evidence and testimony in the form of opinion and reputation was properly admissible. State v. Miller, 21 Utah Adv. Rpt. 8 (10/29/85).

In order for the trial court's error in admitting evidence of specific instances of appellant's prior conduct to warrant reversal of the conviction, the trial court's error must have been prejudicial error. The Utah Supreme Court has held that an error of the trial court is prejudicial error and requires reversal if, in the absence of such error, there is a reasonable likelihood that there would have been a different result. State v. Kosda, 540 P.2d 949 (Utah 1975); State v. Hodges, 517 P.2d 1322 (Utah 1974). Excluding all evidence regarding specific instances of appellant's conduct, the jury still had before it testimony from four employees of the store where the incident occurred that the defendant was fully exposed, that such exposure



was obvious and blatant, and that others in the store noticed appellant's situation. (Tr., pp 36, 41, 47, 52, 67, 73, 74).

Appellant testified that the exposure of his genitalia never occurred, and that he was wearing tight-fitting undershorts underneath his jogging shorts. (Tr., pp 89-92). One of the store employees, however, testified that there was "no way" the appellant was wearing the tight-fitting undershorts claimed, or that she was mistaken as to what she saw. (Tr., p 132). Testimony of the store employees was to the effect that the appellant entered the store, and that he was fully and obviously exposed to all present. (Tr., pp 36, 41, 47, 52, 67, 73, 74). The employees testified that the appellant stood in a line in front of the credit department for a few minutes, walked into the toy department for a few minutes, and then went into the restroom. (Tr., pp 39, 40, 41). Upon exiting the restroom, the employees testified that the condition of appellant's exposure was worse than it had been previously. (Tr., pp 41, 74). Additionally, there was testimony by the appellant himself, that he would have had to deliberately hike up his shorts in order to get them into the situation where he was exposed to the extent testified to by the store employees. (Tr., pp 93-94). Although the appellant claimed that he was at no time exposed while in the store, there is substantial competent evidence in the record supporting appellant's conviction for the crime of lewdness,

and this Court is not persuaded that the improper admission of the specific instances had any impact on the jury, and can not say that there is a reasonable likelihood that the result would have been different.

B. Prosecutor's Closing Remarks.

Appellant's second claim of error is that the appellant was denied his right to a fair trial due to remarks made by the prosecutor in his closing argument. In State v. Valdez, 513 P.2d 422 (Utah 1979), the Utah Supreme Court provided a two prong test in determining whether improper remarks in closing argument requires reversal of a conviction.

[T]he test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the case, probably influenced by those remarks.

Id. at 426.

This Court must first determine whether or not the closing argument called to the attention of the jurors matters which they could not properly consider in determining the guilt or innocence of the appellant, and then under the circumstances of the case whether or not the jurors were influenced by such remarks.

In closing argument, the prosecutor made the following statement:

Counsel finally says that he's [appellant] guilty of being a slop, not lewdness. I'm sorry, it's more than that. It's much more than that. Do you want people walking into the stores where you shop, dressed in that fashion, dangling their genitalia and you're going to find them not guilty? See, that presumption of innocence just went out the window. It's now time for you to decide this case. If you want these people walking around in your stores where you shop, then you're going to find him not guilty. If you want to put a stop to it, you're going to find him guilty. You raised your hand, an obligation, you swore that you would well and truly try this case. I am asking you to do what you agreed to do. (Tr., p 173).

It should be noted, that earlier in his closing remarks, the prosecutor stressed to the jury that if they were not convinced of the defendant's guilt, that they should find him not guilty, and that they could be proud of that decision and hold their heads high with respect to their performance as jurors. (Tr., p 156). Standing alone, however, the remarks of the prosecutor quoted above might well have been interpreted by the jurors to the effect that they had a duty to look beyond the appellant's guilt or innocence and deal generally with the problem of lewdness in public places. It is possible that the jurors would consider, in addition to the facts regarding the appellant's guilt or innocence, that a guilty verdict would operate generally to reduce the problem of lewdness in public places. Such considerations by the jury would be clearly outside the scope of the jurors'

proper considerations, and would be improper. The remarks made by the prosecutor with regard to stopping "these people" from lewdness in public places were improper.

In determining whether or not such remarks warrant reversal of appellant's conviction, this Court must look to the second prong of the Valdez test regarding the probable influence of such remarks on the jury. The Utah Supreme Court cases cited by the appellant regarding improper remarks by counsel in closing argument, indicate that improper remarks by a prosecutor in closing argument will not warrant reversal of a conviction where there is substantial evidence in the record supporting the conviction. State v. Smith, 700 P.2d 1106 (Utah 1985); State v. Troy, 688 P.2d 483 (Utah 1983); State v. Johnson, 663 P.2d 48 (Utah 1983). In Valdez, the court stated that "if proof of defendant's guilt is strong, the challenged conduct or remark will not be presumed prejudicial." (Quoting State v. Seeger, 4 Ore.App. 336, 479 P.2d 240 (1971)). In State v. Smith, 700 P.2d 1106 (Utah 1985), the Utah Supreme Court held that although the prosecutor's remarks were "clearly improper" the jury was probably not influenced by the remarks in view of substantial evidence of the defendant's guilt. As discussed above, the record in the instant case contained substantial competent evidence supporting the lewdness conviction and this Court finds that it is unlikely that the result would

have been different in the absence of the prosecutor's improper remarks, and that such remarks, therefore, were not prejudicial.

C. Adequate Assistance of Counsel.

Finally, appellant argues that his conviction should be reversed on the grounds that he was denied effective assistance of counsel because defense counsel at trial failed to object to the improper remarks of the prosecutor in closing argument. In Strickland v. Washington, \_\_\_\_ U.S. \_\_\_\_, 104 Sup.Ct. 2052, 25 L.Ed.2d 763 (1984), the Supreme Court set forth the standard in determining whether or not a conviction should be reversed on the grounds of ineffective assistance of counsel.

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In view of the substantial evidence in the record supporting the appellant's lewdness conviction, it appears highly unlikely that the result would have been different had the defense counsel objected to defendant's remarks, and that appellant's ineffective assistance of counsel claim, therefore, fails under the Strickland standard. In fact, in view of the several overruled objections of defense counsel shortly prior to the prosecutor's closing remarks, a further objection at the time of the prosecutor's remarks may possibly have done more harm than good.

The Utah Supreme Court, in Codianna v. Morris, 660 P.2d 1101 (Utah 1983), established a more comprehensive standard to aid in determining whether or not a conviction should be set aside or reversed for ineffective assistance of counsel. The court stated:

(1) The burden of establishing inadequate representation is on the defendant "and proof of such must be a demonstrable reality, and not a speculative matter."

(2) A lawyer's "legitimate exercise of judgment: in the choice of trial strategy or tactics that did not produce the anticipated result does not constitute ineffective assistance of counsel."

(3) It must appear that any deficiency in the performance of counsel was prejudicial. In this context, prejudice means that without counsel's error there was a "reasonable likelihood that there would have been a different result."

Counsel for the appellant must satisfy all three of the above requirements in order to succeed in setting aside or reversing his conviction.

Under the first two requirements of the Codianna standard, the appellant must show that the failure to object to the prosecutor's remarks was as "a demonstrable reality" inadequate and unprofessional representation and further that it was not a legitimate exercise of judgment or choice of trial strategy. Under the circumstances of the instant case, it does not appear that the appellant has met these two tests. In view of the several objections of defense counsel (many of which were overruled)

before the remarks of the prosecutor in closing argument, defense counsel may reasonably have determined that it was in his client's best interest not to object. (Tr., pp 120, 121, 122, 123, 127, 128, 129, 130, 131). Defense counsel may have felt that the jury would have reacted adversely to the appellant if another objection was made and overruled. Furthermore, the failure to object may have been based upon defense counsel's reasonable hopes that the jury would not focus on the remarks, and upon a reasonable belief that an objection would only focus their attention on matters which they should not consider. It appears, therefore, that defense counsel's decision not to object to the prosecutor's remarks was a legitimate exercise of professional judgment, and it is speculative whether or not such decision constituted an inadequate assistance by counsel.

The third prong of the Codianna standard, requires that even if defense counsel was inadequate and unprofessional in his representation of the appellant, appellant's conviction will not be disturbed unless it is shown that such ineffective assistance of counsel was prejudicial to the appellant. As stated above, the standard in determining whether or not error in the trial court is prejudicial is whether or not there is a reasonable likelihood that there would have been a different result in the absence of the error. As discussed above, it does not appear that the appellant was prejudiced by the comment

by the prosecutor in closing remarks regarding the stopping of "these people" from engaging in lewd behavior in public places in view of the substantial competent evidence in the record supporting the appellant's lewdness conviction. This is especially true when the prosecutor's comments objected to by appellant are placed into context with the rest of the prosecutor's closing remarks.

In his closing remarks, the prosecutor stressed to the jury that if they were not convinced by the evidence admitted at the trial that the defendant was guilty, then the jurors were duty bound to find the defendant not guilty, and that they could thereafter be proud of their decision and of their conduct as jurors. (Tr., p 156). The prosecutor also stressed to the jury that this case was obviously more important to the defendant than to the City, stating that this is one case in a thousand for the City, but that this was the defendant's life that was on trial. (Tr., p 156).

Furthermore, the trial court instructed the jurors that the comments and remarks of counsel were not evidence, and that their decision could only be based upon evidence accepted by the court. (Tr., p 144-155). The jury was also instructed that they must presume the innocence of the appellant until they were convinced otherwise by evidence received by the court. (Tr., p 144-155).




This Court finds that it is unlikely that the jury was influenced by the remarks of the prosecutor, and further finds that it is unlikely that the jury's verdict would have been different in the absence of such remarks or in the presence of an objection by defense counsel.

CONCLUSION

This Court finds that the admission of evidence regarding specific instances of the appellant's conduct, and the comments by the prosecutor in his closing remarks were improper. The Court further finds, however, that in the absence of such evidence and remarks, it is unlikely that the jury's resulting verdict would have been different, and that the appellant, therefore, was not prejudiced thereby. The appellant's lewdness conviction is hereby affirmed.

Dated this 28 day of April, 1986.

  
\_\_\_\_\_  
JUDITH M. BILLINGS  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 28 day of April, 1986:

R. Spencer Robinson  
Attorney for Plaintiff/Respondent  
Assistant City Attorney  
2470 S. Redwood Road  
West Valley City, Utah 84119

Ronald J. Yengich  
Attorney for Defendant/Appellant  
72 East 400 South, Suite 355  
Salt Lake City, Utah 84111

C. Porter

showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Id.* — U.S. at —, 104 S.Ct. at 2064. The level of judicial scrutiny which defense counsel's performance must withstand is highly deferential.<sup>19</sup> *Id.* — U.S. at —, 104 S.Ct. at 2065.

[37] Defendants challenge counsel's assistance in several respects. First, they assert that defense counsel did not make his opening statement until the opening of defendants' case in chief and then, defendants claim, the statement was defective such that they were "denied the opportunity to present the jury with an intelligent, cohesive description of their case." Defendants further claim that defense counsel's closing statement was defective. Defendants do not explain why the timing of the opening statement was not merely a "legitimate exercise of judgment." *State v. McNicol*, 554 P.2d at 205. As to the quality of the opening and closing statements, defendants do not even attempt to demonstrate how counsel's representation in this regard "fell below an objective standard of reasonableness." *Strickland*, — U.S. at —, 104 S.Ct. at 2065. "The object of an ineffectiveness claim is not to grade counsel's performance." *Id.* — U.S. at —, 104 S.Ct. at 2070. The record does not reveal and defendants make no showing that the opening and closing state-

ments support a claim of ineffectiveness of counsel.

Defendants also claim that trial counsel's failure to move to strike the testimony of four State witnesses reflects ineffective assistance of counsel. Defendants allege that the witnesses, Craig Duvall, Christine Swanson, Linia Teniaki, and Kelly Powers, "offered no probative testimony as to the truth of the allegations." Defendants are not specific regarding any objections, the grounds for the proposed motion to strike, or whether it was likely the trial court would have granted such a request. Furthermore, as a result of repeated objections to the witnesses' testimony by defense counsel, nothing therein may be remotely characterized as harmful or prejudicial to the defense.

Defendants next argue that trial counsel was ineffective when he attempted to impeach a State witness based on prior inconsistent statements from a preliminary hearing without requesting transcripts from the hearing. As noted previously, defendants have not provided those transcripts as part of the record on appeal. Nor do defendants explain the content of the inconsistent statements and how they would have been helpful. Without more, we cannot consider whether this point of error represents ineffective assistance of counsel.

Defendants also challenge the trial counsel's assistance with respect to his failure to elicit character witness testimony. The record indicates the contrary. Despite repeated objections, defense counsel managed to elicit much positive testimony from the character witnesses. We there-

fore find this claim of counsel

As further evidence, defendant (allowing a prejudicial letter) to be admitted. The record indicates that he initiated the letter and that he initiated the letter. Moreover, the letter was not an appeal, and we are not regarding its effect.

[38, 39] The defendant's defense counsel's prosecution question by's decision to advise of her of her arrest. The evidence of exercise her counsel, or prosecute may violate a self-incrimination 610, 618, 96 S.Ct. (1976); *State v. 1291-92* (1982). defense counsel not asked by the prosecution questions on the

Having determined the defendant's performance with regard to the foregoing, whether this defendant *Codianna*, 660 *na*, this Court quoted 601 P.2d 918, 919. The judge means that

19. The *Strickland* court explained its reasoning: It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of

counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See *Michel v. New York*, *supra*, 350 U.S. 91 at 101, 76 S.Ct. 158 at 164, 100 L.Ed. 83. *Id.*, — U.S. at —, 104 S.Ct. at 2065-66.

20. The exchange: testimony of an On direct by prosecution QUESTION: "I ask Mildred La ANSWER: "I c QUESTION: "I ANSWER: "Th sult with her a On recross by de QUESTION: "S was given she that correct?" ANSWER: "Ne ney."

APPENDIX "C"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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WEST VALLEY CITY,	:	MEMORANDUM DECISION
Plaintiff/Respondent,	:	CIVIL NO. CRA-86-9
vs.	:	
KENNETH H. RISLOW,	:	
Defendant/Appellant.	:	

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The Court on request of counsel for the defendant heard oral argument on this appeal from the Fifth Circuit Court, West Valley Department on May 19, 1986. The plaintiff was represented by Spencer Robinson, Assistant City Attorney, and the defendant by Ronald Yengich, Esq. The Court agreed to reconsider its Memorandum Decision issued on April 28, 1986, as counsel for the defendant had not been given an opportunity to respond by way of written Memoranda or oral argument to the City's Memorandum of Points and Authorities.

On rehearing the defendant argues that this case should be governed by State of Utah v. Derrick Andreason, No. 20616, Filed May 6, 1986, Utah Supreme Court. The defendant urges that an essential element of the crime of which the defendant was convicted is intent: that under circumstances where the defendant should have had knowledge that he was exposed, that he knowingly exposed himself. Counsel states that the evidence

as to the defendant's intent was circumstantial, and was conflicting, and thus that this is exactly the circumstance where the prosecutor's improper closing argument was probably instrumental in the jury's finding of guilt. The Court in Andreason, supra, states:

When the evidence in the record is circumstantial or sufficiently conflicting, jurors are more likely influenced by improper argument. In such cases they are more susceptible to the suggestion that factors other than the evidence before them should determine a defendant's guilt or innocence. Considering all the facts and circumstances of this case, we conclude that the jury was probably influenced by the improper closing remarks in view of the highly marginal nature of any evidence of criminal intent or knowledge on the part of the defendant, a reasonable likelihood exists that in the absence of the prosecutor's prejudicial argument, there might have been a different result.

Id. at page 4.

The Court has reviewed again the transcript of the hearing, and agrees that the evidence on intent was conflicting and circumstantial. The Court has already held in the prior Memorandum Decision that the prosecutor's remarks during closing statement were improper. However, it is undisputed that counsel for the defendant did not object to these remarks at the time of trial. Therefore, in order to find a reversal, this Court would have to find that trial counsel's failure to object to the improper statement of the prosecutor resulted in inadequate assistance of counsel. As stated in the Court's prior Memorandum Decision, this Court cannot agree with that premise. Therefore, even

though if a proper objection had been made, this Court may have had grounds for reversal, the Court does not believe that the failure to make such an objection rises to the level of inadequate representation of counsel. As more fully discussed at pp. 12-16 of the Court's prior Memorandum Decision, defense counsel's decision not to object to the prosecutor's remarks was a legitimate exercise of professional judgment and not inadequate representation.

Based upon the above, the Court reaffirms its affirmance of the conviction of the defendant.

Dated this 29th day of May, 1986.

15/ Judith M. Billings  
JUDITH M. BILLINGS  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this \_\_\_\_\_ day of May, 1986:

Richard Spencer Robinson  
Assistant City Prosecutor  
Attorney for Plaintiff  
2470 S. Redwood Road  
West Valley City, Utah 84119

Ronald J. Yengich  
Attorney for Defendant  
72 East 400 South  
Salt Lake City, Utah 84111

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asing black representation; and that his retaries did not like him.

'he district court rejected appellant's m stating:

Vhat Plaintiff seems not to realize is hat it is a trait of human nature that ome people instinctively resent a situa- ion wherein a person "from the outside" s brought in, given a full associate pro- essorship, moved "ahead" of several fac- lity members already employed at the Iniversity, and given an unusual twelve- month contract rather than the usual ine-month contract, regardless of the ace of the person involved.

F.Supp. at 124. The court determined t the work environment was not so pol- ed with discrimination as to substantially ect appellant's employment, and that the or animosity which existed toward Dr. liver was not grounded in race. See iddi v. Kansas City Chiefs Football Club, ., 568 F.2d 87 (8th Cir.1977). This find- is not clearly erroneous. See Wagh, ra, 705 F.2d at 1021.

We have studied appellant's remaining uments and find them to be without rit. Accordingly, we affirm the judg- nt of the district court.



UNITED STATES of America, Appellee,  
v.

Deil Otto GUSTAFSON, Appellant.

UNITED STATES of America, Appellee,  
v.

Ralph Edwin BRUINS, Appellant.

Nos. 83-1631, 83-1653.

United States Court of Appeals,  
Eighth Circuit.

Submitted Dec. 12, 1983.

Decided Feb. 29, 1984.

Rehearing Denied March 30, 1984.

Six defendants were indicted for false try on bank records, mail fraud, wire

fraud, and conspiracy. One defendant agreed, pursuant to a plea bargain, to plead to one count of mail fraud and testify on behalf of the Government. The United States District Court for the District of Minnesota, Edward J. Devitt, J., granted judgments of acquittal to two defendants. After a jury verdict, two defendants were convicted of all counts, and one defendant was convicted of 11 counts. Appeal was taken. The Court of Appeals, Ross, Circuit Judge, held that: (1) letter of bank examiner, which was introduced to show that defendants had knowledge and notice that suspicious "check floating" activity had occurred at bank and that it was deemed misapplication of funds by bank examiners, was properly introduced under rule pertaining to "other crimes" evidence; (2) fact that codefendants had agreed after trial to give information to Government in exchange for a more lenient sentence did not constitute newly discovered evidence entitling one of the defendants to a new trial; and (3) trial court did not abuse its discretion in refusing to rule in advance on defendant's motion in limine requesting that Government not be allowed to broach defendant's second indictment in cross-examination of acquitted codefendant who defendant wished to call to testify for the defense.

Affirmed.

#### 1. Criminal Law $\Leftarrow$ 369.2(1)

Requirements which must be met for "other crimes" evidence to be admissible under rule of evidence are: (1) a material issue on which other crimes evidence may be admissible has been raised; (2) proffered evidence is relevant to the issue; and (3) evidence of the other crimes is clear and convincing. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

#### 2. Criminal Law $\Leftarrow$ 371(1), 372(1)

To be admissible on such issues as intent, knowledge, or plan, "other crimes"

Cite as 728 F.2d 1078 (1984)

evidence must relate to wrongdoing similar in kind and reasonably close in time to the charge at trial. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

#### 3. Criminal Law $\Leftarrow$ 369.1

Evidence admissible under rule of evidence pertaining to other crimes may be excluded if its probative value is substantially outweighed by danger of unfair prejudice. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

#### 4. Criminal Law $\Leftarrow$ 369.2(1)

Rule pertaining to admission of "other crimes" evidence is one of inclusion because it allows admission of evidence of other crimes, wrongs or acts relevant to an issue in the trial, unless it tends only to prove criminal disposition. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

#### 5. Criminal Law $\Leftarrow$ 369.2(1), 1153(1)

Trial court is vested with broad discretion in deciding whether to admit wrongful act evidence, and decision to admit such evidence will only be reversed when it is clear that questioned evidence has no bearing upon any of the issues involved at trial. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

#### 6. Criminal Law $\Leftarrow$ 369.2(3)

Letter of bank examiner to bank board of directors, which was introduced at trial as evidence which tended to show that defendants had knowledge and notice that suspicious "floating" activity had occurred at bank and was deemed a misapplication of funds by bank examiners, was properly introduced in prosecution for false entry on bank records, notwithstanding claim that it was introduced only to show that defendants had propensity toward criminal behavior, since letter was relevant to rebut defense claim that defendants were innocent because they relied on subordinates to handle such day-to-day transactions. Fed. Rules Evid.Rule 404(b), 28 U.S.C.A.; 18 U.S.C.A. § 1005.

#### 7. Criminal Law $\Leftarrow$ 338(1)

Evidence is relevant when it serves to rebut defense that a person has justifiably

relied upon subordinates to handle business matters.

#### 8. Criminal Law $\Leftarrow$ 374

With regard to requirement that in order to be admissible, evidence of "other crimes" must be clear and convincing, proffered evidence cannot be admitted if it is of vague and uncertain character. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

#### 9. Criminal Law $\Leftarrow$ 374

In order to be admissible under clear and convincing standard, prior conduct cannot be equally consistent with an innocent explanation. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

#### 10. Criminal Law $\Leftarrow$ 369.2(3)

Evidence of prior conduct relating to improper check "float" which occurred when bank credited defendant's account with check prior to its collection was admissible in prosecution for false entry on bank records, since evidence was clear and convincing, it was related to wrongdoing similar in kind and reasonably close in time to charge at trial, and its probative value substantially outweighed the danger of unfair prejudice. 18 U.S.C.A. § 1005; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

#### 11. Criminal Law $\Leftarrow$ 673(5)

A limiting instruction telling jury not to consider evidence of other acts as substantive proof but only as proof of notice or knowledge of a prior incident diminishes danger of any unfair prejudice arising from admission of evidence of other acts.

#### 12. Criminal Law $\Leftarrow$ 938(1)

Before motion for new trial on ground of newly discovered evidence can be granted, five criteria must be met: (1) evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which court may infer diligence on part of movant; (3) evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce acquittal.



**Criminal Law** ⇨ 938(1), 1156(3)

Motions for a new trial on ground of newly discovered evidence are looked upon with disfavor, and Court of Appeals will not overturn trial court's decision with regard to such a motion absent a clear abuse of discretion.

**Criminal Law** ⇨ 938(2)

Fact that codefendants in prosecution made false entry on bank records, mail and wire fraud, and conspiracy agreed after trial to give information to Government in exchange for more lenient sentence did not constitute newly discovered evidence entitling defendant to a new trial, notwithstanding defendant's contention that codefendants would not now try to implicate him in their crime and that their testimony would be much more credible since, following their agreement, they would be on government's side.

**Criminal Law** ⇨ 632(4)

Trial court did not abuse its discretion in refusing to rule in advance on motion in limine requesting that Government not be allowed to broach a second indictment of defendant in cross-examination of acquitted defendant who defendant wished to call to testify for the defense.

James M. Rosenbaum, U.S. Atty., Douglas A. Kelley, Asst. U.S. Atty., Dist. of Minn., Minneapolis, Minn., James L. Forn, Legal Intern, for appellee.

Reference P. Durkin, Dudley & Smith, St. Paul, Minn., Albert J. Krieger, Susan W. Dusen, Albert J. Krieger, P.A., Miami, Fla., for appellant Deil Otto Gustafson.

Before HEANEY, ROSS and FAGG, Circuit Judges.

ROSS, Circuit Judge.

On November 5, 1981, defendants Agosto, Gustafson, Newstrum, Bruins, Bacigalupo

The Honorable Edward J. Devitt, Senior Judge, United States District Court for the District of Minnesota.

and Norris were named in a 31 count indictment that charged violations of 18 U.S.C. §§ 1005 (false entry on bank records), 1341 (mail fraud), 1343 (wire fraud), and 371 (conspiracy). Newstrum agreed, pursuant to a plea bargain, to plead to one count of mail fraud and testify on behalf of the government. A jury trial began in United States District Court for the District of Minnesota<sup>1</sup> on January 3, 1981. On January 14, the court granted judgments of acquittal to defendants Bacigalupo and Norris. On January 23, the jury returned its verdict: Agosto was convicted on all counts; Gustafson was convicted on all counts; and Bruins was convicted of 11 counts. On May 3, the district court imposed the following sentences: Agosto received 20 years and a \$63,000 fine; Gustafson received 10 years and an \$81,000 fine; and Bruins received 3 years and a \$20,000 fine. Costs were imposed against Agosto and Gustafson. On August 29, 1983, defendant Agosto died of a heart attack.

On appeal, defendants Bruins and Gustafson raise the following issues: 1) whether government exhibit 500 was improperly admitted under rule 404(b); 2) whether the trial court erred in denying Bruins' motion for a new trial; and 3) whether the trial court erred in refusing to rule on Gustafson's motion in limine to restrict the government's cross-examination of Bacigalupo.<sup>2</sup> For the reasons discussed herein, we affirm.

**I. General Background**

Defendant Gustafson, during the relevant time period, owned 20 percent of the Tropicana Hotel and Casino. Gustafson also owned the Summit National Bank of Saint Paul, Summit State Bank of Richfield, Summit State Bank of Phalen Park, Summit State Bank of South Saint Paul, and Summit State Bank of Bloomington. Defendant Newstrum was Gustafson's "right-

2. Prior to oral argument, Gustafson moved to strike the affidavit of Michael Ferrence, Jr., from the record. As it appears that this affidavit was never presented to the trial court, the motion to strike is granted.

hand man" in the operation of the various corporations. Defendant Agosto was the owner of Production and Leasing (P & L), a Nevada corporation, which provided the Follies Bergere floor show to the Tropicana for the sum of \$60,000 per week. Defendant Norris was employed by Agosto at P & L as an administrative secretary. Defendant Bruins was the president of the Summit Bank of Richfield and acted as a consultant to the Summit National Bank. Defendant Bacigalupo was the vice president and cashier at the Summit National Bank and personally handled the Tropicana and P & L accounts at that bank.

The subject of this criminal prosecution was a check floating scheme which was conducted to fraudulently assist the Tropicana and P & L's financial position by providing interest-free loans to both enterprises by the Summit Banks of Saint Paul and Richfield during the years of 1977 and 1978. The Tropicana obtained an improper loan from the Summit Bank of Saint Paul by using the bank as its depository bank for Tropicana employees' federal withholding taxes. P & L obtained its loans by using two Summit banks as its depository for federal withholding taxes and by opening commercial checking accounts at both banks. The Tropicana and P & L made deposits to these accounts in the form of nonsufficient fund (NSF) checks. The banks treated these as cash (collected) items and used bank funds to pay Tropicana and P & L obligations. When the checks were returned as dishonored, the banks would accept new NSF checks to replace them. This process would continue until the defendants decided to pay with "good" checks. In order to conceal this "float" scheme, officers of both banks had to make false entries on the books to avoid arousing the suspicions of bank examiners. This scheme allowed the Tropicana and P & L to continue day-to-day operations in spite of severe cash flow shortages.

During the trial, the government produced evidence that Marlee, Inc., a Nevada corporation that owned the Gamblers Hall of Fame casino, opened a checking account at Summit Richfield in July of 1975. Gus-

tafson owned Marlee, Inc. The opening deposit was a \$300,000 personal check of Ed Legg drawn on a Las Vegas bank. Prior to collection, the bank had paid \$169,000 of checks written on the account. The Legg check was not collected as payment was stopped, thus, a \$169,000 overdraft was created in the account. Two days later, Gustafson deposited a check drawn on an Ethiopian bank which was valued at approximately \$300,000. The item was sent to a Minneapolis bank for collection. However, on the same day, Summit Richfield gave the Marlee account a \$300,000 credit which covered the overdraft. On September 16, 1975, the foreign check was still uncollected and Gustafson assured the board of directors that he would personally pay the overdraft by September 30 if the check did not clear. The overdraft was paid by Gustafson on that date.

After the bank was examined in 1975, Chief Examiner Joseph Vogel wrote a letter to the board of directors at Summit Richfield dated December 1, 1975. The letter characterized the Marlee transaction as a "direct misapplication of bank funds" with attendant "fictitious entries" on the bank's books. It named Gustafson, Newstrum, and Bruins as the persons responsible and stated that reports had been submitted to the United States attorney and the FBI. Bruins responded to the letter and indicated that he and Gustafson were concerned but felt that they handled the situation properly. No charges were filed. The Vogel letter, government exhibit 500, was introduced at trial as evidence which tended to show the defendants had knowledge and notice that suspicious "floating" activity had occurred at the bank and was deemed a misapplication of funds by the bank examiners.

The testimony of trial witnesses established that by the spring of 1978, there were so many checks and replacement checks in the clearing process that the handling of such checks became almost impossible. Agosto ordered his people to consolidate 17 Tropicana checks into two checks, payable to P & L, in the amounts of \$660,000 and \$360,000, respectively. These checks were

deposited into the P & L account at Summit Richfield. When these checks were dishonored by the Valley Bank of Nevada, the Marquette National Bank of Minneapolis, Summit Richfield's correspondent bank, became quite alarmed. By May 16, 1978, the Marquette Bank had refused to extend provisional credit to Summit until those deposits had been collected.

This precipitated a crisis for the Summit Banks and led to what was labeled the "Jane Lannin Affair" at trial. Bruins telephoned Gustafson to inform him of the problem created by the Marquette Bank. Gustafson summoned Newstrum and put Bruins' call on a speaker phone. Bruins suggested that the Tropicana open new accounts at other Summit Banks which did not clear through the Marquette Bank. Newstrum was ordered to call Las Vegas and have blank Tropicana checks sent to Minnesota and delivered to Bruins. Newstrum called Jane Lannin and told her to drive to the Minneapolis Airport, pick up a speed pack from the Tropicana, deliver it to Bruins and await further instructions. When Lannin arrived at the bank, Bruins instructed her to open new accounts at two other Summit Banks in the name of Hotel Conquistador, Inc. When Lannin opened the new accounts, she drew checks payable to Summit National as directed by Bruins. The plan never achieved its desired effect because the bank examiners entered the bank before the checks could be presented for collection. Newstrum testified that Gustafson told him to lie to the FBI about the "Jane Lannin Affair" and to shift the responsibility from Minnesota to the people in Las Vegas.

On Monday, May 22, 1978, the federal bank examiners entered Summit National and Summit Richfield and discovered that \$2,400,000 worth of checks were in float. Since this exceeded the capital of the bank, there was concern that the bank would fail. Gustafson borrowed \$1,500,000 from a local

bank to pay off floating checks. Agosto, through wire transfers, was able to pay off all but \$220,000 at Summit National and \$141,000 at Summit Richfield.

It appears that after the above payments were made, Gustafson and Bacigalupo set about to try to cover the remaining deficiency. On June 21, 1978, two miscellaneous credit slips to the P & L account were filed showing cash deposits of \$110,000 and \$109,000, respectively. These slips bore the initials of Bacigalupo as the responsible bank official. No currency transaction reports were filed. Furthermore, suspicious loans had been made earlier in the same day. These transactions are the subject of a second indictment in which Bacigalupo and Gustafson were charged with failure to file currency reports and for false entries on bank books. That case had not been tried prior to the trial of the instant case.

## II. Evidence of Other Crimes, Wrongs or Acts

Government exhibit 500, the letter of Chief Bank Examiner Vogel, was admitted into evidence and went to the jury. Appellants assert that the admission of such evidence was an abuse of Rule 404(b) of the Federal Rules of Evidence.<sup>1</sup> Appellants contend that the government introduced this evidence to show that they had a propensity towards criminal behavior. Under Rule 404(b), such evidence is not admissible to prove the bad character of the defendant, but may be admissible for other purposes, such as proof of motive, knowledge, or intent. *United States v. Goehring*, 585 F.2d 371, 372 (8th Cir.1978).

[1-3] The standards in this circuit for the admission of other wrongs or acts evidence for such purposes are well established:

Our cases reveal certain requirements which must be met for other crimes evi-

therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

1. Rule 404(b) reads as follows:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity

dence to be admissible under the rule: (1) a material issue on which other crimes evidence may be admissible has been raised, e.g., *United States v. Drury*, 582 F.2d 1181, 1184 (8th Cir.1978); *United States v. Maestas*, 554 F.2d 834, 837 (8th Cir.), cert. denied, 431 U.S. 972, 97 S.Ct. 2936, 53 L.Ed.2d 1070 (1977); (2) the proffered evidence is relevant to that issue, *ibid.*; (3) the evidence of the other crimes is clear and convincing, e.g., *United States v. Cobb*, 588 F.2d 607, 612 (8th Cir.1978), cert. denied, [440 U.S. 947], 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979); *United States v. Drury*, *supra*, 582 F.2d at 1184; *United States v. Davis*, 551 F.2d 233, 234 (8th Cir.), cert. denied, 431 U.S. 923, 97 S.Ct. 2197, 53 L.Ed.2d 237 (1977). In addition, to be admissible on such issues as intent, knowledge, or plan, the other crimes evidence must relate to wrongdoing "similar in kind and reasonably close in time to the charge at trial." *United States v. Drury*, *supra*, 582 F.2d at 1184. See, e.g., *United States v. Little*, 562 F.2d 578, 581 (8th Cir.1977); *United States v. Jordan*, 552 F.2d 216, 219 (8th Cir.), cert. denied, 433 U.S. 912, 97 S.Ct. 2982, 53 L.Ed.2d 1097 (1977). Finally, evidence otherwise admissible under Rule 404(b) may be excluded under Fed.R.Evid. 403, "if its probative value is substantially outweighed by the danger of unfair prejudice . . ."

*United States v. Burchinal*, 657 F.2d 985, 993 (8th Cir.), cert. denied, 454 U.S. 1086, 102 S.Ct. 646, 70 L.Ed.2d 622 (1981) quoting *United States v. Frederickson*, 601 F.2d 1358, 1365 (8th Cir.), cert. denied, 444 U.S. 934, 100 S.Ct. 281, 62 L.Ed.2d 193 (1979).

[4, 5] Rule 404(b) is one of inclusion because it allows the admission of evidence of other crimes, wrongs or acts relevant to an issue in the trial, unless it tends only to prove criminal disposition. *United States v. Wagoner*, 713 F.2d 1371, 1375 (8th Cir.1983). The trial court is vested with broad discretion in deciding whether to admit wrongful act evidence. *United States v. Evans*, 697 F.2d 240, 248 (8th Cir.), cert. denied, — U.S. —, 103 S.Ct. 1779, 76 L.Ed.2d 352 (1983). The decision to admit such evidence

will only be reversed when it is clear that the questioned evidence has no bearing upon any of the issues involved at trial. *United States v. Marshall*, 683 F.2d 1212, 1215 (8th Cir.1982).

[6, 7] In the present case, we find that all of the standards for admission were met; thus, the trial court did not abuse its discretion. At trial, a material issue on which evidence of other acts may be admissible was raised when the appellants' defense consisted of claiming they were innocent because they relied on their subordinates to handle these day-to-day transactions. Furthermore, government exhibit 500 is relevant to that issue. Evidence is relevant when it serves to rebut a defense that a person had justifiably relied upon subordinates to handle business matters. See *United States v. Park*, 421 U.S. 658, 678, 95 S.Ct. 1903, 1914, 44 L.Ed.2d 489 (1975).

[8-10] We also find that the evidence of other acts was clear and convincing. To meet the clear and convincing standard, the proffered evidence cannot be admitted if it is of vague and uncertain character. *United States v. Clemons*, 503 F.2d 486, 490 (8th Cir.1974). Furthermore, the prior conduct cannot be equally consistent with an innocent explanation. *Id.* The uncontradicted evidence showed that the Ethiopian check was treated as a cash item and credited to Gustafson's account on the same day it was sent to Minneapolis for collection. Additional checks were then written on the account after it was given credit and prior to collection. We find it clear that an improper "float" occurred due to the bank giving credit to Gustafson's account. Under this same analysis, we find that the evidence related to wrongdoing similar in kind and reasonably close in time to the charge at trial.

[11] Finally, we find that the evidence was properly admitted because its probative value was substantially outweighed by the danger of unfair prejudice. This court would find it quite difficult to rule that the admission of government exhibit 500 caused the appellants to be convicted on an im-

proper basis. Moreover, the trial court gave a limiting instruction telling the jury not to consider such evidence as substantive proof but only as proof of notice or knowledge of a prior incident. Such an instruction diminishes the danger of any unfair prejudice arising from the admission of evidence of other acts. *United States v. Goehring*, *supra*, 585 F.2d at 373.

### III. Bruins' Motion for a New Trial

Bruins asserts that "because Gustafson and Agosto agreed, after trial, to give information to the government in exchange for a more lenient sentence, newly discovered evidence now exists that would justify granting him a new trial. Bruins submits that now Gustafson and Agosto would not try to implicate him in their crime and their testimony would be much more credible as they are now "on the government's side." Bruins argues that since this was unavailable during the first trial, it constitutes newly discovered evidence.

[12, 13] This court has set forth the criteria for granting a motion for a new trial on the ground of newly discovered evidence on numerous occasions. Before such a motion can be granted, the following five criteria must be met:

- (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

*United States v. Swarek*, 677 F.2d 41, 43 (8th Cir.1982), *cert. denied*, 459 U.S. 1102, 103 S.Ct. 723, 74 L.Ed.2d 949 (1983). It is also well settled that such motions are looked upon with disfavor and we will not overturn the trial court's decision absent a clear abuse of discretion. *United States v. Pope*, 415 F.2d 685 (8th Cir.1969), *cert. denied*, 397 U.S. 950, 90 S.Ct. 973, 25 L.Ed.2d 132 (1970).

[14] We find that the showing made in support of the motion for new trial does not satisfy the criteria set out in *Swarek*. The court did not abuse its discretion in denying the motion.

### IV. Gustafson's Motion in Limine

[15] At the close of the government's case, the court granted a judgment of acquittal to Bacigalupo. As he was available as a witness, Gustafson announced his intention to call Bacigalupo to testify for the defense. The government advised that, if Bacigalupo was called, its cross-examination would include the subject matter of the second indictment pending against Bacigalupo and Gustafson. Gustafson made a motion in limine requesting that the government not be allowed to broach the second indictment in cross-examination. The trial court refused to rule in advance on the motion and Gustafson chose not to call Bacigalupo to the stand.

Gustafson asserts that this court's decision in *United States v. Burkhead*, 646 F.2d 1283 (8th Cir.), *cert. denied*, 454 U.S. 898, 102 S.Ct. 399, 70 L.Ed.2d 214 (1981), compels a finding of reversible error. We disagree. In *Burkhead*, the court found reversible error when a trial court failed to rule in advance on whether a defendant could be cross-examined regarding events underlying his conviction on severed substantive counts as it was determinative of his desire to take the stand. We find that Gustafson's reliance on *Burkhead* is misplaced. The court in *Burkhead* held that in the usual case the judge has discretion to refuse to rule in advance, however, this case was so outside the ordinary that a refusal to rule in advance on a matter determinative of the defendant's desire to take the stand constituted an abuse of discretion. *Id.* at 1285. Thus, *Burkhead* is the exception and the instant case is covered by the general rule. The court did not abuse its discretion.

### V. Conclusion

For the foregoing reasons, the convictions are affirmed.

### LOVING SAVIOUR CHURCH, an unincorporated religious association, Appellant,

v.

UNITED STATES of America, Robert F. Cunningham, Robert F. Turner, George E. and 7 Unknown Persons, Appellees.

No. 83-1612.

United States Court of Appeals,  
Eighth Circuit.

Submitted Dec. 15, 1983.

Decided Feb. 29, 1984.

Rehearing and Rehearing En Banc  
Denied March 27, 1984.

Church brought wrongful levy action arising from seizure of property by the Internal Revenue Service. The United States District Court for the District of South Dakota, John B. Jones, J., 556 F.Supp. 688, entered judgment, and church appealed. The Court of Appeals held that property held in name of church could be levied on to satisfy tax liabilities of individual taxpayers who had set up the church.

Affirmed.

### Internal Revenue 4857

Taxpayers fraudulently conveyed property to a church to avoid federal tax lien and church was alter ego of the taxpayers, who were fully supported by funds and property of the church they created in whatever style they themselves chose; thus, property held in name of church could be levied on to satisfy individual taxpayers' tax liabilities.

Glenn L. Archer, Jr., Asst. Atty. Gen., Michael L. Paup, Gary R. Allen, Stanley S. Shaw, Jr., Tax Div., Dept. of Justice, Washington, D.C., for appellees; Philip N. Ho-

I. The Honorable John B. Jones, United States District Court, District of South Dakota, South-

gen, U.S. Atty., Sioux Falls, S.D., of counsel.

Gary H. Hemminger, Hemminger & Frederiksen, Englewood, Colo., for appellant.

Before HEANEY, ROSS and FAGG, Circuit Judges.

### PER CURIAM.

The Internal Revenue Service levied upon and seized a building in Huron, South Dakota; a 40-acre tract of farmland; three motor vehicles and two bank accounts in connection with the federal income tax liability of Dr. Albert A. Anderson and Myrtle G. Anderson. Title to all the property was held by the plaintiff, Loving Saviour Church, an unincorporated association. The bank accounts were in the name of Loving Saviour Church and the Anderson Business Trust. This action for a preliminary injunction to secure the release of the property and for damages resulting from the levy was brought under 26 U.S.C. § 7426. Loving Saviour Church appeals from an adverse decision in the district court<sup>1</sup> which held that the IRS properly levied upon the property to satisfy the Andersons' tax liabilities.

### Background

In 1975 the Andersons purchased some trust forms from a person involved in the tax protest movement, set up the A & M Family Trust, and transferred all their property to the trust. In 1976, a new A & M Family Trust and an Anderson Business Trust were set up to replace the 1975 trust. In 1977 the Andersons received Doctor of Divinity degrees from the Life Science Church and set up their own church which later became the Loving Saviour Church.

After taking a vow of poverty, Dr. Anderson transferred all the property from the A & M Family Trust and the Anderson Business Trust to the church for no consid-

ern Division.

ble from this case on its facts. There the *Post's* story was based almost entirely on a source previously unknown to the defendants, whom they knew to have a criminal record. Obvious avenues for checking the facts and allegations in the story were ignored, even though the editors had actual warning that much of it was false. The critical difference in this case is that Brooks relied on two reputable sources, and there was nothing to indicate to him that their information, or his synthesis of it, was not wholly accurate. Moreover, his reason for including the sentence about Ryan was his desire to make the book a balanced, objective history of AT&T. Certainly the Southern Bell controversy was worthy of mention in a history of the telephone company, and a rule of liability that could cause authors to avoid such controversial topics for fear of damage judgments would ultimately reduce the flow of information to the public.

Our reading of this case is fully in line with the decisions in other circuits that have applied the *New York Times* standard. As long as the sources of the libelous information appeared reliable, and the defendant had no doubts about its accuracy, the courts have held the evidence of malice insufficient to support a jury verdict, even if a more thorough investigation might have prevented the admitted error. See *Dickey v. CBS Inc.*, 583 F.2d 1221, 1227 (3d Cir. 1978); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 912-14 (2d Cir. 1977); *Grzelak v. Calumet Publishing Co.*, 543 F.2d 579, 583 (7th Cir. 1975); *Vandenburg v. Newsweek*,

tiff, included evidence that the defendant had described the plaintiff's appearance and expression, and had quoted her in his article even though she clearly was not at home when he visited. *Id.* at 253, 95 S.Ct. at 470.

9. The court's instructions on actual malice were as follows:

The courts have set out this standard in various ways: that is, they have defined it some ten or twelve years ago, the first time the Supreme Court dealt expressly with this problem. They defined actual malice as publication with knowledge that it was false or with reckless disregard of whether it was false or not. In other cases, it's been referred to as highly unreasonable conduct constituting an extreme departure from the standards

507 F.2d at 1026-28; *Drotzmann's, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830, 834 (8th Cir. 1974). In two cases in which the evidence of malice was found to be sufficient, by contrast, the facts indicated strongly that the challenged allegations had been completely fabricated by the writer. See *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976); *Davis v. Schuchat*, 510 F.2d 731, 735-36 (D.C. Cir. 1975).

The trial court below submitted this case to the jury with the instruction that they must find the element of actual malice on the part of defendants in order to find them liable. The court's definition of malice, however, was too broad, in that it included Justice Harlan's standard from *Butts*, which has since been rejected by a majority of the Court, and which may have confused the jury by indicating that a finding of negligence would suffice for malice.<sup>9</sup> Defendants, however, did not object to the inclusion of this definition. They did request the court, after it had finished the instructions but before the jury retired, to reopen the instructions and include the language of the *St. Amant* case, which the court refused. Though we do not say it was error for the court to refuse to include this belated offering, we disagree with its conclusion that the *St. Amant* language would be inappropriate to the circumstances of this case. The *St. Amant* language has been cited frequently in subsequent decisions of the Court, including very recent ones,<sup>10</sup> and it has never been limited to suits brought by public officials.

of investigative reporting ordinarily adhered to by responsible publishers. In another case, it was said there must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of his publication. In another it was referred to as knowing falsehood or reckless disregard of the truth, and then I believe the most recent case, which is now several years old, the Court again stated the original proposition that publication with knowledge that it was false or with reckless disregard of whether it was false or not.

10. See *Herbert v. Lando*, 441 U.S. 153, 156, 99 S.Ct. 1635, 1638, 60 L.Ed.2d 115 (1979); *Gertz v. Robert Welch*, 418 U.S. at 332, 94 S.Ct. 2997, 3003, 41 L.Ed.2d 789.

We need not decide, however, whether the instructions were so prejudicial as to constitute "plain error" and a basis for reversal. The defendants have properly challenged the sufficiency of the evidence, and on that basis we have followed the Supreme Court's lead in First Amendment cases and have conducted an independent examination of the record as a whole to determine whether the judgment constitutes "a forbidden intrusion on the field of free expression." *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82, 88 S.Ct. 197, 198-199, 19 L.Ed.2d 248 (1967). We find the evidence of actual malice insufficient to present a jury question in light of the constitutional standard, and we therefore reverse.

REVERSED.

WIDENER, Circuit Judge, concurs in the result.



UNITED STATES of America, Appellee,  
v.

Eileen Eldorado JOHNSON, Appellant.

No. 79-5272.

United States Court of Appeals,  
Fourth Circuit.

Argued Aug. 19, 1980.

Decided Nov. 12, 1980.

A medical doctor was convicted of federal income tax evasion, and new trial was denied by the United States District Court for the Western District of Virginia at Lynchburg, James C. Turk, Chief Judge. Defendant appealed. The Court of Appeals, James Dickson Phillips, Circuit Judge, held that where defendant at trial claimed inadvertence, claiming she had had nothing to do with preparing her tax returns because she cared nothing for money

and chose, instead, to devote her time to demanding personal needs of her patients, testimony of auditor for United States Department of Health, Education and Welfare that defendant in billing for medicaid services reported four times as many services per patient as other Virginia doctors was admissible under rule providing for admissibility of evidence of other crimes, etc., to prove preparation, plan, knowledge, absence of mistake or accident, etc.

Affirmed.

Widener, Circuit Judge, dissented and filed opinion.

# 1. Criminal Law ⇐370, 372(14)

In prosecution for federal income tax evasion wherein defendant at trial claimed inadvertence, claiming she had nothing to do with preparing her tax returns because she cared nothing for money and chose, instead, to devote her time to demanding personal needs of her patients, testimony of auditor for United States Department of Health, Education and Welfare that defendant in billing for medicaid services reported four times as many services per patient as other Virginia doctors was admissible under rule providing for admissibility of evidence of other crimes, etc., to prove preparation, plan, knowledge, absence of mistake or accident, etc. 26 U.S.C.A. § 7201; Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

# 2. Criminal Law ⇐369.1

First sentence of rule concerning admissibility of evidence of other crimes, etc., brings forward traditional rule that extrinsic acts evidence is inadmissible solely to prove that defendant is of bad character and therefore likely to have committed crime charged. Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

# 3. Criminal Law ⇐369.2(1)

Extrinsic acts evidence may be admissible for other purposes than those listed in rule concerning admissibility of such evidence, list provided by the rule being merely illustrative and not exclusive. Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

## 4. Criminal Law ⇐ 371(12)

In determining whether extrinsic act evidence should be admitted to prove motive, etc., under rule, trial judge must first determine if proffered evidence is relevant to issue other than accused's character, and, if so, trial judge must balance probative value of such evidence against dangers of undue prejudice aroused by such form of evidence. Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

## 5. Criminal Law ⇐ 369.1

Prohibition of rule that evidence of other crimes, wrongs or acts is not admissible to prove character of person in order to show that he acted in conformity therewith is designed to prevent prosecutorial overreaching by means so obviously effective that it has been inescapable temptation for advocates over the years. Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

## 6. Criminal Law ⇐ 371(1)

Where a defendant has deliberately sought as primary means of defense to depict herself as one whose essential philosophy and habitual conduct in life is completely at odds with possession of state of mind requisite to guilt of offense charged, defendant may be considered in effect to have forfeited any protection afforded by rule against some types of "other act" evidence. Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

## 7. Criminal Law ⇐ 730(1)

In prosecution for income tax evasion, government counsel's unfortunate reference to defendant's use of "fraudulent" medicaid forms was sufficiently corrected by cautionary actions that risk of prejudice was adequately removed. 26 U.S.C.A. § 7201; Fed. Rules Evid. Rule 404(b), 28 U.S.C.A.

S. W. Tucker, Richmond, Va. (Hill, Tucker & Marsh, Richmond, Va., J. Hugo Madison, Norfolk, Va., on brief), for appellant.

John S. Edwards, U. S. Atty., Roanoke, Va. (Faye S. Ehrenstamm, Asst. U. S. Atty., Roanoke, Va., on brief), for appellee.

Before RUSSELL, WIDENER and PHILLIPS, Circuit Judges.

JAMES DICKSON PHILLIPS, Circuit Judge:

Convicted by a jury of federal income tax evasion under 26 U.S.C.A. § 7201, Eileen Eldorado Johnson unsuccessfully moved in the district court for a new trial, on the grounds that evidence of her overstated Medicaid billings was improperly admitted and that government counsel's reference to her "fraudulent" Medicaid forms unduly prejudiced the jury. We affirm, holding that the extrinsic acts evidence was properly admitted under Fed.R.Evid. 404(b) and that no prejudice resulted from the "fraudulent" reference in view of the trial court's corrective action.

## I

Johnson is a medical doctor, who inherited her practice from her deceased brother. She filed tax returns for 1972, 1973, and 1974, which understated her income by approximately \$120,000.00 and her tax liability by approximately \$31,000.00. Her defense at trial was inadvertence: she had had nothing to do with preparing her tax returns because she cared nothing for money and chose, instead, to devote her time to the demanding personal needs of her patients. To support this defense she produced seven local witnesses—three physicians, a school board member, a public school teacher, a mortician, and a minister—who testified to her truthfulness, honesty, and compassion, and to the busy nature of her practice.

In attempted rebuttal of this portrait of Johnson as an altruistic healer of the sick, whose concerns lay elsewhere than attending to her financial interests and resulting legal responsibilities, the government called Robert Pemberton, an auditor for the U.S. Department of Health, Education & Welfare. Pemberton testified at length about his investigation of Johnson's billings for Medicaid services for 1976-78. His study showed that Johnson reported four times as many services per patient as other Virginia

doctors. Johnson did not object to the general course of Pemberton's testimony. In fact, the following day Johnson again took the stand in order to testify that she had not signed the Medicaid billings upon which Pemberton had based his investigation. During cross-examination, government counsel asked Johnson, "Who would have received the benefit of all the fraudulent forms for Medicaid that were filed?" Johnson's counsel objected and moved for a mistrial because use of the term, "fraudulent," unduly prejudiced the jury. The trial judge overruled the motion, directed government counsel to rephrase the question, and gave the jury a cautionary instruction.

## II

[1] We hold that Pemberton's testimony was admissible under Fed.R.Evid. 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[2, 3] The first sentence of Rule 404(b) brings forward the traditional rule that extrinsic acts evidence is inadmissible solely to prove that defendant is a bad character and, therefore, likely to have committed the crime charged. See, e.g., *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973); *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948); Advisory Committee Notes to Fed.R.Evid. 404(b); McCormick, *Evidence* § 190, at 447 (2d ed. 1972). Extrinsic acts evidence, however, may be admissible for other purposes including those listed in Rule 404(b). The Rule's list is merely illustrative, not exclusive. Wright & Graham, *Federal Practice and Procedure: Evidence* § 5240, at 469 (1978).

[4] Rule 404(b) of course commits to trial judge discretion the determination whether extrinsic act evidence shall be ad-

mitted under its second sentence. In exercising that discretion the judge first must determine if the proffered evidence is relevant to an issue other than the accused's character. If so, then the trial judge must balance the evidence's probative value against the dangers of undue prejudice aroused by this form of evidence. This may concededly pose particularly difficult problems. The Advisory Committee Notes to Rule 404(b) state:

No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403 [confusion of issues, misleading the jury, undue delay, waste of time, and needless presentation of cumulative evidence].

[5] Within this general guideline for the exercise of trial court discretion, we think the evidence here challenged was properly admitted. The general prohibition contained in the first sentence of Rule 404(b) is designed to prevent prosecutorial overreaching by a means whose obvious effectiveness has made it an inescapable temptation for advocates over the years. The second sentence, however, reflects the perception that evidence of "other acts" may sometimes be critical to proof on a dispositive issue related to a defendant's state of mind. The ambivalence reflected in the Rule but serves to emphasize the particular delicacy of the discretionary rulings its administration may require. There is no gain-saying that the ruling here posed just such a problem for the trial judge, but we think he properly resolved it.

[6] Particularly where, as here, a defendant in a criminal case by her own testimony and that of others has deliberately sought as the primary means of defense to depict herself as one whose essential philosophy and habitual conduct in life is completely at odds with the possession of a state of mind requisite to guilt of the offense charged, that defendant may be considered in effect to have forfeited any pro-

tection that the first sentence of the Rule might otherwise have provided against the type of "other act" evidence here challenged. See *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954). In such circumstances, testimony such as that of Pemberton may well be the only effective way to rebut evidence designed generally to plant in the jury's mind a reasonable doubt that such a person could have possessed the culpability of mind requisite to convict of the crime charged. Balancing the probative value of the challenged evidence against its potential for unfairly prejudicing the defendant, and on the latter point taking into account that the defendant deliberately chose to base her defense upon evidence not otherwise effectively rebuttable, we conclude that the district judge's admission of Pemberton's evidence lay well within the bounds of the discretion reposed in him.

### III

[7] We think that government counsel's unfortunate reference to "fraudulent" Medicaid forms was sufficiently corrected by the trial judge's cautionary actions so that the risk of prejudice was adequately removed.

Finding no merit in the defendant's other contentions, we affirm.

**AFFIRMED.**

WIDENER, Circuit Judge, dissenting:

I respectfully dissent and would grant a new trial.

Assuming that the evidence of other acts is admissible for one purpose or another, and I think, after *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973), even taking into consideration the later advent of the new rules, the admissibility of such evidence is pretty well entrusted in this circuit to the almost uncontrolled discretion of the trial judge, Pemberton's most damning testimony is not considered by the majority in its opinion.

Pemberton testified that Dr. Johnson had billed for specific services not rendered, and he ascertained that fact by asking the patients involved. Thus, the false billing he

concluded Dr. Johnson had done was proved by statements other than those made by the declarant while testifying at a trial or hearing and offered in evidence to prove the truth of the matter asserted. This is hearsay pure and simple under FRE 801(c) and inadmissible under FRE 802, for it is not subject to any exception as to which I am advised.

An example follows:

"THE COURT:

Q. And then you checked with some of the patients?

A. Yes, sir.

Q. And found out that the services were not rendered?

A. In talking with the recipients, they stated that they had not received certain services which were billed by Dr. Johnson."

Specific instances of conduct, whether offered to rebut a defense to the merits, as the majority treats it, or whether offered to rebut a defense of good character, I think may no more be proved by hearsay than any other essential fact in the case.

The testimony I have quoted is only a part of that introduced; other evidence is equally as inadmissible. It may only be considered highly prejudicial, and its admission should warrant a new trial.



**PROCTOR & SCHWARTZ, INC. and  
SCM Corporation, Appellants,**

v.

**C. F. ROLLINS, Appellee.**

No. 79-1876.

United States Court of Appeals,  
Fourth Circuit.

Argued Oct. 6, 1980.

Decided Nov. 13, 1980.

Georgia resident brought action against  
Pennsylvania and New York corporations to

recover damages for personal injuries sustained. The United States District Court for the District of South Carolina, Sol Blatt, Jr., J., 478 F.Supp. 1137, denied the corporations' motions to dismiss and permission to appeal was granted. The Court of Appeals, Haynsworth, Chief Judge, held that South Carolina statute, closing the doors of South Carolina's courts for suits involving a foreign cause of action brought by a foreign plaintiff against a foreign corporation, deprived the District Court of jurisdiction over the injured Georgia resident's suit, in the absence of countervailing affirmative federal considerations.

Reversed and remanded.

#### 1. Federal Courts ⇐ 75

South Carolina statute, closing the doors of South Carolina's courts for suits involving a foreign cause of action brought by a foreign plaintiff against a foreign corporation, deprived federal district court of jurisdiction over injured Georgia workman's suit against Pennsylvania manufacturer of a machine which injured him in Georgia, in the absence of countervailing affirmative federal considerations. S.C.Code 1976, § 15-5-150.

#### 2. Federal Courts ⇐ 75

Plaintiff's failure to timely file suit in the more logical, convenient forum did not constitute a countervailing consideration favoring exercise of federal jurisdiction in the face of statute closing doors of state's courts for suits involving a foreign cause of action brought by a foreign plaintiff against a foreign corporation. S.C.Code 1976, § 15-5-150.

John P. Linton, Charleston, S. C. (Sinkler, Gibbs & Simons, Charleston, S. C., on brief) and Samuel P. Pierce, Jr., Atlanta, Ga. (Warner S. Currie, Swift, Currie, McGhee & Hiers, Atlanta, Ga., on brief), for appellants.

John E. Parker, Ridgeland, S. C. (Peters, Murdaugh, Parker, Eltzroth & Detrick, Ridgeland, S. C., on brief), for appellee.

1. *Nix v. Mercury Motors Exp. Inc.*, 270 S.C. 477, 242 S.E.2d 683 (1979).

Before HAYNSWORTH, Chief Judge, and BUTZNER and SPROUSE, Circuit Judges.

HAYNSWORTH, Chief Judge:

[1] By permission of this court, Proctor & Schwartz, Inc. and SCM Corporation prosecute this interlocutory § 1292(b) appeal of the denial of their motions to dismiss. Among the grounds asserted for reversal, they argue that South Carolina's "door closing" statute, S.C.Code § 15-5-150, deprived the district court of jurisdiction. We agree.

In 1972, Rollins was injured in an accident involving a machine manufactured by Proctor & Schwartz. Rollins resides in, was injured in, and recovered workmen's compensation in Georgia. The allegedly defective machine was manufactured in Pennsylvania. Proctor & Schwartz, a Pennsylvania corporation, is a wholly owned subsidiary of SCM, a New York corporation.

Five years after the accident, Rollins sued the two foreign corporations in the United States District Court for the District of South Carolina. South Carolina's relatively long six year statute of limitations, rather than any nexus with the facts giving rise to this cause of action, dictated Rollins' choice of forum. By 1977 the Georgia limitations period had long since run.

Section 15-5-150 opens the South Carolina state courts to two types of suits against foreign corporations: (1) by any resident for any cause of action; and (2) by a non-resident for any cause of action that arose within South Carolina. By implication, and by interpretation of the South Carolina Supreme Court,<sup>1</sup> the statute closes the doors of South Carolina's courts for suits, as the present one, involving a foreign cause of action brought by a foreign plaintiff against a foreign corporation.

In *Szantay v. Beech Aircraft Corporation*, 349 F.2d 60 (4th Cir. 1965), this court held that a South Carolina federal court exercis-

**CERTIFICATE OF DELIVERY**

I hereby certify that four true and correct copies of the foregoing were mailed/delivered to Ronald J. Yengich and Earl Xaiz, of Yengich, Rich, Xaiz and Metos, 72 East 400 South, Suite 355, Salt Lake City, UT 84111, on this \_\_\_\_\_ day of December, 1986.

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