

1976

# State of Utah v. International Amusements, Dba, Adult Book And Cinema Store, Stuart Lee, David Andrew Pauly, Hersel Richardson, Jr., And Kenneth Blair Cleveland : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- :  
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

INTERNATIONAL AMUSEMENTS, dba :  
ADULT BOOK AND CINEMA STORE, :  
STUART LEE, DAVID ANDREW PAULY, :  
HERSEL RICHARDSON, JR., and :  
KENNETH BLAIR CLEVELAND, :

Defendants-Appellants. :  
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BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF THE  
JUDICIAL DISTRICT COURT, IN AND FOR  
COUNTY, STATE OF UTAH, THE HONORABLE  
F. WAHLQUIST, JUDGE, PRESIDING  
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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No.
-vs-	:	14535
INTERNATIONAL AMUSEMENTS, dba	:	
ADULT BOOK AND CINEMA STORE,	:	
STUART LEE, DAVID ANDREW PAULY,	:	
HERSEL RICHARDSON, JR., and	:	
KENNETH BLAIR CLEVELAND,	:	
Defendants-Appellants.	:	

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellants were found guilty by a jury and sentenced for distributing pornographic material.

DISPOSITION IN THE LOWER COURT

Each appellant was separately charged for distributing pornographic material in violation of Utah Code Ann. § 76-10-1204 (Supp. 1975). The case was tried before a jury which entered a verdict of guilty against each defendant. Each defendant was subsequently sentenced by the Honorable John F. Wahlquist presiding.

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the convictions and judgments rendered below.

## STATEMENT OF FACTS

Respondent agrees with the statement of facts contained in appellants' brief with the following additions and corrections:

1. Although appellants did take exception to some of the instructions given by the court, they failed to do so with regard to Nos. 4, 5 and 6 relating to the element of scienter:

MR. FLORENCE: The Defendants except to the instruction which I have numbered seven, which refers to the Defendant David Andrew Pauly and the element that must be found before he can be convicted and particularly except to the provision of that portion of paragraph 1 which says that he was the corporation. They must find that he was the manager of the corporation and knew or should have known that such a book was displayed for sale.

I suggest that does not conform to the law and the standard in the later instruction with respect to responsibility of parties and the fact that they must solicit, request, demand, encourage, intentionally aid another to engage in the criminal conduct with the same kind of criminal intent.

The same exception will be taken with respect to the instruction on International Amusements for the same reason and the same language that the corporation's local managing authority knew or should have known. Not only do we object to the knew or should have known language, but also restricting it to local managing authority is not being consistent with the later instruction which says that it must be a high managerial agent.

Instruction No. 11, in my instructions with respect to International Amusement and their conduct which will constitute an offense. I suggest the court is not limited totally to a high managerial agent, or as in my requested instruction No. 4, the board of directors, both of which comes out of the Utah State law and is much more liberal than is permitted by the Utah State law.

The defendants further except to the limitation on their requested instruction No. 6 with respect to the affirmative defense and excepts particularly to the court's additional language making that defense only available if the sale was to the person in question was intended by the sales person.

The defendants further except to the portion of the instruction which starts, the test is not whether it would arouse sexual desires and particularly to that last paragraph in that instruction which says that in determining the common conscience of the community that they are to consider the community including young and old men, women and children.

I suggest that is not the test in considering community standards. I suggest by the law it is restricted to adults, that there is a different standard entirely when referring to children and unreasonably and improperly misleads the jury as to what their responsibilities are and the standards that they must adopt in considering whether or not these materials are offensive to community standards.

That's all.

(Tr.171-173).

2. Although appellants claim to have submitted six jury instructions to the court, it is unclear from the record whether this was ever in fact done. Appellants' reference to Page 166 of the transcript indicates only their intention to submit the instructions; it does not indicate that the court received any:

THE COURT: Are there other matters of instructions, general instructions?

MR. FLORENCE: No. Only the six that I have submitted, and I would suggest to the court that all six of them, other than perhaps some minor changes in adjectives and verbs are word for word from the Utah State statute also six of them.

THE CLERK: I haven't received a copy.

MR. FLORENCE: I will get you one.

(Tr. 165-166)

In all fairness to appellants, however, it appears that Proposed Instruction No. 5 on page 59 of the record (Vol. No. 1) and Proposed Instruction No. 3 on page 60 of the record (Vol. No. 1) are part of their six instructions. Respondents received from the Weber County Attorney's Office a copy of what they believed to be the appellants' six instructions.<sup>1</sup> Respondents submits that in none of these six instructions do the appellants refer to the element of scienter in the

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<sup>1</sup>These are included as an appendix to this brief



court's instructions Nos. 4, 5 and 6 on which they now claim error.

#### ARGUMENT

#### POINT I

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS NOS. 4, 5, 6, 8 AND 9

Appellants' argument under Point I is two-pronged: (1) that the trial court erred in its instructions Nos. 4, 5, and 6 in that the court left out instruction for the element of scienter; and (2) that in its instructions Nos. 8 and 9, the court improperly instructed on the element of scienter. For clarity sake, respondents will treat these two arguments separately.

(1) The long-standing rule concerning alleged errors in a criminal case was articulated by the Utah Supreme Court in State v. Smith, 45 Utah 381, 146 Pac. 286 (1915); the court held where there is no exception and no assignment of error, the defendants cannot claim error on appeal. The reason for this rule is to require the prosecution and the defense to assist the court so as to avoid error:

"The purpose of exceptions is to assist the court in giving correct instructions. This purpose is best served by calling its attention to what is wrong and suggesting what is right. But the purpose of this procedure is not to permit a party to take an exception upon one ground, and then if he is convicted, use a different ground than he disclosed to the court to obtain a reversal. Accordingly, if the defendant has not **stated** a correct basis for objection to an instruction, he cannot wait until after he loses, and then complain about it for the first time."  
State v. Valdez, 19 Utah 2d 426, 432 P.2d 53, 55 (1967).

The Utah Supreme Court has just recently re-affirmed this rule in State v. Kazda, 545 P.2d 190 (Utah 1976):

"There is an important purpose to be served by the rule requiring that objections be made to the instructions. It gives an opportunity for the court to correct, or to fill in any inadequacy in the instructions, so that the jury may consider the case on a proper basis. In order to accomplish that purpose, the rule should be adhered to. Accordingly, the standard rule is that when a party fails to make a proper objection to an erroneous instruction, or to present to the court a proper request to supply any claimed deficiency in the instructions, he is thereafter precluded from contending error."  
Id. at 192, 193.

There is an exception to this rule, however, stated in State v. Villiard, 27 Utah 2d 204, 494 P.2d 285 (1972), an appeal from a rape conviction. In Villiard, the defendant claimed error as to certain instructions although he had failed to except to them. The court said that if "the error is so palpable as obviously to reflect prejudiciality amounting to a denial of due process or justice" failure to except to such error would not prevent reversal. Id., at 286.

In the instant case, respondent contends that appellants did not object to, nor did they take exception to the instructions Nos. 4, 5 and 6 as they relate to the scienter element. Respondent also contends that appellants did not offer any of their own instructions relating to this claimed error which would have cured the alleged defect. Included in respondents' statement of facts, supra, is the transcript recitation of appellants' objections to the instructions, and nowhere in that recitation do the appellants make such a claim of error. Appellants may argue, however, that their six instructions referred to on page 166 of the transcript would have

cured the alleged defect. Unfortunately, however, their instructions were not preserved in the record; and if the six instructions sent by the Weber County Attorney's Office are those submitted by appellants, they do not cure the claimed defect in Instructions Nos. 4, 5 and 6. Assuming these were appellants' instructions, they merely repeat the same error now claimed:

PROPOSED INSTRUCTION NO. 1: "Before you can find the defendants or any of them guilty you must find that they distributed or offered to distribute, exhibited or offered to exhibit, pornographic material to others."

There is no reference to the scienter element in Proposed Instruction No. 1.

PROPOSED INSTRUCTION NO. 2 relates to the definition of "contemporary community standards."

PROPOSED INSTRUCTION NO. 3 relates to David Andrew Pauly who was referred to in Instruction No. 8.

PROPOSED INSTRUCTION NO. 4 relates to International Amusements, dba, Adult Book and Cinema Store which was referred to in Instruction No. 9.

PROPOSED INSTRUCTION NO. 5 relates to the definition of "high managerial agent."

PROPOSED INSTRUCTION NO. 6 relates to a possible affirmative defense.

Therefore, respondents submit that appellants have waived their claim of error by failing to take exception and by failing to provide curative instructions.

Appellants may claim that even if they did waive their claim, the court should preserve it under the Villiard exception, supra. Respondent submits that this argument is invalid also, for three reasons:

(A) The purpose of instructions is to give the jury a fair understanding of the issues of fact to be determined and the applicable law. To this end the instructions must be read as a whole and not as unrelated messages. 23A C.J.S. Criminal Law § 1321(1) provides:

"Provided they are consistent with one another, all the instructions given in a case should be read together and construed as a whole, and if, when so construed, they state the law fully, clearly and correctly, they are sufficient, although a particular instruction or part thereof, standing alone, might be objectionable."

Instructions Nos. 8 and 9 require that the jury find those defendants "knew or should have known" that the material was pornographic. Instruction No. 10 states:

"You are instructed that every person acting with the mental state for the conduct of this offense who directly commits the offense, or who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct." (Emphasis added).

And last, Instruction No. 24 informs the jurors explicitly that they are to take the instructions as a whole:

"These instructions though numbered separately, are to be considered and construed as one connected whole. Each instruction should be read and understood in reference to and as a part of the entire charge and not as though any one sentence or instruction separately were intended to state the whole law of the case upon any particular point. Moreover, the order in which the instructions are given has no significance as to their relative importance."

(B) Even if this court should find that the trial court's instructions were erroneous, this would certainly not be prejudicial error. During the trial the trial judge attempted to educate the jury so that they would be familiar with the charges and be able to listen to the evidence with a greater awareness. During the voir dire of the jury the judge, in an

attempt to explain the principal-agent theory of liability, explained their liability in terms of their intent:

"In other words if A employs B to commit a crime on behalf of C, they would all be liable if they all had the same criminal intent and that is what they are charging here. But you would not be liable unless you intended the commission of the crime charged." (Tr.87)  
(Emphasis added)

Again, after the jurors were sworn in the trial judge had the clerk read the information (Tr.125) which contained the scienter element in the definition of the offense. (See Record Vol. 1-13, Record Vol. 2-16, and Record Vol. 3-10).

Respondents submit that the jurors in this case were educated and sensitized to the scienter element by the trial court and their consideration of this element can be inferred from a reading of the transcript and record in light of the facts and statements contained therein. Alternatively, if this court finds error, the education of the jury minimizes any prejudicial effect.

(C) Last, there was, in effect, constructive knowledge in this case. In other words, knowledge on the part of the appellants was such a foregone conclusion that even if there was error in the court's

instructions there is no possibility that "the error is so palpable as obviously to reflect prejudiciality amounting to a denial of due process or justice."

State v. Villiard, supra, at 286. The jurors could easily have inferred the scienter from a hearing of all the facts and circumstances:

- 1) There was a sign on the door stating it was for adults only, and that there was a browsing fee of fifty cents. (Tr.130)
- 2) The magazine rack contained magazines showing explicit sex on the covers. (Tr.131)
- 3) Exhibit 1-P entitled "Explicit Sex" Vol. 1, No. 1.
- 4) Exhibit 2-P entitled "Hard Act".
- 5) Exhibit 3-P entitled "Hard Action" Vol. 1, No. 1.
- 6) ~~Exhibit 4-P~~ entitled "Tongue of Lust".
- 7) Mr. Pauly had the keys to the movie projectors (Tr.149).

Therefore, in light of the above three arguments, the case at bar does not come under any exception to



the rule that if the defendant fails to claim error in an instruction he is thereby precluded from raising it on appeal.

Appellants rely on Smith v. People, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959) to support their contention that the trial court's instructions were constitutionally defective. In Smith, the court struck down an ordinance which would have imposed strict liability for selling obscene books, stating that such an ordinance would place too heavy a burden on a bookseller. Appellants overlook that the court differentiated between striking down a strict liability obscenity law, and determining a constitutionally adequate mens rea.

"We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. Doubtless any form of criminal obscenity statute

applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene, but we consider today only one which goes to the extent of eliminating all mental elements from the crime." Id. at 219. (Emphasis added)

(2) The second prong of appellants' argument is that even though instructions Nos. 8 and 9 contained the scienter element, the element was improperly presented. Appellants claim that although the instructions do require that these two defendants (Pauly and International Amusements) know or have reason to know the materials were offered for sale, "neither instruction requires any knowledge of the character or content of the material." (Appellants' brief, page 13) Since the instructions Nos. 8 and 9 vary only slightly and that variation does not have bearing on this issue, they will be treated together, under the wording of No. 8.

"Before you can find DAVID ANDREW PAULY, defendant, guilty of any of the counts in question, you must find all the elements of that count proven beyond a reasonable doubt.

COUNT I.

1. That on or about December 9, 1975, there was sold and displayed for sale Exhibit 1P within Weber County, State of Utah; and that he was the manager of the corporation and knew or

should have known that such a book was displayed for sale, and that persons were employed for the purpose of the sale." (Emphasis added)

The instruction continues, stating that that book must be found to be illegal pornography and defining illegal pornography. Respondent submits that the language of this instruction is clear, and that the knowledge element relates to knowledge that the book was pornographic.

The trial court did not err in its instructions Nos. 8 and 9. Should the court find error in instructions Nos. 4, 5 and 6, there was no prejudicial error and the convictions rendered below should be affirmed.

## POINT II

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT THE MATTER WAS TO BE JUDGED BY CONTEMPORARY COMMUNITY STANDARDS.

Utah Code Ann. § 76-10-1201(12) (Supp. 1975) defines "contemporary community standards" as "those current standards in the vicinage where an offense alleged under this act has occurred, is occurring, or will occur." The trial judge gave almost this identical definition in his instruction No. 14.

"Contemporary community standards means those current standards where an offense alleged under this action has occurred."

Appellants are alleging that the bounds of the community should be defined in terms of a statewide community standard. The United States Supreme Court in Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 94 S.Ct. 2750 (1974), expressly dealt with this issue. In Jenkins, the court held that there is no constitutional requirement that juries be instructed to apply the standards of a statewide community.

"We agree with the Supreme Court of Georgia's implicit ruling that the constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. Miller approved the use of such instructions; it did not mandate their use. What Miller makes clear is that state juries need not be instructed to apply national standards. We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community'. Miller held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing

statutes under this element of the Miller decision. A state may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in Miller without further specification as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in Miller." Id., at 157.

See also Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974).

The language in Utah Code Ann. § 76-10-1201(12) does not require a state-wide standard nor does it even suggest that that would be a preferable standard, and in light of the recent United States Supreme Court opinions supra, to the contrary, to expect this court to read into our statute a statewide community standard would constitute impermissible legislating on the part of the court.

### POINT III

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON HOW TO DETERMINE AN "AVERAGE PERSON" IN THE COMMUNITY.

There are two crimes regarding pornography in Utah, one general and one for minors. Appellants claim that there is a separate standard for children and therefore the trial court erroneously included the word "children" in instruction No. 15, his explanation at how the jury should determine what is an "average person". Respondent contends that the trial court used the term "children" only to suggest a formula

from which the jury could ascertain whether or not the material was pornographic. Instruction No. 15 states:

"The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called wordly-wise and sophisticated indifferent and unmoved.

The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.

In this case, members of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious -- men, women and children." (Record Vol. 1-45) (Emphasis added).

In computing the "average person" the young and old, the educated and uneducated, the religious and irreligious, must all be taken into consideration. The "average person" conception is statutorily derived. Utah Code Ann. § 76-10-1203(1)(a) says that if "the average person" would find the material pornographic, then it comes under the statute. There is nothing in the statutes to indicate children should not be included in that formula, and in fact § 76-10-1203(2) language can be read to include children in all cases:

"In any prosecution dealing with an offense relating to pornographic material or performances, or dealing in harmful material, the question whether material or a performance appeals to prurient interest in sex shall be determined with reference to average adults or average minors as the case may be." (Emphasis added)

Additionally, Utah Code Ann. § 76-10-1201(12) states:

"'Contemporary community standards' means those current standards in the vicinage where an offense alleged under this act has occurred, is occurring, or will occur. (Emphasis added).

The trial court instructed the jury accordingly in Instruction No. 14 (Record Vol. 1-44):

"Contemporary community standards means those current standards in the vicinage where an offense alleged under this action has occurred."  
(Emphasis added).

A fair reading of "vicinage" would include the standards of all persons in the community, not just adults.

The trial judge by including children in his instruction was merely trying to instruct as to the conscience of the average person and he was within permissible statutory grounds to do so. He committed no error in his instructions and the appellants' convictions should be affirmed.

#### CONCLUSION

Respondents respectfully submit that appellants' convictions and judgments rendered in the trial court should be affirmed.

Respectfully submitted,

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## APPENDIX

### INSTRUCTION NO. 1

Before you can find the defendants or any of them guilty you must find that they distributed or offered to distribute, exhibited or offered to exhibit, pornographic material to others.

Material is pornographic if: (a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex; (b) it is patently offensive <sup>IN</sup> ~~and~~ the description or depiction of nudity, sexual conduct, sexual excitement, sado-masochistic abuse, or excretion; and, (c) taken as a whole, it does not have serious literary, artistic, political or scientific value.

Contemporary community standards means those current standards in the vicinage where an offense alleged under this action has occurred.

Nudity means the showing of the human male or female genitals, pubic area, or buttocks, with less than an opaque covering, or the showing of a female breast with less than an opaque covering, or any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.

Sexual conduct means acts of masturbation, sexual intercourse, or any touching of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female, breast, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent or actual sexual stimulation or gratification.

Sexual excitement means a condition of human male or female genitals when in a state of sexual stimulation or arousal, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

Sado-masochistic abuse means flagellation or torture by or upon a person who is nude or clad in undergarments, a mask, or in a revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

INSTRUCTION NO. 3

Before you can find the defendant David Andrew Pauly guilty of a crime as charged, you must find that he solicited, requested, commanded, encouraged or intentionally aided any of the other defendants in conduct which constituted the crime for which they have been charged.

INSTRUCTION NO. 4

Before you can find the defendant International Amusements, dba, Adult Book and Cinema Store guilty of a crime as charged, you must find that the conduct of any defendant which constitutes the offense with which they have been charged was authorized, solicited, requested, commanded, undertaken, performed, or recklessly tolerated by the Board of Directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation or association.

INSTRUCTION NO. 5

High managerial agent means: (a) A partner in a partnership; (b) an officer of a corporation or association; (c) an agent of a corporation or association who has duties of such responsibility that his conduct reasonably may be assumed to represent the policy of the corporation or association.

INSTRUCTION NO. 6

If you find that the defendants or any of them distributed pornographic material to a person having scientific, educational, governmental or other similar justification for possessing pornographic material, you must find the defendants or defendant, as the case may be, not guilty.