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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

---oooOooo---

THE STATE OF UTAH, Plaintiff and Respondent,	:	
vs.	:	Case No. 14710
DON C. COFFEY, Defendant and Appellant.	:	

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BRIEF OF APPELLANT

---oooOooo---

STATEMENT OF NATURE OF CASE

This is a criminal case in which the Appellant was convicted of issuing a bad check in violation of §76-6-505, Utah Criminal Code.

DISPOSITION IN THE LOWER COURT

On May 24, 1976, the Defendant-Appellant was tried to a jury before the Honorable Allen B. Sorensen and found guilty of a second degree felony.

RELIEF SOUGHT ON APPEAL

Appellant, Don C. Coffey, seeks a vacation of the jury verdict and a judgment of not guilty notwithstanding the

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verdict of the jury, or in the alternative, a new trial.

STATEMENT OF FACTS

The Defendant-Appellant, Don C. Coffey, at the time of the alleged offense was in the business of buying, transporting, and selling fruit. On July 29, 1975 he contacted one Morris Ercanbrack, a fruit grower. The Defendant and Mr. Ercanbrack negotiated, Mr. Ercanbrack gave the Defendant a truckload of cherries, and the Defendant gave Mr. Ercanbrack a check in the amount of $3,560.00 drawn on the Dixie State Bank, St. George, Utah.

The check was presented for payment and was dishonored. The Defendant did not have sufficient funds or credit with Dixie State Bank for payment of the check.

ARGUMENT

POINT I

DENIAL OF DEFENDANT'S MOTION TO DISMISS AT THE CLOSE OF EVIDENCE WAS ERROR BECAUSE THE STATE FAILED TO MEET ITS BURDEN OF PROVING THE DEFENDANT'S INTENT TO DEFRAUD WHEN IT OFFERED NO EVIDENCE ON THE POINT.

The state offered two witnesses who testified that the Defendant issued a check to Morris Ercanbrack in the amount of $3,560.00 drawn on the Dixie State Bank,

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St. George, Utah, in payment for a truckload of cherries. It was stipulated that at the time the check was issued, the Defendant did not have sufficient funds or credit with the bank to pay the check.

§76-20-11, U.C.A. 1953 said that the making of a check at a time when the maker has insufficient funds to pay the check is prima facie evidence of intent to defraud. §76-6-505 of the Utah Criminal Code replaced §76-20-11. §76-6-505 is silent on what constitutes prima facie evidence of intent to defraud. That change implies that the legislature intended to remove any presumption which arises from the mere making of a check without sufficient funds.

In State v. Bruce 1 U.2d 136, 262 P.2d 960(1953), a case decided under the old section, this Court reviewed evidence which would bear on the Defendant's intent. Certainly, under the new section, some evidence should be required. Such evidence is required in other jurisdictions. See People v. Griffith, 120 C.A.2d 873, 262 P.2d 355.

In the instant case there was no evidence whatsoever concerning the Defendant's standing with the bank, whether any check had ever been previously dishonored, if other checks were issued on or around

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the same day, how long Mr. Coffey had been dealing with the bank, or whether or not the particular check was dishonored because of an insufficiency of funds amounting to $1.00 or to $3,500.00. No evidence was brought forth to establish the requisite intent except that the check, in a normal commercial setting, was issued and was subsequently dishonored.

Based upon the State's failure to offer evidence of intent to defraud, the Defendant's motion to dismiss at the close of evidence should have been granted. See Kunkel v. Estes, 346 P.2d 185 (Oklahoma 1959).

POINT II

DENIAL OF DEFENDANT'S MOTION TO DISMISS AT THE CLOSE OF EVIDENCE WAS ERROR BECAUSE THE STATE FAILED TO MEET ITS STATUTORY BURDEN OF PROVING THAT THE DEFENDANT KNEW THAT THE CHECK WOULD NOT BE PAID.

The statute which the Defendant is charged with violating provides that the Defendant, to be guilty, must know when he issues the check that it will not be paid by the bank. §76-6-505(1) Utah Criminal Code. The only evidence on this point in the record is the statements by both prosecution witnesses that they had been told by the Defendant that the check was good. This evidence, though minimally probative, indicates

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the Defendant's belief that the check would be paid.

It cannot be seriously argued that the Defendant's knowledge should be presumed or implied. The statute under which the Defendant is charged provided that knowledge will be presumed when the Defendant has no account but establishes no presumption in any other case. §76-6-505(2) Utah Criminal Code. The well established doctrine of _inclusio unius est exclusio alterius_ requires that the statute be interpreted as eliminating the presumption of knowledge except as specified. _Hansen v. Board of Education_, 101 Ut. 15, 116 P.2d 936 (1941). _State v. Driscoll_, 101 Mont. 348, 54 P.2d 571.

This Court in _State v. Bruce_, _supra_, stated that conditions of the mind, including, presumably, knowledge, were capable of proof. In the instant case, as previously stated, there was no evidence whatsoever concerning the Defendant's standing with the bank, whether any check had ever been previously dishonored, if other checks were issued on or around the same day, how long Mr. Coffey had been dealing with the bank, or whether or not the particular check was dishonored because of an insufficiency of funds amounting to $1.00 or to $3,500.00. No evidence was brought forth

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to establish the requisite knowledge except that the check, in a normal commercial setting, was issued and was subsequently dishonored.

Based upon the State's failure to offer any evidence as to the Defendant's knowledge, the Defendant's motion to dismiss at the close of evidence should have been granted.

POINT III

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN NOT FULLY, FAIRLY, AND CORRECTLY INSTRUCTING THE JURY AS TO THE ELEMENTS OF THE CRIME.

As noted previously, the statute under which the Defendant was charged made the issuance of a check a crime only if the Defendant knew he had no sufficient funds or credit. The Defendant's knowledge is an important and essential element of the offense.

In the jury instructions given at trial, instruction number 5 purports to list the essential elements of the crime. Nowhere in instruction number 5 is the jury advised that knowledge is an element of the offense. The instruction goes on to say that if the jurors are satisfied beyond a reasonable doubt of "all of the essential elements of the offense _as above-set forth_, the Defendant is guilty..." (emphasis added).

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The instruction challenged clearly tells the jury that they must find the Defendant guilty, even though the Defendant is without knowledge, if the other elements have been proved.

Instructing the jury with instruction number 5 was error which could not fail to prejudice the Defendant. The trial court must fully instruct the jury on all essential elements of a crime. See State v. Clingerman, 516 P.2d 1022, 213 Kan. 525 (1973), Thomas v. State, 522 P.2d 528 (Alaska 1974).

The trial court goes on, in instruction number 6, to seemingly offer the jury an alternate ground for finding the Defendant guilty. Instruction number 6, set forth in its entirety, states:

> Any person who issues or passes a check for the purpose of obtaining from any person any money, property or thing of value knowing it will not be paid by the drawee bank and payment is refused by the drawee bank is guilty of issuing a bad check.

Instruction number 6 clearly tells the jury that they might find the Defendant guilty without regard to his intent to defraud, without regard to the amount of the check, without regard to why payment is refused, and without regard to whether the Defendant had

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sufficient funds or credit. This, again, was prejudicial error. See State v. Clingerman, supra.

POINT IV

THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT IN OFFERING INSTRUCTIONS THAT WERE CONFUSING AND CONTRADICTORY.

As previously discussed, instructions 5 and 6 were erroneous in that they instructed the jury to find the Defendant guilty without one or another essential elements. Instructions 5 and 6 are also confusing and contradictory. Each instruction purports to set forth the conditions under which the jury must find the Defendant guilty. Each is seemingly a complete standard in itself.

The offering of separate, differing standards of guilt is inevitably confusing to a lay jury and is prejudicial error. State v. Hendricks, 258 P.2d 452 123 Ut 267.

It is not the function of an appeal to weigh evidence. Nonetheless, a result which is completely unsupported by evidence cannot stand. Kunkel v. Estes, 346 P.2d 185 (Oklahoma 1959). For that reason the judgment below should be reversed and Defendant's motion to dismiss granted. Further, the trial court's

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instructions to the jury were prejudicial and would entitle the Defendant to a new trial.

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully Submitted,

JOHN G. MULLINER
MULLINER & MCCULLOUGH
Attorneys for Defendant-Appellant

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