

1978

# The State of Utah v. Michael Paul Adams : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
Plaintiff-Respondent, :  
-v- : No. 15353  
MICHAEL PAUL ADAMS, :  
Defendant-Appellant. :

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BRIEF OF APPELLANT

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Appeal from the Judgment of the  
Third Judicial District Court  
Salt Lake County, State of Utah  
Honorable Peter F. Leary, Judge

---

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-Respondent, :  
-v- : No. 15353  
MICHAEL PAUL ADAMS, :  
Defendant-Appellant. :

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BRIEF OF APPELLANT

---

NATURE OF THE CASE

This is an appeal from a verdict and judgment of guilty rendered on one count of manslaughter in the Third Judicial District Court of the State of Utah in and for Salt Lake County, the Honorable Peter F. Leary, Judge.

RELIEF SOUGHT ON APPEAL

The appellant seeks to have his conviction reversed or, in the alternative, to have this case remanded for a new trial.

STATEMENT OF FACTS

The appellant, Michael Paul Adams, was charged with one count of criminal homicide, murder in the second degree,

in violation of Title 76, Chapter 5, Section 203, Utah Code Annotated, as amended, (1973), to wit: That on or about the 21st day of June, 1976, in Salt Lake County, State of Utah, the said Michael Paul Adams, intending to cause the death of Charles Roger Goodman, did cause the death of Gerald R. Braithwaite under the following circumstances:

- A. That he intentionally or knowingly caused the death of Gerald R. Braithwaite; or
- B. Intending to cause serious bodily injury to another, he committed an act clearly dangerous to human life that caused the death of Gerald R. Braithwaite; or
- C. Acting under the circumstances evidencing a depraved indifference to human life, he recklessly engaged in conduct which created a grave risk of death to another and thereby caused the death of Gerald R. Braithwaite.

The above-entitled matter came before the court, sitting with a jury, on the 11th day of July, 1977, before the Honorable Peter F. Leary, Judge in the Third Judicial District, State of Utah.

At the close of appellant's case, the prosecution announced a rebuttal witness. The prosecutor then introduced, through that witness, a self-incriminating statement made by the appellant to the rebuttal witness, an arresting officer. Defense counsel objected to the admissibility of the statement

on the grounds that it was involuntary and requested a full hearing in which the trial judge could determine the issue of voluntariness and admissibility as a matter of law out of the presence of the jury (Tr. 375). The trial judge refused to grant defense counsel's request for a hearing and allowed only limited voir dire and cross-examination of the arresting officer and refused defense counsel's motion to allow him to put on independent evidence and testimony (Tr. 404).

During closing arguments the prosecutor made prejudicial references concerning the appellant's invocation of the privilege not to have his wife testify (Tr. 483).

After a jury trial, the appellant was found guilty of manslaughter.

Due to the complexity of this case, further facts will be submitted in the argument portion of this brief as necessary.

## ARGUMENT

### POINT I

THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FULL HEARING TO DETERMINE THE VOLUNTARINESS AND ADMISSIBILITY OF SELF-INCRIMINATING STATEMENTS MADE TO THE ARRESTING OFFICER.

During an in camera proceeding, after defense counsel had rested and prior to the prosecution's rebuttal, the prosecution attempted to introduce self-incriminating

statements made by the appellant concerning the commission of the crime charged. Defense counsel moved to have the trial judge conduct a hearing to determine, as a matter of law, the voluntariness and admissibility of the appellant's self-incriminating statements (Tr. 375). The relevant dialogue is as follows:

MR. HANSEN: What I would ask the Court's permission to do is have that proffer of proof in court out of the presence of the jury so that in an attempt to lay a foundation the error won't creep in before the objection can be made.

I think we're entitled to have that proffer of proof in question and answer form.

THE COURT: Well, I don't know that you're entitled to a proffer of proof.

MR. HANSEN: Well, I'm making the motion that we have it in chambers out of the presence of the jury in question and answer form to see if he can lay the proper foundation.

MR. HANSEN: We're in effect therefore getting everything in there in front of the jury that could be avoided for any possible error. If we had it here first I don't see any disadvantage to the State. But I can see a lot of potential damage to the defendant if we have this in front of a jury.

I think it's a matter of law whether or not the Miranda warning



has been given and whether or not the answer should be given, and I think as a matter of law it should be decided out of the presence of the jury and not by the--having foundation and what-not laid in their presence.

THE COURT: Well, I'm not disposed to do that, Mr. Hansen. If you've got some legal authority that would indicate that that's what I should do I would be very interested in hearing about it. (Tr. 377.) (Emphasis added.)

The dialogue continued at a later point as follows:

THE COURT: Well, if you have no objection to it, Mr. Yocom, I would do it. But I'm not disposed to do it. (Emphasis added.)

Defense counsel at Tr. 394 expressly reiterated its claim that the Court must have a hearing to determine the voluntariness of the statement out of the presence of the jury.

After a lengthy discussion as to the character of appellant's statements, the Court responded:

Now, I at this point am not prone to pursue the matter in separate hearing unless I am furnished with some law. (Tr. 396.)

At that point the prosecuting attorney stated that he was willing to allow the defense counsel to cross-examine

the witness, stating:

MR. YOCOM: Your Honor, the State might comment on what has just transpired. I would have no objection whatsoever if Officer Riet be brought in and subjected to whatever voir dire, cross-examination or questioning that counsel desires at this time with regard to the voluntariness or sufficiency of Miranda or anything else.

If there is some question in the Court's mind as to voluntariness or anything else, I'm inclined to submit Mr. Riet to that type of examination in chambers before we proceed.

MR. HANSEN: But we want that plus other witnesses, including the defendant, as to whether or not it was voluntary, whether or not he understood-- (Emphasis added.)

THE COURT: Well, the problem I'm faced with Mr. Hansen, is this: I would assume that in the normal course of events that if you had some contrary evidence that the Court would afford you an opportunity to present that evidence to the jury. (Emphasis added.)

Now, I have no intentions of preventing that. But then it gets to the question of what weight the jury may give concerning the matter. And I would assume that if you think that you're prejudiced in some way, that you would have an opportunity if you so desired to put evidence on in connection with it.

MR. HANSEN: But our position,

your Honor, is that the voluntariness has to be decided as a matter of law first. (Emphasis added.)

THE COURT: I understand what your position is.

MR. HANSEN: That's why I want to take extensive--

THE COURT: Well--.

MR. HANSEN: --examination out of the presence of the jury of all witnesses that are involved in it. (Tr. 398, 399.)

The Court denied defense counsel's motion, stating:

And the motion made this morning as to a hearing in connection with the voluntariness, further hearing in connection with it is denied. (Tr. 404.)

It is therefore clear that the trial court was under the misconception that the defense counsel was not entitled to have an independent hearing to determine the admissibility and voluntariness of appellant's self-incriminating statements.

The Utah Supreme Court has clearly held that where there is a question as to the voluntariness and admissibility of self-incriminating statements, the defendant is entitled as a matter of law to a full hearing outside the presence of the jury to determine the voluntariness of said statements.

This was articulated by the Utah Supreme Court in State v. Crank, 142 P.2d 178 (Utah 1943). In that case, the defendant was convicted of a second degree murder charge based on his alleged self-incriminating statements. The court announced its position that the defendant is entitled to a full hearing to determine admissibility where the defendant would be afforded the right to introduce evidence and independent testimony as follows:

. . . The court will therefore hear, all competent evidence offered, both by the state and by the accused, as to the voluntariness of the confession, and then determine independently of the jury the competency of the evidence--that is the voluntariness of the confession--as a matter of law. This does not mean merely a prima facie showing but must satisfy the mind of the court in the light of all the evidence given by both state and defense. Id. at 185. (Emphasis included and added.)

The court further held that once the defendant has objected to the introduction of self-incriminating statements based on their inadmissibility and involuntariness, the court must hear all evidence by both sides, stating:

. . . We hold that the defendant, as a matter of right, may give all evidence he has before the court, pertaining to the voluntariness of a confession before

the confession is received in evidence; and that the court must base its ruling on the competency of the confession as evidence upon all the testimony on the question adduced by both state and the defendant. If on a consideration of all the evidence on the matter the court does not find the confession to be voluntary it should be excluded as incompetent. To hold otherwise does violence to the constitutional provision that an accused may not be compelled to give evidence against himself. Id. at 187.

Furthermore, the court held that where a trial court refuses to hear defendant's evidence on the question of admissibility, voluntariness, and competency of a defendant's self-incriminating statements, the trial court commits reversible error, stating:

. . . By thus, in effect, refusing to hear the defendants' evidence on the question of whether the confession was involuntary and so incompetent, the court was in error. Id. at 184.

The Court's holding was founded upon the constitutionally protected right against self-incrimination under the Fifth Amendment to the United States Constitution, Article I, Section 12 of the Constitution of Utah, and Section 77-1-10, Utah Code Annotated (1953).

The Supreme Court of the United States, some

eleven years after the Crank case, adopted the requirement of a full independent hearing out of the presence of the jury to determine voluntariness in Jackson v. Denno, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964). In that case the appellant appealed his conviction of murder in New York where the question of voluntariness of a confession was submitted to a jury. The appellant had contended that his confession was involuntary. On certiorari, the United States Supreme Court reversed and remanded, stating, among other things, that the New York statute violated due process of law in that it did not afford a hearing out of the presence of a jury in which the judge would determine, as a matter of law, the voluntariness of self-incriminating statements. The Court stated:

The defendant, objecting to the admission of a confession, is entitled to a fair hearing in which both the underlying factual issues in the voluntariness of his confession are actually and reliably determined. Id. at 380.

The Supreme Court continued its analysis as follows:

At the very least, Townsend v. Sain, 372 U.S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745, would require a full evidentiary hearing to determine the actual context in which Jackson's confession was given. Id. at 392.

The Supreme Court further held in Jackson, supra,

that states must adopt procedures consistent with that opinion. The Court stated that:

. . . These procedures must, therefore, be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend. Id. at 391.

The requirement of the separate states adopting adequate procedures to resolve this type of issue was further articulated in Boles v. Stephenson, 379 U.S. 43, 9 L. Ed.2d 109, 84 S. Ct. 174 (1964). In that case, the appellant appealed on the grounds that the Virginia Supreme Court of Appeals used erroneous standards for determining the voluntariness of an oral admission of guilt and that said admission was involuntary. The Court stated:

As we held in Jackson, supra, where the state defendant has not been given an adequate hearing upon the voluntariness of his confession, he is entitled to a hearing in the state courts under appropriate procedures and standards designed to insure a full and adequate resolution of this issue. Id. at 45.

The Fifth Circuit Court of Appeals in Turner v. United States, 387 F.2d 333 (1968) reiterated and clarified

Jackson in an opinion by Circuit Judge Griffin Bell, stating that:

The voir dire in connection with admissibility vel non of oral admissions, once the issue was drawn, should have been conducted outside the presence of the jury. (Citations omitted.) It is also reversible error not to permit the defendant, in such circumstances, to testify on the admissibility, voir dire, and prior to her case in chief, whether a confession or admission, oral or written, be involved. It is then that a defendant may need to testify in rebuttal to the prosecution, and, this too, should take place outside the presence of the jury. (Citations omitted.) Id. at 334.

The procedures that the Utah Supreme Court has promulgated to determine the voluntariness of self-incriminating statements clearly meet the Jackson requirements if they are followed.

In the present case, as in Jackson and Crank, there was a question raised as to the voluntariness of appellant's self-incriminating statements. The appellant's statement which was in question is as follows:

Well, I had to shoot the man. I had no choice . . . There was five of them coming at me all at once . . . I can handle one or two, but I can't handle five at once.



The factual basis for appellant's claim of involuntariness was based on the fact that just prior to the time defendant made the statement, he had been hit in the eye with an ashtray, completely lacerating his eye from the socket. It was argued that under such conditions, the appellant was under such pain as to render the appellant incapable of exercising free will so as not to have the capacity to refrain from making said statement, thereby making the statement involuntary and its introduction into evidence prejudicial and by virtue of the fact that appellant was incapable of understanding any Miranda warnings, if in fact they were given. (See People v. McPherson, 465 P.2d 17, 94 Cal. Rptr. 129 (1970).)

It is clear that there was a sufficient evidentiary dispute to require a hearing in the instant case by the trial judge to determine the issue of admissibility and voluntariness as a matter of law out of the presence of the jury.

Therefore, the trial court's failure to grant the appellant a full hearing where he would be entitled to introduce independent evidence and testimony to enable the judge to adequately determine, as a matter of law, out of the presence of the jury, the admissibility and competency of self-incriminating statements violated Article I, Section 12 of the Utah Constitution and the Fifth and Fourteenth Amendments of the United States Constitution as interpreted by

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State v. Crank, supra, Jackson, supra, Boles, supra, Turner, supra, and Section 77-1-10, Utah Code Annotated (1953). By refusing the requested hearing, the court committed prejudicial and reversible error requiring this court to reverse the appellant's conviction or, in the alternative, to have his case remanded for a new trial.

## POINT II

THE APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY CONCERNING THEIR DUTY TO DETERMINE THE WEIGHT AND CREDIBILITY TO BE GIVEN TO ARRESTING OFFICER'S TESTIMONY CONCERNING THE APPELLANT'S SELF-INCRIMINATING STATEMENTS.

The trial judge erred in failing to meet his affirmative obligation to specifically instruct the jury that it is within their province to determine what weight and credibility they should give to the arresting officer's testimony concerning the appellant's self-incriminating statements.

It is well settled in Utah law that once the judge has held a full hearing, is satisfied by the evidence, and has determined as a matter of law that a self-incriminating statement by the defendant is voluntary, competent, and admissible (discussed, supra), he must then give to the jury an instruction that it is their duty to determine what weight and credibility to give such self-incriminating statement.

The Utah Supreme Court addressed this point in

State v. Crank, 142 P.2d 178 (Utah 1943) when Justice Wade, writing for the majority, stated:

. . . We agree with the rule approved in those cases, that a confession is not admissible in evidence unless it was voluntarily made; that this question must be determined by the court from all of the evidence from both sides bearing thereon; that if the court is satisfied from the evidence that the confession was voluntary, then the court admits the confession in evidence to the jury, together with all of the evidence on the question of whether it was voluntary, and the circumstances surrounding its being made, and from such evidence the jury must determine the weight and credibility to be given it, but may not determine its competency as evidence, that being a question for the court. Id. at 196.

The Crank decision was reiterated by the Utah Supreme Court in State v. Allen, 505 P.2d 302, 29 Utah 2d 88 (1973). The court stated:

. . . If the court thereafter determines from the evidence that the confession was voluntary, it admits the confession in evidence to the jury, together with all of the evidence on the question of whether it was voluntary including the surrounding circumstances at the time it was made. The jury must determine the weight and credibility to be given to such evidence, but the jury may not determine its competency as

evidence, which is strictly a question for the court. Id. at 304.

The Utah Supreme Court has also held the above position to be the requirement in Utah courts in the cases of State v. Mares, 192 P.2d 861 (Utah 1948) and State v. Warwick, 11 Utah 2d 116, 355 P.2d 703 (1960).

In the present case, the trial judge gave no evidence or instructions to the jury as to the voluntariness of appellant's self-incriminating statements, nor did he give them the surrounding circumstances in which they were made. The trial judge merely gave a stock instruction on the jury's right to determine what credence to give the testimony of witnesses generally. Utah law requires a specific instruction that the jurors have the power to decide what weight and credibility they wish to give testimony concerning defendant's self-incriminating statements.

In the case of State v. Ashdown, 5 Utah 2d 59, 296 P.2d 726 (1956), after the court quoted the language from Crank, supra, quoted above, laying down the position that after the judge determined admissibility, the jury determines weight and credibility, the court went on to say that the court had an affirmative obligation to instruct the jury on the above standard. The court stated:

. . . the jury should be  
instructed to consider such

evidence for the purpose of determining what weight should be given to it. Id. at 732. (Emphasis added.)

Therefore the trial court in the instant case committed prejudicial error on two grounds:

1. The court failed to meet its affirmative obligation to give to the jury specific instructions on the jury's duty and power to determine what weight and credibility to give the arresting officer's testimony concerning appellant's self-incriminating statements recorded in his written report, and
2. The court erred in not giving to the jury any evidence or instructions concerning whether or not the statements were voluntary, nor any evidence as to the surrounding circumstances in which the statements were made.

The trial judge's action clearly is in violation of the requirements of Crank, Ashdown, Warwick, and Allen, all *supra*.

### POINT III

THE PROSECUTION VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW AS WELL AS HIS CONSTITUTIONAL RIGHT NOT TO TESTIFY IN HIS OWN BEHALF, BY FAILING TO DISCLOSE TO DEFENSE COUNSEL PRIOR TO TRIAL, THE SUBSTANCE OF, AND HIS INTENTION TO USE, SELF-INCRIMINATING STATEMENTS MADE BY THE APPELLANT AND RECORDED BY ARRESTING OFFICER.

The prosecution violated appellant's constitutionally protected right not to testify in his own behalf as embodied in Article I, Section 12 of the Utah Constitution; Section 77-1-10, Utah Code Annotated; the Due Process Clause, Article I, Section 7 of the Utah Constitution; and the Fourteenth Amendment of the United States Constitution by failing to disclose to defense counsel that the prosecution had in its possession a written recording made by the arresting officer of a self-incriminating statement of the defendant made during his arrest at the scene of the alleged crime.

Defense counsel had informally requested from the prosecution all evidence that he intended to use at trial. Further, at the preliminary hearing there was no mention by the prosecution that he either had in his possession or intended to use at trial the arresting officer's written recording of appellant's self-incriminating statement. It was only after defendant had elected to take the stand to testify on his own behalf that the prosecution, on rebuttal, attempted to introduce the written recording of appellant's self-incriminating statements. It was only at this point that defense counsel was made aware of such statements.

Defense counsel objected on the basis of surprise and requested a hearing to determine the competency of the evidence as more fully discussed in Point I. The statement was admitted over appellant's objection.

The prosecutor's failure to disclose the existence of the statements constituted prosecutorial misconduct, constituted unfair surprise, and violated appellant's right not to testify in his own behalf.

The American Bar Association Standards Relating to the Administration of Criminal Justice, Discovery and Procedure Before Trial, Part II. Disclosure to Accused § 2.1, Prosecutor's Obligation requires the prosecution to disclose to defense counsel any written or recorded statement made by defendant in his possession. The appropriate portion of the standard reads as follows:

2.1 Prosecutor's obligation

(a) . . . the prosecuting attorney shall disclose to defense counsel the following material and information within his possession or control:

(ii) any written or recorded statements and substance of any oral statements made by the accused . . . .

The prosecution clearly violated this standard by failing to disclose either the existence or substance of the written recording of defendant's oral statement, thereby committing prosecutorial misconduct.

The United States Court of Appeals, District of Columbia Circuit placed a due process requirement on the prosecution's duty to disclose in the case of United States v.

Bryant, 439 F.2d 642 (1972). The Circuit Judge, J. Skelly Wright, writing for the court, stated that requiring the government to disclose evidence to the defendant "would make the trial more of a 'quest for truth' than a 'sporting event.'" Id. at 644.

The court announced its position concerning prosecutorial disclosure and the standards to be used when it stated:

It is the law in this circuit that the due process requirement applies to all evidence which might have led the jury to entertain a reasonable doubt about defendant's guilt, and that this test is to be applied generously to the accused when there is 'substantial room for doubt' as to what effect disclosure might have had. Id. at 648.

Further, the court stated that the due process requirement of disclosure by prosecution did not only apply to evidence that was favorable to the defendant, but to all such evidence that was "crucial to the question of appellant's guilt or innocence." Id. at 649.

The court announced the purpose for this requirement when it stated:

The purpose of the duty is not simply to correct an imbalance of advantage whereby the prosecution may surprise the defense at trial with new evidence, rather, it is also to make of the trial a search for truth informed by all



relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government. Id. at 648.

Therefore, in the instant case, the prosecution clearly breached this standard, thereby violating appellant's right to due process of law.

The Court of Appeals for the Third District of California in the case of People v. Superior Court, in and for the County of Shasta, 70 Cal. Rptr. 480 (1968), in deciding the question of pretrial discovery, stated:

Prior to trial, a defendant is entitled to obtain written statements made by him to police officers . . . Obviously, the same rule applies to oral statements made to the police. Id. at 483. (Citations omitted.)

Therefore it is clear that in the present case the prosecution had a duty to disclose to the defense counsel that the prosecution had in its possession and intended to use self-incriminating statements made by the defendant to the arresting officer, preserved in the officer's investigative report that was within the exclusive possession and control of the prosecution. The prosecution's failure to disclose such to defense counsel until after appellant had testified in his own behalf abridged appellant's right to elect not to testify and violated

the due process clause of the United States Constitution and the Constitution of Utah.

#### POINT IV

THE PROSECUTOR'S COMMENT TOGETHER WITH  
THE TRIAL JUDGE'S FAILURE TO ADMONISH  
THE JURY CONCERNING THE APPELLANT'S WIFE'S  
FAILURE TO TAKE THE STAND DENIED APPELLANT  
HIS STATUTORY AND CONSTITUTIONAL RIGHT NOT TO  
HAVE HIS WIFE TESTIFY.

At the close of the trial, during the prosecution's closing arguments, the prosecution made prejudicial references to appellant's wife's failure to testify at trial. The prejudicial remark is as follows:

He warned Carol over the phone.  
Could have--he said he talked to  
her. 'Well, she's coming over.'  
What did he tell her? He could  
tell her, 'Carol, don't come.  
I think Charlie's got a gun and by  
God he's going to come in here and  
kill you. You're crazy for coming.'  
Well, we don't know what he told her.  
I suppose we'll never know what he  
said to his wife. (Emphasis added.)  
(Tr. 483.)

This is clearly prosecutorial misconduct in violation of Article I, Section 12 of the Constitution of Utah, Utah Code Annotated, Section 77-1-10, and Rule 39 of the Utah Rules of Evidence.

The Utah Rules of Evidence, Rule 39, dealing with reference to exercise of privilege states:

If a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no inference shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.

The prosecutor's misconduct, being in violation of the constitution, statutes, and Rules of Evidence of Utah is clearly error. However, it is possible for the trial judge to correct this error by a timely and adequate admonition to the jury to disregard the prosecutor's statements and in support of the privileges not to testify at trial. However, in the present case, the trial judge refused defendant's motion for mistrial and in no way admonished the jury to disregard prosecutor's statement. (Tr. 538.)

The prosecutor's comment and the judge's failure to admonish the jury constituted a substantial impairment and disparaged defendant's right to claim the privilege not to have his wife testify at trial. In the case of State v.

Brown, 14 Utah 2d 324, 383 P.2d 930 (1963), the defendant was convicted of a rape. His defense was alibi in that he was home with his wife at the time of the offense. The court held that it was prejudicial error for prosecuting attorney to comment to the jury on defendant's wife's failure to testify. The court reversed with directions to grant a new trial. The court stated:

The district attorney's comment to the jury in substance, that the defendant's wife, the one person who could have testified that defendant was at home at the time the assault occurred did not testify, was prejudicial error. Id. at 932.

The court was concerned in that letting prosecutors refer to the invocation of the privilege would in effect destroy or impair the privilege. The court stated:

The cases are in hopeless confusion whether . . . such comment on the failure to testify is prejudicial error. If such comment is permissible, the privilege is largely destroyed. We conclude that this comment destroyed the privilege to not testify and was prejudicial. Id. at 932.

The standard for determining whether or not a comment by the prosecutor is improper and therefore error was set out

in State v. Trusty, 28 Utah 2d 317, 502 P.2d 113 (1972). In that case, defendant was found guilty of second degree murder and appealed on the grounds that the prosecutor made references to the invocation of the privilege to have his wife not testify. The court set out the standard when it stated:

That any comment by the prosecutor which in a substantial way will impair or disparage a claim of privilege is improper and therefore is error; and that if it be such that there is a possibility that it prejudiced the defendant, in the sense that there is any likelihood that there may have been a different result, then the error should be deemed prejudicial and another trial granted.

Although the court in the Trusty case affirmed the lower court's findings of no error, it did so on two grounds.

. . . First, there was no objection upon which the court could act until after the defendant had answered the question. The second, if there had been any implication adverse to the defendant, the trial judge gave an appropriate cautionary instruction which it should be assumed that conscientious jurors would follow. Id. at 114, 115.

In the present case, the harm was committed by the inference that the jurors could have drawn from the prosecution's remarks and, second, by the judge's failure to cure

any possible adverse implication by an appropriate cautionary instruction or admonition. The comment by the prosecutor, having gone unchecked and uncorrected by an appropriate cautionary instruction or admonition by the trial judge, denied appellant his constitutionally and statutorily protected right to claim the privilege of having one's wife not testify at trial and therefore the error should be deemed prejudicial.

### CONCLUSION

The appellant seeks reversal or, in the alternative, to have the case remanded for new trial based upon the following grounds:

- A. The trial court's refusal to grant the appellant a full hearing where he could introduce independent evidence and testimony as well as cross-examine any witnesses introduced by the prosecution for the purpose of determining the voluntariness and admissibility of self-incriminating statements violated the appellant's constitutionally protected right against self-incrimination and due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Constitution of Utah.

The admission into evidence of the incriminating statement made by the appellant without benefit of said hearing was both prejudicial and in violation of appellant's constitutional rights as interpreted by the courts under Crank, Boles, and Jackson.

- B. The trial judge committed prejudicial error by failing to specifically instruct the jury concerning their power and duty to determine what weight and credibility they wish to give to the arresting officer's testimony as to appellant's self-incriminating statement as well as his failure to give to the jury all relevant evidence concerning the voluntariness of the statements and evidence as to the surrounding circumstances under which the statements were made, this being in conflict with the requirements for a fair trial set down by the Utah Supreme Court in Crank, Allen, Mares, Warwick, Ashdown, supra, and in violation of due process of law.
- C. The prosecution violated appellant's right to due process of law as embodied in Article I, Section 7 of the Constitution of Utah and the Fourteenth Amendment to the United States Constitution, as well as appellant's constitutional right not to testify in his own behalf as embodied in Article I, Section 12 of the Constitution of Utah and Section 77-1-10, Utah Code Annotated, by failing to disclose to defense counsel that the prosecution had in its possession a written recording of appellant's self-incriminating statements made to arresting officers introduced and disclosed during rebuttal after appellant had testified in his own behalf and had rested his case.
- D. Appellant's constitutional right not to have his wife testify at

trial as embodied in Article I, Section 12 of the Constitution of Utah; Section 77-1-10, Utah Code Annotated; and Rule 39 of the Utah Rules of Evidence was substantially impaired by the prosecution commenting to the jury concerning the failure of the appellant's wife to testify and by the trial judge's failure to correct the error through a timely admonition to the jury to disregard the prosecution's statement as required by Brown and Trusty, supra.


Wherefore, appellant respectfully prays that the court reverse his conviction or, in the alternative, that this case be remanded for new trial.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellant were served on Robert B. Hansen, Attorney General of Utah, 236 State Capitol, Salt Lake City, Utah 84114, this 23rd day of February, 1978.

