

1949

# State of Utah v. Robert S. Harries : Brief of Respondent

Utah Supreme Court

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IN THE  
**SUPREME COURT**  
OF THE  
**State of Utah**

STATE OF UTAH  
Plaintiff and Respondent

vs.

ROBERT S. HARRIES,  
Defendant and Appellant

No. 7273

---

**RESPONDENT'S BRIEF**

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SEP 24 1949

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CLERK, SUPREME COURT, UTAH

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IN THE  
**SUPREME COURT**  
OF THE  
**State of Utah**

STATE OF UTAH

Plaintiff and Respondent

vs.

ROBERT S. HARRIES,

Defendant and Appellant

No. 7273

---

STATEMENT OF FACTS

The defendant and appellant herein was indicted by a grand jury of Salt Lake County, Utah, June 26, 1948, for the commission of the crime of receiving a bribe as an executive officer of this state, under the provisions of section 103-26-4, Utah Code Annodated 1943. (Tr. 1) To this indictment, he entered a plea of not guilty (Tr. 6), was tried before a jury in the third judicial district court in and for Salt Lake County (Tr. 16), was found guilty of the crime of bribery as charged in the indictment, and is before this Court on appeal from that verdict, and the judgment and sentence based thereon.

Defendant makes forty-two assignments of error occurring at the trial, as set forth in his brief, pages 14

to 22. We have grouped them for reply as will appear in the argument.

## ARGUMENT

### PROPOSITION I

THE TRIAL COURT COMMITTED NO ERROR IN DENYING DEFENDANT'S MOTION TO INSPECT AND COPY THE TRANSCRIPT OF TESTIMONY BEFORE THE GRAND JURY, AND TO GRANT A CONTINUANCE UNTIL AFTER SUCH INSPECTION.

Defendant assigns as errors Nos. 1 and 2, the refusal of the district court to order the clerk of the court to make available to the defense for the purpose of inspection and copying the transcript of proceedings before the grand jury, and to grant a continuance until after inspection by defense counsel of that transcript. Apparently defendant's theory is that one indicted has such a right. We respectfully submit that no such right exists, and such a theory misconceives the function of a grand jury.

At common law the grand jury's province is to hear the state's case; it is an informing and accusing body only, and is under duty to hear evidence only on the part of the prosecution. *State v. Bramlett*, 164 S. E. 873, 166 S. C. 323. Evidence taken before a grand jury is a confidential matter to which the accused has no right of access. *Goodman v. United States* (C. C. A. 9, 1939) 108 F. (2d) 516, 127 A. L. R. 265.

In the case of *Havenor v. State*, 125 Wisc. 444, 104 N. W. 116, the Wisconsin court held that one accused of

a crime is not entitled to inspect before trial the records of the grand jury in order to enable him to prepare for trial or to lay a foundation to impeach a witness who testified before the grand jury. In the case of *People v. Macner*, 13 N. Y. S. (2d) 451, 171 Misc. 720, the court stated:

“The defendant states in his moving affidavit that he seeks an inspection of the Grand Jury Minutes in order to prepare for trial. The law is well settled that an inspection will not be granted for such purpose. (cases cited)”

It may be noted from the affidavit and motion of defense counsel (Tr. 13-15) that defendant asserts a right to inspect the minutes of the grand jury in order to prepare for trial. See also defendant's assignment of error No. 2 (Defendant's brief p. 15), and argument of counsel on this point (Defendant's brief p. 23-24).

Defendant relies on sections 105-19-9 and 105-19-10, Utah Code Annotated 1943, as amended by Chapter 13, Laws of Utah 1947. Section 105-19-9 provides that two copies only shall be made of grand jury proceedings, one of which is filed with the clerk of the court and one of which is delivered to the district attorney. Section 105-19-10 provides that the proceedings shall be kept secret, with two exceptions:

“No member of the Grand Jury, nor any person at any time present at any session of the Grand Jury, shall disclose what he himself or any other grand juror or person may have said at such session. No grand juror shall divulge in what manner he or any other grand juror may have voted on a matter

before them; any grand juror or other person may, however, be required by any court to disclose the testimony of a witness examined before the Grand Jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the Court, or to disclose the testimony given before the Grand Jury by any person upon a charge against such person for perjury in giving his testimony, or upon his trial therefor.”

It would thus appear the legislature intended that the proceedings may be divulged in two instances; first, to impeach a witness, and second, in case perjury before the grand jury is charged. Defendant admits access to the transcript for purposes of impeachment (Defendant’s brief p. 24) and the question of perjury is not before the court in this matter.

The common-law rule preserving the secrecy of grand jury proceedings is modified only to the extent indicated by statute. *State v. McDonald*, 119 S. W. (2d) 286, 342 Mo. 998.

The responsibility for relaxing the rule of secrecy of grand jury proceedings, where it may be relaxed, resides in the trial court of which the grand jury is a part, and such matter resides in that court’s discretion. *Schmidt v. United States*, (C. C. A. 6, 1940) 115 F. (2d) 394. We submit, first, that the trial court had no power in this case to grant defendant access to the transcript of grand jury proceedings, and second, that if the statute may be construed to grant such power, there is no showing of abuse of the trial court’s discretion in denying such access.



It follows necessarily that as defendant had no right of access to the transcript of grand jury proceedings, there was no error in denying defendant's motion for a continuance in order to inspect such transcript.

## PROPOSITION II

### THE DENYING OF THE MOTION FOR A CONTINUANCE UNTIL AFTER THE GENERAL ELECTION WAS NOT ERROR.

The record shows the indictment found June 26, 1948 (Tr. 1 and 2), that a bench warrant issued and defendant was arrested June 26, 1948 (Tr. 3), and that on July 10, 1948, defendant was arraigned, entered his plea, and trial was set for September 13, 1948. (Tr. 6)

The motion for a continuance until after the election (Tr. 15), together with supporting affidavit (Tr. 13-14) was filed with the clerk of the court on September 13, 1948, and a minute entry (Tr. 16) shows that it was presented to the court and submitted without argument on the morning of the trial. It would appear that the withholding of such a motion until the jury panel is present and the case is ready to go to trial would indicate the motion was not taken too seriously by counsel at that time.

Section 105-30-1, Utah Code Annotated 1943, provides as follows:

“When an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party by affidavit, direct the trial to be postponed to another day of the same or of the next term. But the court shall not postpone

the trial for a longer time than may be necessary.”

This and previous statutes similar thereto have been construed several times by this court. The general rule is that the granting of a continuance in a criminal case is discretionary with the trial court, and its refusal to grant a continuance is not reversible error unless clearly prejudicial. *State v. Willims* 163 Pac. 1104, 49 U. 320, *State v. Freshwater* 85 Pac. 447, 30 U. 442, 116 Am. St. Rep. 853, *State v. Fairclough*, 44 Pac. (2d) 692, 86 U. 326, *State v. Hartman* 119 Pac. (2d) 112, 101 U. 298.

At the time the motion was made, there was no affirmative showing that defendant would be prejudiced by going to trial at that time. The motion states merely “\* \* That the trial of this cause be continued and postponed until after the general election next ensuing.” (Tr. 15) The affidavit in support thereof makes a general allegation that there was at the time “great agitation and controversy”, and that therefore the affiant believed defendant could not receive a fair and impartial trial. The motion was submitted without argument. We respectfully submit that the record shows nothing at the time the motion for continuance was made, to warrant a continuance or to constitute the denial of the motion prejudicial error.

We further submit that the defendant did not show proper diligence in moving for a continuance. This court, in the case of *State v. Freshwater*, *supra*, held that there was no abuse of discretion by the trial court in refusing a continuance where the moving party showed lack of diligence. While the facts of that case differ from this, we believe the same principle applies. The trial here was

held forty-eight days after the arrest was made and thirty-four days after the arraignment and plea. No motion was filed until the morning of the trial, and it was then submitted without argument. We believe the court committed no error in denying the motion, particularly in view of the delay in filing thereof.

### PROPOSITION III

#### THE TRIAL COURT COMMITTED NO ERROR BY REASON OF ITS RULINGS UPON MATTERS OF EVIDENCE.

Appellant has grouped assignments of error, numbers 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30 and 31, under the general proposition that the court committed error in admitting conversations out of the presence of the defendant between Lack and diverse other persons, Ossana and his partner, Myers, and others which appellant contends has no reference to the matter charged in the indictment. We will not disturb the appellant's grouping of these errors for the purpose of meeting his argument. It is an elementary proposition of law that the acts, declarations, and confessions of one conspirator with third persons are admissible against a defendant co-conspirator. This rule holds true whether or not the acts, declarations or confessions were made in the defendant's presence or with or without defendant's knowledge. The evidence which is admissible under this rule includes anything said, written, or done by any conspirator in furtherance of a common plan or purpose. *State vs. De Angeles*, 269 Pac. 515, 72 Utah 209; *State vs. Gillies*, 123 Pac. 93, 40 Utah 541; *People vs. Farrell*, 40 Pac. 703, 11 Utah

414; State vs. McCurtain, 172 Pac. 481, 52 Utah 63; State vs. Inlaw, 141 Pac. 530, 44 Utah 485; Rose vs. United States, (Calif.) 149 Fed. (2d) 755; State vs. Brown 53 Idaho 576, 26 Pac. (2d) 131; State vs. Ingalls 4 Wash. (2d) 676, 104 Pac. (2d) 944. The rule is well stated in the case of People vs. Bunkers, 2 Cal. App. 197, 84 Pac. 364 (370) in which the court held that where an accomplice and a witness entered into a conspiracy to procure money from third persons for accused, evidence of conversations between third persons was competent for the purpose of showing the source of the money and tracing it to the accused and for the purpose of showing that the third persons were not accomplices. In applying the above rules the cases uniformly hold that they are applicable to all acts, declarations and admissions which are done in furtherance of the common conspiracy.

The trial court submitted this case to the jury on the theory that in addition to the offense of bribery there was a conspiracy to violate the liquor laws between the defendant and those witnesses whose testimony is objected to by defendant. Proof of this conspiracy was necessary as an element of the offense of bribery as charged but it was not the offense charged. The defendant was accused of accepting a bribe under section 103-26-4, Utah Code Annotated 1943. A conspiracy to violate the liquor laws is not a part of the crime of bribery, therefore, these witnesses, while conspirators in the crime of violating the liquor laws, were not accomplices in the crime of bribery as charged in the indictment. State vs. Wappenstein, 67 Wash. 502, 121 Pac. 989. The rule is also well stated in 1 Nichol's, Applied Evidence, page 302:

“A test by which to determine whether one is an

accomplice, so as to require corroboration of his testimony, is to ascertain whether he could be indicted for the offense for which the accused is being tried.”

In the Wappenstein case, *supra*, at page 998 of 121 Pacific Reporter, similar objections were raised and the court very ably stated the law as to what constituted an accomplice within the meaning of the rule which requires corroboration of an accomplice’s testimony.

“Finally, it is contended that the court erred in refusing to give instructions requested by the defendant as to the weight to be given to the testimony of an accomplice and as to the necessity for corroboration of such testimony. These requests were based upon an assumption that Gerald and Tupper were accomplices of the defendant in the commission of the offense charged. They were not ‘accomplices’ within the legal significance of that term. The appellant was charged with accepting a bribe from Gerald and Tupper, and as an element of the offense the corrupt agreement between the three was alleged. The corrupt agreement itself constituted an independent crime—that of conspiracy. If the defendant had been indicted for conspiracy, then Gerald and Tupper would have been accomplices in that crime. The conspiracy, however, was not a conspiracy to bribe an officer, but to conduct houses of prostitution in violation of law. While proof of the conspiracy was necessary as an element of the offense as charged, it was not the offense charged. The gravamen of the offense was soliciting and accepting a bribe. The giving or offering of a bribe and the so-



liciting or receiving of a bribe are two distinct crimes defined and made punishable by separate sections of the statute. These sections, so far as here material, are as follows:

“ ‘Every person who \* \* \* shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a person executing any of the functions of a public officer other than as hereinbefore specified, with intent to influence him with respect to any act, decision, vote or other proceeding in the exercise of his powers or functions, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both.’ Section 2320, Rem. & Bal. Code.

“ ‘Every executive or administrative officer or person elected or appointed to an executive or administrative office who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his vote, opinion or action upon any matter then pending, or which may by law be brought before him in his official capacity, shall be influenced thereby; \* \* \* shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both.’ Section 2321, Rem. & Bal. Code.

“The prosecution was based upon the latter of these sections, and it is plain that neither Tupper nor Gerald could have been indicted under that section or for the crimes therein defined either as principal or accessory. This is obvious since the section applies

only to public officers, and the statute itself in the prior section has declared the acts of which Tupper and Gerald were guilty to constitute a separate and distinct crime. The true test to determine whether a witness is an accomplice or not is: Could the witness himself have been indicted either as principal or accessory for the crime charged and under investigation? If he could not, he is not an accomplice. Manifestly, under that test Tupper and Gerald were not accomplices; neither had received a bribe, neither was a public officer. \* \* \*

Section 103-26-3, Utah Code Annotated 1943, provides:

“Every person who gives or offers any bribe to any executive officer, or to any peace officer or to any person authorized to enforce the law in this state, with intent to influence him in respect to any act, decision, vote, opinion or other proceedings as such officer, or person authorized to enforce the law, is guilty of a felony.”

The defendant in this case was indicted under the provision of 103-26-4, Utah Code Annotated 1943, which provides:

“Every executive officer, or person elected or appointed to an executive office, who asks, receives or agrees to receive any bribe, upon any agreement or understanding that his vote, opinion or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby is guilty of felony.”

These statutes are substantially the same as the statutes

in the Wappenstein case and under the rule of that case the witnesses whose testimony is objected to were not accomplices of the defendant. It is apparent, therefore, that the witnesses referred to are conspirators with the defendant Harries, in liquor law violation, and their testimony is admissible against the defendant who is a co-conspirator. However, they are not accomplices with the defendant in the crime of bribery and, therefore, their testimony does not need corroboration. Thus, it is clear that the objections raised by the appellant as to the admission of statements between Lack and others, and Ossana and others, are without merit.

At the bottom of page 31 of appellant's brief, appellant lists twelve Utah cases without reference to the propositions for which they stand. Upon reading these cases, we find that they all lay down the rule that a conviction cannot be had on the testimony of an accomplice unless it is corroborated by other evidence which, in itself, tends to connect the defendant with the commission of the offense charged. These cases go on to state the rule that corroboration is not sufficient if it merely shows commission of an offense or the circumstances thereof and that while the corroborator's evidence need not be sufficient of itself to support a conviction and need not corroborate an accomplice's testimony on every material point, it must in and of itself tend to connect the defendant with the commission of the offense and must be inconsistent with the defendant's innocence, and it is not enough that it cast a mere suspicion only upon him. We are in complete agreement with the law as stated by these cases. It is apparent that the trial court also so understood the law as evidenced by Instruction



No. 5, which states in part :

“And you are instructed that under the law a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the accomplice tends to connect the defendant with the commission of the offense, and if you find that the crime of bribery has been committed, as charged in the indictment, \* \* \* and if in your determination of the facts from a consideration of all the evidence in the case you find Robert Harries is proved guilty beyond a reasonable doubt, and in reaching this determination you base your findings of guilt upon any evidence of a material fact from the testimony of either of these accomplices, you must then find from other evidence, independent of the testimony of Lack or Ossana, evidence which tends to connect the defendant with the commission of the offense, as in the fore part of this instruction set forth; otherwise you must acquit~~int~~ him. Such corroboration is not sufficient if it merely shows the circumstances of the offense or the commission of the offense charged, or merely tends to cast a grave suspicion on the accused or is consistent with his innocence.

“On the other hand the corroborating evidence need not be sufficient of itself to establish the guilt of the defendant, nor is it essential that the testimony of the accomplice be corroborated on every material point, but it must, tend to implicate him in, and connect him with, the commission of the offense charged.”

The trial court proceeded upon the theory that Lack and Ossana were accomplices as a matter of law if the defendant, Harries, were found to be guilty of the crime charged. Under the Wappenstein case, *supra*, it is apparent that even Lack and Ossana would fall within the same classification as the other witnesses to whom appellant objects and their testimony would not need corroboration. However, if the trial court were in error in instructing the jury that Lack and Ossana were accomplices, whose testimony required corroboration, this error was manifestly in favor of the defendant inasmuch as the court required corroboration, where under the Wappenstein ruling, it was not necessary. It is clear, however, that even under the trial court's interpretation that Lack and Ossana were accomplices, their testimony is most fully corroborated by the testimony of Myers, Nikas, the Hatsis Brothers, Bullock, Young and other witnesses.

Assignment of error No. 4 covers the entire opening statement of the District Attorney (Tr. 65-98). The objections made to the opening statement by counsel for appellant during the trial were to those items treated above, i.e. conversations between Lack and Ossana and others.

The opening statement is not evidence. *State vs. Distefano*, 70 Utah 586, 262 Pac. 113. Its purpose is merely to outline the evidence.

In the case of *State vs. Erwin*, 101 Utah 365, 120 Pac. (2d) 285, this court stated:

“The purpose of an opening statement is to advise the jury of the facts relied upon and of the questions and issues involved, which the jury will have to de-

termine, and to give them a general picture of the facts and the situations, so that they will be able to understand the evidence. Counsel should outline generally what he intends to prove, and should be allowed considerable latitude. He should make a fair statement of the evidence, and the extent to which he may go is largely in the discretion of the trial court.”

It will be readily seen that the district attorney made no statement that does not fall within the spirit and the letter of this rule. Surely if the matters complained of were properly admitted in evidence, there was no error in outlining them in the opening statement.

Appellant’s assignments of error 32, 33 and 34 have to do with the court’s rulings in sustaining the objection of the State to questions put to the witness, Lunt, on cross examination regarding what “digging in” was done. This matter of “digging in” arose from an anonymous letter sent from Helper, Utah, to Mr. Lunt, charging that the Enforcement Division was playing favorites among alleged liquor law violators and charging a certain “Harold L.” with accepting pay-offs and turning a large portion thereof over to the head of the Enforcement Division of the Liquor Commission. The State introduced this letter into evidence and Mr. Lunt testified on direct examination that he had a conversation with Mr. Harries about the letter and that he told Mr. Harries:

“There are certain charges there that I think should be looked into and I want you to dig into this matter.” (Tr. 584)

On cross examination appellant’s counsel attempted to

bring out, through witness Lunt, statements that were made by the defendant Harries. This was objected to as hearsay and improper examination. The objection was sustained and the appellant assigns the rulings sustaining objections to this line of testimony as error. It seems apparent from the court's statements at the time the rulings were made that the court was unusually liberal in allowing the appellant's counsel to go as far as he did in cross examination of this witness. On page 594 of the transcript, the court stated:

“THE COURT: You are at liberty to have Mr. Lunt testify as to things he did and things that Mr. Harries probably did while they were, (in Price) in reference to this digging in as a matter of cross-examination, but I believe it is improper to permit Mr. Lunt to testify here as to what Mr. Harries told him. It would be hearsay and there is no opportunity of the State to cross-examine the veracity or the accuracy of the testimony given by somebody who is not subject to cross-examination.”

On page 597, the court stated:

“THE COURT: I think you have the right, Mr. Woolley, to determine from Mr. Lunt what Mr. Harries and he did as to digging into this, but the conversation that they had with other men, I don't believe is proper for Mr. Lunt to reiterate here for the same reason as I indicated.

“In other words, he is testifying for somebody else who it not appearing and may never appear. The objection is sustained.”

The appellant cites as error the court's sustaining of

the objection of the State to the question put to the witness, Lunt, on cross-examination:

“Q. And what occurred?”

The witness answered in the following manner:

“Mr. Harries stated to the commission—”

It is obvious, therefore, that the witness, Lunt, was not attempting to testify as to what occurred but rather as to what the defendant, Harries, had said on that occasion and the objection to this answer falls within the rulings of the court above mentioned. On page 600 of the transcript, the court again sustained the State’s objection to this line of testimony and very ably set out the grounds on which such objections were sustained as follows:

“THE COURT: The objection is sustained. I think, Mr. Woolley, after all the cross-examination of Mr. Lunt is on the proposition of whether or not he told Mr. Harries to dig in. It is not particularly how far they dug in or how far Mr. Harries even dug in, as far as this witness is concerned. You have the right to test his veracity and his credibility and to contradict or modify his testimony as to what he has testified on direct, and that to the effect that he told Mr. Harries, ‘you look into this matter.’ Now, I have let you go an awful long ways on that phase of the matter.”

We submit that the court did, in fact, let Mr. Woolley go a long way on this matter.

Appellant’s assignment of error No. 35 relates to the objection of the State to a question put to the defendant

on direct examination as to the nature of testimony of one, Steve Nikas and his wife in a trial concerning the Diamanti knock-over at Price, Utah. The questions were as follows: (Tr. 714)

“Q. I don’t think I asked you about the testimony at the Diamanti trial in Price. State whether or not one of the Nikas boys was a witness in favor of the State or the Utah Liquor Control Commission in that proceeding?

A. Steve Nikas and his wife also testified for the State in that trial.

Q. And what was the nature of their testimony?

MR. ROBERTS: I object to this, your Honor, as being hearsay and immaterial.

MR. ASHTON: They have never been witnesses in this case, Steve Nikas or his wife.”

There does not seem to be any question but what this was hearsay and immaterial as neither Steve Nikas nor his wife were witnesses in this proceeding, and an attempt here to have the defendant relate matters to which they testified at a Liquor Control Commission proceeding is manifestly immaterial and hearsay and the court very properly sustained the State’s objection to this question.

Appellant assigns as error No. 16, the court’s sustaining of the State’s objection to the question, “Mr. Lack, will you now please tell the jury the story of the burglary in your pharmacy.” This question was the first question asked of Mr. Lack by defendant’s counsel on cross examination. The State had made no reference



whatever to any burglary on direct examination. There was no foundation laid for such a question and it was wholly outside the scope of the direct examination. There was no error in sustaining the State's objection to this question.

## PROPOSITION IV

### THE COURT COMMITTED NO ERROR IN ITS INSTRUCTIONS TO THE JURY.

Defendant assigns as error the refusal of the court to give certain requested instructions (Assignments of Error No. 37, 38 and 39).

Under assignment of error No. 37, defendant argues that the court committed error in refusing to give the last paragraph of defendant's requested instruction No. 1, stated as follows:

“And you are further instructed in this case that the statements or admissions of the defendant, the accused, are not sufficient with the testimony of an accomplice alone to warrant a conviction.” (Tr. 33)

In its instruction No. 5, the court charged the Jury as follows:

“ \* \* \* and you are instructed that under the law a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself and without the aid of the accomplice tends to connect the defendant with the commission of the offense \* \* \*.” (Tr. 43)

We believe that the portion of instruction No. 5 quoted above, together with the remainder of that instruction, sufficiently covers the law involved in defendant's re-

requested instruction No. 1 and that, therefore, there is no error in refusing to give defendant's requested instruction No. 1 verbatim. We take the rule to be that when members of the jury are fully and fairly instructed upon a subject, it is not error for the trial court to refuse defendant's proposed instructions which are merely repetitious of the law in the instructions as given. *People vs. Parchen* 98 Pac. (2d) 1045, 37 Cal. App. (2d) 215. The Utah court has followed this rule, stating that the trial court is not required to instruct in the same language as requested but should give a proper charge on the subject in its own language. *State vs. Rosenberg*, 35 Pac. (2d) 1004, 84 U. 402.

Defendant assigns as error (Assignment of Error No. 38) refusal of the court to give his requested instruction No. 2. (Tr. 34) Without quoting the instruction as requested, or the instruction as given, we respectfully submit that the court covered the law properly in its instruction No. 3 (Tr. 41) and instruction No. 6 (Tr. 44) and there was therefore no error in refusing to give the instruction as requested. *State vs. Rosenberg*, *supra*.

Defendant assigns further as error (Assignment of Error No. 39) refusal of the court to give defendant's requested instruction No. 6 (Tr. 38). This alleged error is not argued in defendant's brief, and we quite frankly are at a loss to determine wherein refusal to give said requested instruction constitutes error. That is, we fail completely to see any connection between the statute as cited in the said instruction No. 6 with the charge of bribery as set forth in the indictment and presented at the trial. It may well have been error for the court to give such instruction; we see no error in the court's



refusing to do so.

We respectfully submit that defendant's assignment of error No. 40 does not present an issue to this court. The exception is quoted as follows :

“The court erred in giving the instructions to the jury as given by the court and to the whole thereof for the reason and on the ground that the same do not contain a complete statement of the law and matters upon which the jury must, of necessity, have been instructed in the case and upon the evidence as received by the court and permitted to go to the jury and introduced by the State over the objections of the defendant, and the limitation and extent to which said evidence might be considered by the jury, particularly with respect to the numerous and diverse matters of hearsay and conversations between Cyrus V. Lack, the witness, and several persons called as witnesses and otherwise, and out of the presence of the defendant.” (Tr. 877)

We construe this exception as being directed to all the instructions to the jury as given.

In the case of *State vs. Warner* 291 Pac. 307, 79 U. 500, this court held that a mere general exception to an instruction is unavailing unless the instruction as a whole is erroneous. Sec. 105-38-1 Utah Code Annotated 1943, provides in part as follows :

“ \* \* \* Exceptions to instructions to the Jury shall be taken and preserved as in civil cases.”

This court has held in numerous civil cases that a general exception to an entire charge is insufficient if any

portion of it is correct and that an exception to the instructions as given should be specific enough to show what part of it is considered error. *Ryan vs. Beaver County*, 21 Pac. (2d) 858; 82 U. 27; 89 A. L. R. 1253. We submit that the trial court correctly stated the law in its instructions and that therefore assignment of error No. 40 is not based upon a proper exception.

The defendant assigns as error (Assignment of error No. 41) the giving of the last paragraph of the court's instruction No. 6 (Tr. 44). Instruction No. 6 deals with the evidence offered for the purpose of showing that the defendant committed other offenses than the one for which he stood accused. The court points out that such evidence is admitted for a limited purpose only, not to prove distinct offenses, but only as it bears upon the question whether or not the defendant was guilty of the crime as charged. The court cautioned that such evidence was to be considered for no other purpose and then concluded with the allegedly objectionable paragraph as follows:

“The value, if any, of such evidence, depends on whether or not it tends to show that the defendant entertained the intent which is a necessary element of the alleged crime for which he is now on trial, or that there existed in the mind of the defendant a plan, scheme, system or design, into which fitted the commission of the offense for which he is now on trial.”

The theory upon which the court instructed was the same as that on which the court admitted hearsay evidence to which the defendant objected and now argues

as error. The authorities cited heretofore in support of the admission of such evidence are, we believe, sufficient justification for this instruction. We respectfully submit that the last paragraph of the court's instruction No. 6 is a proper statement of the law.

## PROPOSITION V

### THE COURT COMMITTED NO ERROR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

Defendant based his motion for a new trial on the statutory grounds set out in Section 105-39-3 Utah Code Annotated 1943, although defendant's grounds are numbered somewhat differently. Section 105-39-4 Utah Code Annotated 1943, requires that affidavits in support of the grounds mentioned in subsections (2), (3), (4) and (7) of Section 105-39-3 be filed within 30 days after filing the notice of motion. Defendant's grounds 1, 2, 3, 4 and 10 (Tr. 51), correspond to the grounds mentioned in Section 105-39-3 which requires affidavits in support thereof. The defendant filed one affidavit only (Tr. 53) and that affidavit is in support of grounds 1 and 2 in the defendant's motion. We submit that grounds 3, 4 and 10 are entitled to no consideration whatever by this Honorable Court inasmuch as they are fatally defective.

Defendant contends that the jury received evidence out of court and, as stated, filed an affidavit in support thereof signed by his attorney. The sum and substance of said affidavit is to the effect that during the course of the trial the then Governor of the State of Utah issued a statement to the newspapers, said statement being attached to the affidavit. Upon examination of this statement, we can find nothing therein that is prejudicial to

the defendant and further, even if it be assumed that this statement contained prejudicial matter there has been no showing by the defendant that the jury was influenced thereby. Moreover there has been no showing by the defendant that the jury was even aware of this statement.

The remaining grounds urged by the defendant in support of his motion for a new trial are that the court misdirected the jury in matters of law and that the court erred in the decision of questions of law arising during the course of the trial, and did, and allowed acts in the cause prejudicial to the substantial rights of the defendant, and that the verdict is contrary to the law and to the evidence. Any error upon which these grounds are based must have been those alleged errors urged by the defendant which have been heretofore considered in this brief. We feel that the defendant's assignments of error are not well taken for the reasons stated hereinbefore. We submit that the Court committed no error in denying the motion for new trial.

## CONCLUSION

The appellant has set out 42 assignments of error in his brief. We have chosen to group these assignments under several general subject headings, in as much as many of the assignments deal with only one proposition of law. There are no questions of fact before this Court in the case at bar. Appellant has argued that there is insufficient evidence before the Court to sustain the trial court's conviction. However, we feel that the authorities clearly show that the evidence of a co-conspirator is admissible against the defendant and that it does not need

corroboration under the facts of this case. There is abundant evidence in the record to support the conviction of the defendant and we submit that the trial court was liberal to the defendant in its rulings admitting such evidence.

We urge this Court to sustain the trial court's judgment of conviction.

Respectfully submitted,

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