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Recommended Citation
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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH 19221	:	
Plaintiff/Respondent	:	
-v-	:	
RICHARD HATFIELD NICKLES AND MARGARET K. NICKLES,	:	Case No. 19221 Category No. 2
Defendants/Appellants	:	

PETITION FOR REHEARING

Petition for reconsideration of a decision by the Utah Supreme Court filed October 7, 1986 in an appeal from convictions and judgments imposed for aggravated arson, a felony in the second degree, and insurance fraud, a felony in the second degree, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, presiding.

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FILED
NOV 4 1986

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STATEMENT OF THE CASE

This is a petition for rehearing of a decision filed by the Court on October 7, 1986. Originally this case was an appeal from convictions and judgments imposed for Aggravated Arson, a felony in the Second Degree, and Insurance Fraud, a felony of the Second Degree, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge, Presiding.

STATEMENT OF FACTS

The facts are set forth in the Brief of Appellant at 2-16.

INTRODUCTION

In Brown v. Pickard, denying reh'g, 11 P. 512 (Utah 1886), the Utah Supreme Court stated the standard for the granting of a petition for rehearing: "To justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions, ..." In Cummings v. Nielson, 129 P.619 at 624 (Utah 1913), the Court declared:

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> To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result . . . . If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court.

The argument section of this brief will establish that, applying these standards, the Appellant's petition for rehearing is properly before the Court and should be granted. Indeed, in its opinion, State v. Nickles, 43 Utah Adv. Rep. 20, (filed Oct. 7, 1986), (Addendum A). This court has misapprehended and overlooked issues of fact and law.

ARGUMENT

THE DEPUTY COUNTY ATTORNEY'S CONFLICT OF INTEREST IN PROSECUTING APPELLANTS' CASE WARRANTS A NEW TRIAL

In the opinion in this case his court held that if a defendant fails to move for disqualification of a prosecutor at the trial level, the defendant must subsequently demonstrate that he was actually prejudiced by the prosecutor's conflict of interest to justify an order for a new trial on this "actual prejudice" standard is applied even if the defendant did not know, and had no reason to know, of the prosecutor's conflict at the time of trial. Such a standard is impossible to meet and constitutes a dangerous diminution of a prosecutor's ethical and legal obligations.

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While it may be sound legal policy to require the actual prejudice standard on appeal in a case where the defendant knew or had reason to know of the prosecutor's conflict at the time of trial [See U.S. v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981)], the standard is not sound policy in a case in which the defendant could not be expected to know of the conflict at the time of trial.

Presumably, according to the opinion in this case, if a defendant had moved for disqualification at the time of trial, this Court would apply an appearance of conflict standard on appeal. However, the Court's opinion expressed concern about a defendant who tries to take advantage of the system, to "become the unintended [beneficiary] of a rule that attempts to promote the public good." Nickles at 25. Yet, this concern would only arise in a case in which the defendant knew, or had reason to know, of a prosecutorial conflict of interest at the time of trial, but failed to timely raise the issue, thus inviting error. The Court may fairly infer that a defendant who knows or should know of a conflict at the time of trial, but did not raise the issue, did not himself consider the potential for actual prejudice to be very great and has thus waived the issue. This is the situation described in U.S. v. Heldt, supra, a case cited by the Court in support of the actual prejudice standard delivered in the opinion in this case. See especially, Heldt at 1277, footnote 81.

In Heldt, the defendant Church of Scientology claimed on appeal for the first time that it was denied due process of law by an alleged prosecutorial conflict of interest. Heldt at 1275. The Church of Scientology had filed a civil suit against the U.S.

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Attorney's Office prior to its criminal trial. Heldt at 1275. The church claimed that because two prosecutors were defendants in the civil trial, they were self-interested in its outcome and thus could not fairly prosecute the criminal charge. Id. The court noted that even though the church knew of the alleged conflict at the time of trial, it failed to raise the issue, along with other asserted grounds, in its Motion to Disqualify, made at the time of trial. Heldt at 1277. The Court found the alleged conflict to be very weak, basing this finding in large part on the fact that even though the defendants knew of the conflict at the time of trial, "[the conflict] was not at all apparent, as evidenced by the fact that appellants never relied on it as a basis for disqualification." Id. Under these circumstances the Court held that when defendants have failed to move to disqualify on the ground of a conflict of interest, yet assert a denial of due process on appeal, actual prejudice must be shown to justify a new trial. Id. The holding of Heldt is limited to the situation where a defendant knew of the conflict at the time of trial, yet failed to raise it in his Motion to Disqualify. This is simply not the situation in the case now before the court. Neither the Nickles nor their attorney knew of Christiansen's corporate involvement, or of his private business dealings with the insurance adjusting company that investigated this case or of the prosecutor's personal financial interest in pleasing that adjusting company, which investigated the Nickles fire, until November of 1982, some five months after the trial. (R. 2431). In short, neither the Nickles nor their attorney knew of the high degree of risk of actual prejudice that existed at the time of their

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trial until well after the Nickles were convicted. The Court, however, seems to have overlooked this crucial distinguishing characteristic between the instant case and Heldt. This is evidenced by the Court's statement that the "defendants failed to move in the trial court to disqualify the prosecutor and only now, on appeal, assert a denial of due process and equal protection." Nickles at 25. This comment by the Court, and its reliance upon Heldt appears to indicate that the Court believed that the Nickles knew at the time of trial of the conflict, yet failed to raise the issue. As demonstrated, the record clearly shows that this is a misapprehension of fact.

In the opinion in this case, the Court also cited Wright v. United States, 732 F.2d 1048 (2d Cir. 1984) as support for the adoption of the actual prejudice standard. The opinion quoted the following from Wright:

> [T]he degree of prosecutorial misconduct ... and the degree of prejudice to the defendant necessary to justify action by a reviewing court steadily increase as the case goes forward, with the least being required on a motion to disqualify, somewhat more on a pre-trial motion to dismiss an indictment, still more on a motion in the district court after conviction but before appeal, [and] somewhat more on a direct appeal. . . .

43 Utah Adv. Rep. at 25 citing 732 F.2d at 1056 n.8. However, the uncited remainder of the quote goes on to say ". . . [and] a good deal more on collateral attack" Wright at 1056, footnote 8. Appellants argue that taken as a whole, this quotation supports the notion that cases should be reviewed on an individual basis to ascertain the potential for actual prejudice based upon the

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strength of the apparent conflict. Certainly, cases arise which contain slight evidence of a conflict sufficient to disqualify a prosecutor at the trial level but insufficient to cause an appellate court to remand for a new trial. However, the issue in this case, addressed by Wright, concerns the potential for actual prejudice created by a prosecutor acting due to improper motivation to investigate, initiate, and try a case. Contrary to the assertion in the opinion in this case, Wright does not require a showing that the defendant was in fact prejudiced by the prosecutor's conflict. Wright only notes that it is the better policy to require that the risk the defendant was actually prejudiced be greater to justify an order of a new trial on appeal, than is necessary to disqualify a prosecutor at trial. Wright at 1056. The degree of risk, the danger that the prosecutor acted due to improper motivation, in effect, the potential for actual prejudice, is what should be considered by the court on appeal. This can be effectively determined by a facial evaluation of the nature of the conflict itself.

A requirement that the defendant show actual prejudice on appeal is, for practical purposes, an impossible standard to meet. The degree of risk that the prosecutor acted due to improper motivation, the possibility of actual prejudice, is all that can be shown by a defendant. Indeed, in most cases, the sole source of information concerning a prosecutorial conflict is the prosecutor himself. A defendant and his attorney are at the mercy of the prosecutor concerning what is disclosed about such a conflict. The prosecutor may disclose as much or as little as he chooses regarding

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the conflict. However, to believe that in most instances a prosecutor would admit to an improper motivation, risking both the prosecution and possibly his career, is surely the paradigm of naivete . Yet, in effect, this Court holds that absent such disclosure, a defendant has no remedy available on appeal, no matter how improper a prosecutor's conduct "appears." The court thus shifts the entire risk of undisclosed actual prejudice to the defendant.

In reversing the defendant's conviction because of the failure of the prosecutor to recuse himself due to an apparent conflict of interest, the New York Court of Appeals articulated the sound reasoning for adopting a "reasonable potential for prejudice" standard for appellate review of such cases:

> It would be simplistic therefore to think of the impact of a prosecutor's conflict of interest merely in terms of explicit instances of abuse. Even our thumbnail description of prosecutorial power is enough to indicate that resulting prejudice can at least as easily flow from an act of omission as from one of commission, from discretion withheld as from discretion exercised. In this context, whether abuse is express or implied may be difficult to determine. Suffice it to say that any presumption of impartiality tends to be undermined when there is a clear conflict of interest. Indeed, the judgmental nature of much of a District Attorney's conduct will put it beyond effective appellate review. And, no matter how firmly and conscientiously a District Attorney may steel himself against the intrusion of a competing and disqualifying interest, he never can be certain that he has succeeded in isolating himself from the inroads on his subconscious.
>
> [1] Thus, the practical impossibility of establishing that the conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice.

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Furthermore, the Court stated:

> It was important that these responsibilities, carried out in the name of the State and under the color of the law, be conducted in a manner that fostered rather than discouraged public confidence in our government and the system of law to which it is dedicated. This concern, that those occupying prosecutorial office be jealous of the evidences as well as the substance of integrity, was not to be discounted. In particular, the District Attorney, as guardian of this public trust, should have abstained from an identification, in appearance as well as in fact, with more than one side of the controversy.

People v. Zimmer, 414 N.E. 2d 705 at 707, 708 (N.Y. 1980). (emphasis added) (citations omitted).

This reasoning persuasively demonstrates that the adoption of an "actual prejudice" standard for appellate review of prosecutorial cases conflict severely diminishes safeguards for ensuring that the prosecutor meet his ethical and legal obligations and dramatically increases the danger that defendants will be unjustly prosecuted and convicted. Under the standard adopted by this court, a prosecutor who is so disposed can bring charges and prosecute to further his own personal interest, with little fear that a subsequent conviction will be overturned absent the discovery of "smoking pistol."

In the instant case, the State conceded that "Michael Christiansen should not have been the attorney to investigate, file charges in and prosecute the defendants' case" Brief of Respondent p. 41. Obviously, the State could not have reached such a conclusion unless it believed the potential for actual prejudice to be high, not only at the time of trial, but at the time the case was investigated and charges were filed. However, the opinion in the

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case assumed that the risk of actual prejudice was <u>not</u> high because "all work performed by [Christiansen] on this case from the time of the fire in October of 1980 until June of 1981, when he discontinued his association with AFI, was performed in his capacity as Deputy County Attorney." <u>Nickles</u> at 26. This conclusion assumes the very question at issue--that because prosecutor, Christiansen <u>said</u> there was no involvement, there was no conflict of interest, thus no actual prejudice. Yet, given the inherent self-interest of the prosecutor to conceal his actual motivation, the Court, like the defendant, can only examine the appearance of conflict. Despite prosecutor Christiansen's assertion that no conflict existed, (R. 2483-84), the facts amply illustrate that the prosecutor's loyalties were divided. Indeed, at the time this case was investigated and charges were filed, prosecutor Christiansen's AFI was an active business, soliciting new investigations and completing old ones. Under the Court's analysis in this case, the potential for prejudice at these critical stages of the Nickles prosecution was very high.

While Christiansen's corporation, AFI, had apparently ceased most business activities at the time of the Nickles' trial (R. 2486-87), the company was still a viable business entity with Mike Christiansen at its helm. (R. 2488). The risk of actual prejudice ended only when AFI was dissolved in December of 1982, well after the trial in this case. (R. 2488).

Furthermore, it is at least possible, that at the time of trial, Christiansen retained strong personal interest in the future of AFI. At the time of the Nickles' trial, AFI was still an existing, viable corporate entity. (R. 2488). Christiansen was

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still an officer. (R. 2488). The possibility of future business operations and Christiansen's involvement therein, was thus a distinct possibility. Indeed, the fact that Christiansen did not dissolve the corporation until a year and a half after his superiors in the County Attorney's office ordered him to cease his involvement (R.2488, 2491-92), evidences his hope of future business for AFI.

Because the possibility of future business for AFI still existed, Christiansen's motivation for attracting and maintaining potential sources of future income for AFI still existed. General Adjustment Bureau, (GAB), the insurance adjusting agency that investigated the Nickles fire, was the same company that gave AFI the majority of its business. (R. 2464-71). Prosecutor Christiansen's motivation for pleasing GAB is thus obvious. Surely nothing could please this source of past and future income more than a successful prosecution on a half million dollar claim, of a man GAB had vowed they were "out to get." (R. 2523).

The conclusion regarding the potential for actual prejudice is inescapable given these facts. Simply, at the time of trial the prosecutor could well have entertained hopes of the continued viability of his private company and have been motivated to please a past and likely future substantial source of income for that company. The Nickles contend that this "apparent" conflict is significant enough to justify reversal even under the Wright "sliding scale" analysis.

For the reasons discussed above, the better reasoned policy requires that a showing of reasonable potential for actual prejudice be adopted by this Court as the standard for appellate review of

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prosecutorial conflicts of interest. Appellants therefore ask the court to reconsider its standard requiring a showing of "actual prejudice" and remard their case for new trial, free from the risk that their case will be prejudiced by a prosecutor serving two masters.

CONCLUSION

Because this court has overlooked critical issues of fact and law in this case and because the Court has delineated a standard which is impossible to attain, the Appellants respectfully petition this Court to reconsider its decision in this case and reverse their convictions and remand the case for a new trial.

Respectfully submitted this 4th day of November, 1986.

Curtis C. Nesset

CURTIS C. NESSET
Attorney for Petitioner

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I hereby certify that I delivered four copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 4th day of November, 1986.

Curtis C. Nesset
CURTIS C. NESSET
Attorney for Petitioner

I, CURTIS C. NESSET, do hereby certify the following:

(1) I am the attorney for appellant/petitioner in this case and;

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

Respectfully submitted this 4th day of November, 1986.

Curtis C. Nesset
CURTIS C. NESSET
Attorney for Appellant

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ADDENDUM A

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Cite as
43 Utah Adv. Rep. 20

IN THE SUPREME COURT OF THE STATE OF UTAH

The STATE of Utah,
Plaintiff and Respondent,
v.
Richard Hatfield NICKLES and Margaret K. Nickles,
Defendants and Appellants.

No. 19221
FILED: October 7, 1986

THIRD DISTRICT
Hon. Peter F. Leary
Hon. James Sawaya

ATTORNEYS:

Curtis Nesset for Defendants and Appellants.

David L. Wilkinson, Dave B. Thompson for Plaintiff and Respondent.

HOWE, Justice:

Defendants Richard Hatfield Nickles and Margaret K. Nickles appeal their convictions of aggravated arson and insurance fraud.

In the early morning hours of October 30, 1980, while defendants and their two daughters, Kimberly and Diane, were on a trip to

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California, an explosion and fire occurred at their home in Salt Lake County. An investigation by the Salt Lake County Fire Department and Arson Task Force (ATF) uncovered evidence of arson. Defendants were subsequently charged with aggravated arson and insurance fraud, both second degree felonies, under U.C.A., 1953, §76-6-103 (1978) and §76-6-521 (1978), respectively. They were found guilty as charged. Mr. Nickles was sentenced to two concurrent sentences of one to fifteen years in the Utah State Prison. Mrs. Nickles was given an identical sentence, but the court placed her on probation. Both were ordered to pay fines as well as restitution.

I.

Defendants first contend that there was insufficient evidence to support the verdict of the jury. Our standard of review in this regard is well established; we review the evidence and the inferences to be drawn therefrom in the light most favorable to the jury verdict. *State v. Dumas*, 721 P.2d 502 (Utah 1986); *State v. McCardell*, 652 P.2d 942 (Utah 1982).

Cause of Fire

Defendants maintain that reasonable doubt exists, as a matter of law, whether the explosion and fire were arson caused, and that even if they were, whether defendants are the guilty parties. To prevail on this contention, defendants must show that the evidence was so insubstantial or inclusive that reasonable minds must have entertained a reasonable doubt that they committed the crime charged. *State v. Dyer*, 671 P.2d 142 (Utah 1983). Section 76-6-103 (1978), in effect at the time they were charged, provides that "[a] person is guilty of aggravated arson if by means of fire or explosives he intentionally and unlawfully damages ... a habitable structure." The record reflects the evidence of an arson-caused explosion and fire.

In June of 1980, several months before the fire, the fire marshall and captain of the Murray City Fire Department was asked by Mr. Nickles to visit Composter Corporation, a business operated by defendants. Mr. Nickles expressed his concern that the operators of an adjacent boat manufacturing business, who were experiencing financial problems, might attempt to burn down their building. In response to his question about what products the boat manufacturers might have in their possession to set fires, the fire marshall told Nickles that liquid acetone could be used. Although he made at least five subsequent visits to Mr. Nickles at Composter Corporation during July and August, he testified that he had not seen signs of an ongoing business at Composter on any visit.

Several weeks later, on August 13, 1980, Composter Corporation borrowed $75,000 from Capital Thrift & Loan. The note was signed by defendants individually and by Mr. Nickles as president of the corporation. Their home was mortgaged as security for the loan, and according to defendants, the loan was to be paid out of the proceeds from its expected sale.

Defendants' home had been on the market at various times during 1980, and at the time of the fire was listed with one Alice Blair, a real estate agent, who had listed the home on October 3, 1980, for $239,000. She testified that she had not shown the home nor did she have any potential buyers, and that defendants had refused to give her a key, claiming that a complex burglar alarm system had been installed. Blair had also been unable to schedule an open house, even on a weekend defendants were going to be out of town, despite her repeated efforts to do so.

Defendants' home was covered by a "cadillac" insurance policy which was increased from $165,000 to $250,000 in January of 1980. This increase, made at their request, was to cover the refurbishing of their home. In early October of 1980, Mrs. Nickles secured a "rider" for silverware in the amount of $17,280 which became effective on October 10, 1980. Before the date of the fire on October 30th, Mrs. Nickles, her daughters and the family's two dogs left for California. Mr. Nickles planned to fly to Los Angeles for business meetings and then join his family in Santa Maria.

On the evening of October 28, Mr. Nickles telephoned a neighbor, Linda Dickert, and told her that he had a casserole he wanted to give her because he was leaving town at noon the next day. Dickert's fourteen-year-old son, David, went over to pick up the casserole and found it sitting outside on a flower box. He did not go inside the house. He noticed that one of defendants' cars was backed up in the driveway with the trunk opened, approximately ten feet from the door. Several days earlier, Mrs. Nickles had asked David to care for their cat while they were away. She had on previous occasions given the Dickerts the key to the house; this time, however, she placed the cat's food and bowls on the porch outside the front door.

As Dickert was getting ready to go to bed, about 3:00 a.m. on October 29th, she noticed that lights were on in nearly every room of defendants' house. She did not notice any movement or activity. At the trial, she testified that she had heard defendants talk about acetone in connection with their business, that she had seen a gallon container of acetone in their home, and that Mrs. Nickles had offered to lend her some acetone, clai-

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ming that she had it by the "barrelful."

Mr. Nickles was in California with his family at the time he received a call informing him of the explosion and fire. They returned to Salt Lake City on November 2, three days later. In an interview with a special agent for ATF and the Salt Lake County Special Arson Fire Enforcement Unit, Mr. Nickles stated that he had left for California on Wednesday, October 29, at 11:50 a.m. He indicated that only two families knew of his travel plans and that no one had been given a key to the house. He also stated that certain valuables had been removed from the house due to concerns about a possible burglary. Birth certificates and personal papers had also been removed from the house vault and sterling silver had been placed in the vault for safekeeping. During that interview, Mr. Nickles inquired as to whether a timing device had been found. Fire investigators testified that they had observed evidence of a flammable liquid explosion, multiple points of fire origin, "pour patterns," and "puddle" areas indicative of fire origin. A device consisting of a light bulb embedded in a large amount of newspaper ash with an electrical wire running from the base of the light bulb socket to an electrical outlet in the wall was found on the floor of defendants' daughter, Kimberly's basement bedroom. Also found were "trailers" leading out of her bedroom into the hallway. The window and its frame in Kimberly's bedroom were blown out. Investigators found several acetone soaked suitcases under the stairway in the basement.

Expert testimony at trial disclosed that the pour patterns in the house, coupled with the melted steel on a glass door, indicated that flammable liquid had been poured on the floor of the house before the fire. Experts also testified that explosion was not consistent with a natural gas explosion, and was not likely caused by swamp gas. Finally, experts testified that a "wet-type" explosion associated with flammable liquids produced "instant fire," and identified the device found as one commonly used by arsonists to ignite fires.

The explosion hurled glass onto roofs and into yards of nearby houses. Windows were blown out in a neighbor's house, and the house directly south of defendants' was singed by flames. Firemen arrived within minutes of being summoned to fight the fire. When they arrived the home was engulfed in flames. The fire was very hot and difficult to estinguish.

The foregoing facts presented substantial evidence which established, beyond a reasonable doubt, that the fire had been caused by arson.

Guilt of Defendants

Inasmuch as the jury believed that the fire had been arson caused, it is reasonable that it would also find from that same evidence that defendants committed the arson. Although the evidence connecting defendants to the crime is primarily circumstantial, it is a well-settled rule that circumstantial evidence alone may be sufficient to establish the guilt of the accused. *State v. Clayton,* 646 P.2d 723 (Utah 1982); *State v. Franks,* 649 P.2d 3 (Utah 1982); *State v. Paradis,* 106 Idaho 117, 676 P.2d 31, *cert denied,* 104 Sup. Ct. 3592 (1983); *People v. Pierce,* 155 Cal. Rptr. 657, 595 P.2d 91 (1979); *State v. Brady,* 2 Ariz. App. 210, 407 P.2d 399 (1965). Circumstantial evidence need not be regarded as inferior evidence if it is of such quality and quantity as to justify a jury in determining guilt beyond a reasonable doubt, and is sufficient to sustain a conviction. *State v. Weaver,* 637 P.2d 23 (Mont. 1981).

The jury could reasonably infer the following facts from the circumstantial evidence presented at trial: the defendants were in serious financial trouble and made plans to burn down their house to solve their problem; that they increased the insurance on their house so they would receive more money from the policy; that Mrs. Nickels refused to give the realtor a key because she wanted to assist Mr. Nickles in setting the house up for the fire; that she had lied about the burglar alarm system because she planned to claim it on the proof-of-loss statement; that Mr. Nickles put the casserole outside because he did not want the neighbor's son in his house to observe the fire preparations; that Mrs. Nickles put the cat's food out on the porch and did not give the neighbor's son the key because she did not want the cat to be inside when the fire started; that she took the family dogs with her to California for the same reason; that the lights were on at 3:00 a.m. because Mr. Nickles was setting the fire; and finally, that defendants took their time returning from California because they were not shocked or surprised by news of the fire.

If the jury concluded that each defendant, either directly committed the defense or aided in its commission, the verdict must be sustained. The jury had before it considerable circumstantial evidence from which it could have concluded that defendants committed arson, either directly in the case of Mr. Nickles, or indirectly by aiding and assisting, in the case of Mrs. Nickles.

Insurance Fraud

Defendants also contend that there was insufficient evidence to support the jury's verdict finding them guilty of insurance fraud. On December 30, 1980, two months after the fire, defendants submitted a proof-

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of-loss statement to their insurance carrier. The statement listed approximately 1700 items and claimed $233,353.29 for the house, $134,000 for contents, $53,600 for loss of use, $12,876 for silver, $3,800 for furs, $6,500 for landscape, and $360 for other structures.

Insurance adjusters assigned to the case testified that numerous items of the greatest value were not found in the remains of the fire, and that, at best, only 50% of the items claimed by defendants in their proof-of-loss statement were located. Investigators with the Salt Lake County Attorney's Office were unable to verify purchases of several major items, including the sterling silver purportedly purchased at ZCMI, and other items allegedly purchased by defendants and claimed in their proof-of-loss statement.

Defendants assert that their submission of an insurance claim which may have included inaccurate estimates of value does not alone constitute fraud. We concede that it does not; however, under U.C.A., 1953, § 76-6-521, we note that the jury, without addressing the accuracy of the submitted estimates, could easily find that defendants did commit insurance fraud. Section 76-6-521 provides:

> Every person who presents, or causes to be presented, any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes or subscribes any amount, certificate of survey, affidavit or proof of loss, or other book, paper or writing, with intent to present or use the same, or to allow it to be presented or used, in support of any such claim is punishable as in the manner prescribed for theft of property of like value.

The plans submitted to the insurance company for reconstruction of defendants' house included, among other things, an intercom system and a burglar alarm system, neither of which had been in the home prior to the fire. In fact, at the trial, Mrs. Nickles testified that the house did not have a burglar alarm system or an intercom system. From the evidence presented at trial, it is clear that defendants, despite the difficult conditions under which they were required to prepare their proof-of-loss statement, presented a "false or fraudulent claim" to their insurance company. Even if the jury had chosen to disbelieve the testimony of fire investigators as to items they were unable to locate or identify in the rubble, the undisputed evidence that defendants claimed a nonexistent burglar alarm system and intercom system on their proof-of-loss statement is sufficient evidence to support the verdict finding defendants guilty of insurance fraud. A determination of whether their claim was excessive on other items is unnecessary inasmuch as the defendants did submit a fraudulent claim intentionally misrepresenting the existence of these two items. *See State v. Kitchen*, 564 P.2d 760, 763 (Utah 1977).

II.

Defendants next contend that evidence of a telephone call received by an employee of ATF approximately three weeks after the fire, from a caller purporting to be Mr. Nickles, was inadmissible because there was no authentication or identification of the caller. It is well established that communications by telephone are admissible in evidence where otherwise relevant to the facts and issue. 29 Am. Jur. 2d *Evidence* §380 (and cases cited therein). The identity of a caller may be established by circumstantial evidence. *United States v. Brown*, 603 F.2d 1022 (1979); *Grogan v. United States*, 394 F.2d 287 (5th Cir. 1967); *State v. Peele*, 54 N.C. App. 247, 282 S.E.2d 578 (1981). Further, if the party calling, in addition to a statement of his identity, relates facts and circumstances which, taken with other established facts, tends to reveal his identity, the conversation is admissible. *State v. Marler*, 94 Idaho 803, 498 P.2d 1276 (1972); 29 Am. Jur. 2d *Evidence* § 384. Here, both requirements were satisfied. At the trial, the following testimony was given by Elaine Rice, a secretary for ATF:

> Q: At the time that you received the call from the person calling, did the person calling identify himself?
> A: He identified himself to be himself a Dick Nickles, yes.
> Q: Yes.
>
> ....
>
> Q: Did the person purporting to be Mr. Nickles have any further conversation with you?
> A: Yes.
>
> ....
>
> Q: If you would, to the best of your recollection, describe or state what the person purporting to be Mr. Nickles or Mr. Dick Nickles stated to you during the course of the conversation ....
> A: He was asking about some articles that had been removed from his home and then mentioned to me that there had been a suspected arson at his home and that he had been suspec-

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> t[ed] of it and commented that wasn't it lucky he had been 800 miles away with the Secretary of the Department of Energy and that he would have needed a very long fuse or a time delay.
>
> Then, he again came back to the fact that these articles were missing and I asked what was missing and he said some silverware and other things, whole drawers full. And I told him I didn't believe we had them and that he said possibly they had been removed for safekeeping.
>
> I told him that I didn't think we had them, but that I would have [the investigator] call when he got back to the office.

If we examine this conversation in light of the principles stated above, it is clear that the testimony of Eileen Rice reveals that the caller identified himself as Mr. Nickles. Further, he offered information to the employee that only he or someone in his family would have known. Although certain information pertaining to the fire had been made public by the media, there is nothing in the record to controvert the logical inferences to be drawn from this information, i.e., that the caller was in fact Mr. Nickles. Defendants rely on *State v. Marler, supra,* to support their contention that the lower court should not have admitted the telephone call into evidence. We find their reliance to be misplaced. Although the court in that case determined that a "mere statement of his identity by the caller is insufficient proof of the caller's identity," it also acknowledged that corroboration of a statement of identity by the caller sufficient to render the conversation admissible against him may be supplied by evidence "that the *subject matter* of the call revealed that only the named party would likely have knowledge of those conversational facts," or "of other confirming circumstances which make it probable that the named person was, in fact, the speaker." *Id.* at 1281 (citations omitted; emphasis added).

In *State v. Hamilton,* 185 Mont. 522, 605 P.2d 1121 (1980), *cert. denied,* 447 U.S. 924, the Montana Supreme Court noted:

> The completeness of the identification goes to the weight of the evidence rather than to its admissibility, and the responsibility lies in the first instance with the District Court to determine within its sound discretion whether the threshold of admissibility has been met.

Id. at 1128 (citation omitted). We find no abuse of discretion here, and find that the lower court properly admitted testimony of the phone call into evidence.

III.

Defendants' third contention is that they were denied their right to a fair trial due to the individual and cumulative effect of evidence which they claim was inadmissible because it was irrelevant or immaterial. Rule 401,[1] Utah R. Evid., defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." At the trial, defense counsel objected, among other things, to the admission of the neighbor's testimony concerning the lights being on in defendants' home in the early morning hours of October 29, as well as evidence pertaining to other accellerants, the amount of insurance coverage on the property, and the proximity of defendants' business to a thrift store.

We cannot find that the lower court abused its discretion by admitting this evidence. Even if some of these admissions had been error, in light of the other evidence presented at trial, it would be harmless error in that there is no reasonable likelihood in the absence of this evidence there would have been a different result in defendants' trial. *See State v. Hutchison,* 655 P.2d 635 (Utah 1982).

IV.

Defendants next contend that the trial court failed to properly instruct the jury on the elements of insurance fraud by refusing to give their requested Instruction No. 14. That instruction included, as an element to be proved for conviction of the crime of insurance fraud, that the jury must find that defendants submitted values for items on their proof-of-loss statement which were intentionally excessive, not just merely inaccurate estimates of value. They claim that this deficiency may have confused the jury to the extent that it reached a guilty verdict without sufficient evidence of criminal conduct. We find this contention to be without merit. The court's Instruction No. 21 adequately differentiates between intentional fraud and reasonable error in the submissions of estimates of value. That instruction reads:

> You are instructed that an act committed or an omission made under ignorance or a mistake of fact which disproves any criminal intent is not a crime. Thus a person is not guilty of a crime if he acts under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such an act or an omission lawful. *If you find that the defendants, or either one,*

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> *because of a reasonable mistake, made certain claims upon an insurance company believing such claims to be true to the best of his knowledge, then you must find him not guilty of insurance fraud.*

(Emphasis added.) As we noted above, defendants' intention to submit a fraudulent claim is clear from the undisputed evidence that they claimed a nonexistent burglar alarm system and intercom system. Thus, the court properly instructed the jury on the elements of insurance fraud.

V.

Defendants' final contention is that they are entitled to a new trial because there was a conflict of interest on the part of the deputy county attorney assigned to prosecute this case. Earlier, we remanded this case to the trial court for supplemental proceedings on the issue of prosecutorial misconduct. Defendants moved the court for a new trial based on the evidence presented at that hearing. The trial court denied their motion, finding among other things, that "the case was tried and conviction[s] obtained upon evidence and facts developed and found upon investigation of the Salt Lake County Fire Department and not AFI."

The prosecutor had been employed by the Salt Lake County Attorney's Office since 1976. In 1979, he began prosecuting arson and insurance fraud cases, and received training in arson and insurance fraud investigation from the National Fire Academy. In June or July of 1980, the Salt Lake County Attorney's Office was a recipient of a federal grant to establish a countywide arson task force, and he became the lead prosecutor for that group (ATF). The full task force investigated the fire at defendants' home. He, along with other task force personnel, reviewed this case for possible criminal charges.

The fire at defendants' home occurred October 30, 1980. In late March of 1981, approximately five months later, the prosecutor along with his wife and one other individual formed a private corporation called Arson and Fraud Investigation (AFI) which was designed to provide jobs in arson investigation for the several employees of the County Attorney's Arson Task Force who had been notified that their positions would terminate as of July 1, 1981. AFI performed eight investigations in Idaho, Wyoming, and Utah, and he personally participated in many of these investigations. He did not advise the Salt Lake County Attorney about the incorporation of AFI. In June of 1981, when the Salt Lake County Attorney became aware of its existence, he asked the prosecutor to disassociate himself from the business. AFI terminated its business operations by September of 1981 and filed Articles of Dissolution on December 8, 1982. Thus, the prosecutor had been uninvolved in the operations of AFI for approximately one year by the time defendants were brought to trial in June of 1982.

U.C.A., 1953, §67-16-4(4), provides that "no public officer or public employee shall ... [a]ccept other employment which he might expect would impair his independence of judgment in the performance of his public duties." A public prosecutor who is involved with a corporation that investigates possible arson and insurance fraud cases for insurance companies should not also be representing the state in the prosecution of similar cases. This would appear to be a conflict of interest. The pivotal issue here, however, becomes whether in this instance, defendants were entitled to a new trial because of an apparent conflict of interest.

The State cites *Wright v. United States*, 732 F.2d 1048 (2d Cir. 1984), where the Court of Appeals advocated a scaled approach to the review of prosecutorial conflict of interest claims. Specifically, it stated that:

> [T]he degree of prosecutorial misconduct ... and the degree of prejudice to the defendant necessary to justify action by a reviewing court steadily increase as the case goes forward, with the least being required on a motion to disqualify, somewhat more on a pretrial motion to dismiss an indictment, still more on a motion in the district court after conviction but before appeal, [and] somewhat more on a direct appeal....

Id. at 1056 n. 8.

It is clear that a prosecutor should be disqualified on a timely motion when he has a personal conflicting interest in a case. Here, however, defendants failed to move in the trial court to disqualify the prosecutor and only now, on appeal, assert a denial of due process and equal protection. In these circumstances, we must require that defendants prove actual prejudice. *United States v. Heldt*, 668 F.2d 1238, 1277 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). Defendants have made no showing of actual prejudice. To the extent that defendants might receive relief from the prosecution solely on a showing of potential prejudice, they would become the undeserving beneficiaries of a rule that attempts to promote the public good. As we noted above, the business of AFI terminated its operations in September of 1981; defendants were not brought to trial until June of 1982. Any conflict the prosecutor had between AFI and defendants' case had been severed long prior to the trial. All

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work performed by him on this case from the time of the fire in October of 1980 until June of 1981, when he discontinued his association with AFI, was performed in his capacity as Deputy County Attorney. AFI played no part in the investigation. Defendants correctly note that the same prosecutor's misconduct caused reversal of an earlier arson conviction by this Court in *State v. Troy*, 688 P.2d 483 (Utah 1984). However, the facts requiring reversal in that case, i.e., the inappropriate comments made by the prosecutor during opening and closing statements, are not analogous to the conflict of interest issue presented here. Absent a showing of actual prejudice which the defendants were unable to make, we find no error which would justify a new trial, and the lower court properly denied their motion.

Convictions affirmed.

WE CONCUR:

Gordon R. Hall, Chief Justice
I. Daniel Stewart, Justice
Christine M. Durham, Justice
Michael D. Zimmerman, Justice

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1. This Rule is comparable in substance to former Rule 1(2), Utah R. Evid. (1971); the former Rule, in effect at the trial in this action, defines "relevant evidence" as that having a tendency to prove or disprove the existence of any "material fact." The application of former Rule 1(2) by this Court in *State v. Peterson*, 560 P.2d 1387 (Utah 1977), is harmonious with the new language.

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