

1979

State of Utah v. Roger anderson and Thomas E. Brackenbury : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

ROGER ANDERSON and THOMAS
BRACKENBURY,

Defendants-Appellants.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
OF THE FOURTH JUDICIAL DISTRICT IN AND FOR
STATE OF UTAH, HONORABLE J. ROBERT

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FILED

OCT 17 1979

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

ROGER ANDERSON and
THOMAS E. BRACKENBURY,

Defendants-Appellants.

Case No.
16372

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellants were charged with the crime of tampering with a witness, a third degree felony, in violation of Utah Code Ann. § 76-8-508 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellants were tried and convicted before a jury of the crime of tampering with a witness on January 31, 1979, in the Fourth Judicial District Court, in and for Wasatch County, Utah, the Honorable J. Robert Bullock, presiding. Appellant Anderson was sentenced to serve a term not to exceed five years in the Utah State Prison and fined \$500.

Appellant Brackenbury was sentenced to serve nine months in the Wasatch County Jail and fined \$500. Both appellants were placed on twenty-four month probation in lieu of serving the proscribed sentence.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the verdict of the lower court.

STATEMENT OF THE FACTS

In the early evening of May 28, 1978, the appellants [Anderson and Brackenbury] entered the J & M Saloon, owned and operated by one James E. Garner, and located in the town of Soldier Summit, Utah. At that time, Anderson was Chief of Police of Soldier Summit and Brackenbury was the Justice of the Peace for Soldier Summit.

When appellants entered the Saloon, James Garner and a male patron of the saloon were playing a guitar and discussing the subject of Karate (Tr. p. 40). Subsequently, another patron, one Ray Applegate, and Garner took off their shoes and were demonstrating Karate moves to each other (Tr. p. 40). Anderson, according to Garner's testimony at trial, then walked between Garner and Appelgate "as though there were trouble" (Tr. p. 41).

Appellants then moved to the rear of the bar and seated themselves on two stools.

As appellants state in their brief (page 2), the nature and content of the conversation between appellants and Garner was a matter in controversy at trial. Garner testified that Anderson "got kind of huffy about the Karate incident" and that he (Anderson) said, "I'd better explain I'm a black belt" (Tr. p. 41,42).

After the karate incident, appellants called Garner over to join them. Their purposes in visiting the saloon and in calling Garner over to talk were in dispute at trial. According to the testimony of Garner, Anderson called him "down to the end of the bar and said he had some business he wanted to discuss" (Tr. p. 41). Anderson testified at trial that he had "information there was alcohol being sold" (Tr. p. 152) and went to the saloon to see what he could find out.

At some point during the conversation between appellants and Garner, Applegate approached the men and asked if he could be of assistance. Applegate testified at trial that he "figured there was going to be a fight." Anderson told Applegate that he was chief of police (Tr. p. 58) and Applegate returned to his seat. The testimony at trial reveals inconsistent recollections of the content of the conversation between Applegate, Garner and

appellants. Appellants contend that Garner told them "he's [Applegate] my bouncer" and Applegate testified at trial that "Mr. Garner told him [Anderson] that I was his bouncer. . .But I thought he was just teasing. . .I didn't say I was anybody's bouncer" (Tr. p. 86).

Garner testified that at some point in this discussion, Anderson started using "bad language" in front of his wife and Garner reached across the table and "kind of slapped him." The record does not support appellant's contention that Anderson was "drinking a soft drink" (Appellant's Brief, p. 3) at the time Garner slapped him. According to the testimony of Anderson at trial, Brackenbury "had a bottle with him" when the two entered the saloon. Anderson and Brackenbury subsequently left the premises and Anderson returned with a uniformed policeman, one Erwin J. Curtis. Curtis testified at trial that Anderson appeared "excited, definitely excited" when Anderson approached him and asked him to go over to the bar with him. Curtis and Anderson entered the J & M. Saloon and proceeded to arrest Garner for assaulting an officer. Anderson grabbed Garner and a scuffle ensued. Curtis handcuffed Garner, took him outside and placed him in the patrol car. Curtis then transported Garner to the Utah County Jail (Tr. p. 102).

Appellants state in their brief that Anderson returned to the J & M Saloon after Garner's arrest to "gather information and to arrest Ray Applegate for interfering with an officer" (Appellant's Brief, p. 4).¹

Applegate testified at trial that he had consumed "three drinks and a beer" (Tr. p. 83). When questioned on cross-examination by appellants' counsel as to whether he had had "quite a bit to drink," Applegate responded, "No, sir," (Tr. p. 86). Garner also testified at trial that he (Applegate) "wasn't intoxicated for what he had to drink" (Tr. p. 48). When Anderson returned to the saloon and asked Applegate to "go with him," Applegate left with Anderson and they proceeded across the street to a trailer. According to Applegate's testimony at trial, Anderson "shoved" him "a couple of times" as they crossed the street and then "kind of shoved me [Applegate] in there" [the housetrailer] where he told Applegate he was under arrest for interfering with police officers on duty (Tr. p. 63).

The events which occurred in the trailer were in dispute at trial. Applegate testified that Anderson asked him if he saw Garner hit him and that he responded

1 It should be noted that **such** conduct has not had criminal sanctions for more than three years. See State v. Bradshaw, 541 P.2d 800 (Utah 1975).

that he "didn't see anybody hit anybody. I was at the other end of the bar" (Tr. 64). Appellant further testified that Anderson "grabbed me by my shirt" and said, "Yes, you did. Tom saw him strike me." Applegate testified that Anderson then "picked me up by my shirt, raised me up out of the chair" and tore his shirt (Tr. 64). Anderson said, "let me show you judo" or something to that effect and pushed Applegate backwards over his outstretched leg (Tr. 64). Applegate "hit the floor" on his back. Anderson called Applegate a "cottonpicking dink" and said to Applegate, "I could kill you with my bare hands, you fat --and--" (Tr. 65). Applegate testified that Brackenbury told Anderson to "simmer down" and get in uniform. Anderson returned in uniform about twenty minutes later, during which time one George R. Schade, the Mayor of Soldier Summit, had arrived at the trailer (Tr. 65).

Whether Applegate had purchased liquor on the premises of the J & M Saloon and had seen Garner hit Anderson in the mouth was disputed at trial. Certain statements to that effect had been prepared by Brackenbury for Applegate's signature. Whether Applegate signed the statements voluntarily was also in dispute at trial, with Appellants contending that Applegate signed the statements of "his own free will" (Tr. 160). Applegate, however, testified at trial that he w²:

told to sign the statements and signed because, in his own words, "I was scared, they had already pushed me around, and I was scared maybe they might push me around again or beat me up or something," (Tr. p. 73-74).

After Applegate signed the statements in the presence of appellants and the Mayor, he went over to the cafe to have breakfast and was later joined by Anderson who told Applegate he "wouldn't recommend [him] coming back through that area again" (Tr. 76). Applegate then returned to his truck and left the town of Soldier Summit.

Curtis, the police officer who had arrested Garner and transported him to the Utah County Jail, returned to Soldier Summit at approximately 1:00 a.m. He testified that he had a conversation with Anderson and Brackenbury in the cafe wherein Anderson stated "I've got him now." I've got a statement here of him selling whiskey over the bar." When Curtis asked Anderson if Applegate voluntarily gave a statement, Anderson responded that he "had to rough him up a little bit, but [he] got the statement." (Tr. 104). Curtis further testified that Brackenbury said "He [Anderson] roughed him up pretty good" (Tr. 104). Curtis also testified as to a conversation he had with Anderson several weeks after the saloon incident where Curtis asked Anderson what he was

"going to do if they find Applegate." Anderson stated to Curtis that "He had beat him and he was so scared . . . that the bastard or son of a bitch is still running." (Tr. p. 104).

A subsequent investigation was made and appellants were charged with the crime of witness tampering of which they were subsequently convicted of at trial.

A preliminary hearing was held on November 28, 1978, in the Circuit Court of Wasatch County, the Honorable E. Patrick McGuire, presiding. One of the State's witnesses, Ray Applegate, did not reside in the State and was not present at the preliminary hearing. The State introduced the affidavit of Mr. Applegate and moved the court to admit the affidavit pursuant to the provisions of Utah Code Ann., § 77-15-19 (Supp. 1973). The court admitted the affidavit but imposed the condition that the State arrange to have Applegate available one day prior to trial to afford the defendants the opportunity to confront him (P.H. Tr. p. 17). Subsequently the defendants were bound over for trial.

ARGUMENT

POINT I

APPELLANTS WERE AFFORDED THEIR CONSTITUTIONAL RIGHT TO A PRELIMINARY HEARING.

Appellants assert that there is an absolute right of confrontation and cross-examination at preliminary hearings in Utah and that this right was violated in their case when the committing magistrate allowed the State to invoke the provisions of Utah Code Ann. § 77-15-19 (1953), as amended, and introduce a sworn affidavit to establish probable cause, rather than call the affiant, who resided out of state, as a witness at the preliminary hearing. They claim that because of the court's above ruling, they were "in effect" denied their right to a preliminary hearing.

Respondent will show that there is no constitutional right to confrontation and cross-examination at preliminary hearings under either the United States or Utah Constitutions, and at most, there is only a limited statutory right which has been recently restricted by the Utah legislature with the recent enactment of Utah Code Ann. § 77-15-19, supra, which permits the use of hearsay evidence at preliminary hearings.

Appellants concede at the outset of their argument that there is no federal constitutional right

to a preliminary hearing (Appellant's Brief, p. 6). See United States ex rel. Kassin v. Mulligen, 295 U.S. 396, 55 S.Ct. 781, 79 L.Ed. 1501 (1935). Nevertheless, appellants cite Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 431 L.Ed.2d 54 (1975), as suggestive of a federal right to a preliminary hearing. However, the Court in Gerstein was concerned with the issue of whether a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty. In holding that an informal non-adversary proceeding would suffice, the Court discussed the procedures allowed by state statutes to determine probable cause at a preliminary hearing such as presentation of witnesses, cross-examination and so forth. The Court stated:

These adversary safeguards are not essential for the probable cause determination.

*

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*

This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principal, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.

Id. at 121-122 (emphasis added).

As the Court stated in Gerstein, the constitutional provisions which guarantee certain rights to the accused in a criminal trial are not necessarily applicable to preliminary proceedings. See also United States v. Neff, 525 F.2d 361 (8th Cir. 1975). Thus, it is clear there is no federal constitutional right to a preliminary hearing, nor to confrontation and cross-examination at hearings where probable cause determinations are made.

Appellants then accurately state that there is a provision for a preliminary hearing in the Utah Constitution at Art. I § 13. However, this provision is totally silent as to the extent of procedural due process available at a preliminary hearing. Art. I § 13 provides as follows:

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

Despite this silence in the Utah Constitution, appellants attempt to create the impression that there is a state constitutional right to confrontation and cross-examination at preliminary hearings. They rely on another

constitutional provision (Art. I § 12) and case law construing that provision. However, both the provision and the case law only apply to rights at trial and have absolutely no application at a preliminary hearing.

Art. I § 12 provides as follows:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Appellants confuse the constitutional guarantees afforded the accused at trial with the procedure of the preliminary hearing. In each case cited by appellants in support of their argument that as defendants they had the right to cross-examine and confront all witnesses against them at the preliminary hearing, the situation involved a trial setting, not a preliminary hearing, where the right to cross-examination is well-settled. State v. Mannion,

57 Pac. 542 (Utah 1899); State v. King, 68 Pac. 418 (Utah 1902); and State v. Kendrick, 538 P.2d 313 (Utah 1975). The right to confront one's accusers at trial is a right guaranteed by both the United States Constitution and the Utah Constitution. In several Utah cases, where the situation was reversed, i.e., rather than introducing written affidavits at the preliminary hearing and having the witness present at trial, the witness gave testimony at the preliminary hearing but was not present at trial to testify, this Court has determined that the right to confront witnesses was not violated by allowing the testimony of the witnesses, taken at the preliminary hearing, who were shown to be absent from the State, to be read into evidence. See State v. Vance, 110 Pac. 434 (Utah 1910); State v. Inlow, 141 Pac. 530 (Utah 1914); and State v. Depretto, 155 Pac. 336 (Utah 1916). Although the preferable practice would be to have the witness available for cross-examination at the trial, in the presence of the ultimate fact-finder so that demeanor could be observed, this Court has concluded that the absence of a witness at trial, where testimony from the preliminary hearing is available, is not a violation of the accused's right to confrontation.

In Barker v. Page, 390 U.S. 719 (1968), the United States Supreme Court stated:

The right to confrontation is basically a trial right. It includes both the opportunity to cross examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

Id. at 725 (emphasis added).

One year later in Berger v. California, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969), the Court held to its rationale in Barker and observed that one of the important objectives of the right to confrontation at trial was to guarantee that the ultimate fact finder who determines guilt or innocence had an adequate opportunity to assess the credibility of witnesses.

The purpose of a preliminary hearing is only to determine whether there is probable cause that a crime was committed and that the accused committed that crime to justify holding the accused to stand trial. The preliminary hearing is not designed to be a mini-trial but rather it is to be used as a screening device to insure the existence of probable cause before making the accused

stand trial. Miller v. Dist. Ct. in and for Nineteenth Judicial District, 566 P.2d 1063 (Colo. 1977). Nor is it designed to afford discovery for the accused as suggested by appellants. Robbins v. United States, 476 F.2d 26 (10th Cir. 1973). While a preliminary hearing must comply with certain requirements of due process, this does not mean that all procedures used in a trial must be employed. State v. Lenehan, 471 P.2d 748 (Ariz. 1970).

Moreover, the function of a preliminary hearing is like that of a grand jury proceeding (Utah Code Ann. § 77-18-1 et seq., and Utah Code Ann. § 77-19-1 et seq.) in that both procedures seek to determine the existence of probable cause to require a person to stand trial. Yet, it will be noted that an accused at a grand jury proceeding has no right to even be present (unless called as a witness), Johnson v. Superior Court of San Joaquin County, 539 P.2d 792 (Calif. 1975), and no right to cross-examine or confront witnesses against him. See State v. Salazar, 469 P.2d 157 (N.M. 1970). While Utah Code Ann. § 77-19-3 provides that a witness testifying before a grand jury has the right to counsel and the right not to incriminate himself, the statute does not provide for confrontation and cross-examination of witnesses by the

accused. Thus, because both procedures seek only to determine the existence of probable cause sufficient to indict or bind over for trial, the rights guaranteed a defendant in "criminal prosecutions," i.e., a trial, have no application. Grand jury proceedings, like preliminary hearings, are not criminal prosecutions. Rather, they are inquests into whether there should be a criminal prosecution against the accused. Thus, the constitutional rights of cross-examination and confrontation afforded a defendant at a criminal prosecution are not applicable to grand jury proceedings or preliminary hearings except to the extent the legislature may grant those rights by statute.

Respondent recognizes that a defendant does have a limited statutory right to confront and cross-examine witnesses called to testify at the preliminary hearing pursuant to Utah Code Ann. § 77-55-10, which provides that "witnesses must be examined in the presence of the defendant and may be cross-examined in his behalf. However, the statute does not necessarily require that all witnesses must testify at the preliminary hearing,

but rather that those witnesses called to testify must do so in the presence of the defendant, i.e., witnesses cannot be examined by the judge in camera with the accused excluded. Moreover, the statutory right extended by Section 77-15-10, supra, is far from absolute and clearly may be limited by the legislature without constitutional violation.

In fact, this statutory right was recently narrowed and modified by the enactment of Utah Code Ann., § 77-15-19 (Supp. 1977), which provides in pertinent part as follows:

(2) The rule of evidence for trial of criminal cases shall apply at the preliminary examination, except that hearsay evidence that would not be admissible at trial shall be admitted if the Court determines that it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing, and if the witness or party furnishes information bearing on the informant's reliability, and, as far as possible, the means by which the information was obtained. When hearsay evidence is admitted, the court, in determining the existence of sufficient cause, shall consider:

(a) The extent to which the hearsay quality of the evidence affects the weight it should be given, and

(b) The likelihood of evidence other than hearsay being available at trial to provide the information furnished by hearsay at the preliminary hearing. (Emphasis added).

Thus, the legislature may giveth and the legislature may taketh away the extent of confrontation and cross-examination available to an accused at a preliminary hearing. Moreover, respondent submits that these statutes are not in conflict as appellants contend. They may be read together as giving a limited right to confrontation and

cross-examination at a preliminary hearing and should be read together and harmonized.

The law is well settled that statutes should be read as a whole so that all provisions can be given meaning and made compatible if possible. Salt Lake City v. Salt Lake County, 568 P.2d 738 (Utah, 1977); Great Salt Lake Authority v. Island Ranching Co., 414 P.2d 963, 18 Utah 2d 45, rehearing 421 P.2d 504, 18 Utah 2d 276 (Utah, 1966); and Andrus v. Allred, 404 P.2d 972, 17 Utah 2d 106 (Utah, 1965). Reading the two provisions at issue here, it would appear that while the accused has the right, pursuant to 77-15-10, to cross-examine all witnesses called to testify at the preliminary hearing, the statute does not require all witnesses to be called, as in this case where the witness resides out-of-state, and in such situations where, in the language of the statute, "the court determines that it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing," then 77-15-19 will allow the use of hearsay evidence, such as affidavits, to be admissible upon the magistrate's determination of sufficient cause.

Appellants argue that a sworn affidavit is not hearsay (Appellant's Brief, p. 12), but cite no authority to support this position. Rule 63 of the Utah Rules of Evidence defines hearsay as follows:

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence . . .

Rule 63 then proceeds to list certain items which, though recognized to be hearsay, may nevertheless be admissible under certain situations. Affidavits are listed as the second exception to the hearsay rule, and are rendered admissible to the extent allowed by statutes and rules of procedure of this state. Therefore, respondent submits that the Affidavit of Ray Applegate certainly qualifies as "Evidence of a statement" made out of court "offered to prove the truth of the matter stated" and therefore is hearsay. However, under the statute, this type of hearsay i.e., an affidavit, is admissible as an exception to the general rule. Further, the case law supports respondent's contention that an affidavit based on one's own knowledge and belief, submitted for evidentiary purposes, is hearsay. See Franklin v. Nat C. Goldstone Agency, 204 P.2d 37 (Calif. 1949).

Even assuming, arguendo, that the Sections 77-15-16 and 17 are viewed as inconsistent, general rules of statutory construction would validate § 77-15-19 as being controlling. Whether one asserts the later-in-time rule, i.e., that the last statute embodies the latest intent of the legislature

and is therefore controlling (see State ex rel. Bird v. Apodaca, 573 P.2d 213 (N.M. 1977), or the rule that the more specific statute controls over the more general statute (See Matter of Hutchinson's Estate, 577 P.2d 1074 (Alaska, 1978), and Rammell v. Smith, 560 P.2d 1108 (Utah, 1977), or the doctrine of repeal by implication where the earlier statute is treated as being completely repealed by the later statute (See State v. McIntire, 537 P.2d 1151, 22 Or. App. 161, adhered to 540 P.2d 399, 22 Or. App. 611 (Or. App. 1975), the provisions of Utah Code Ann., § 77-15-19 would still prevail.

In support of their claim of a right to confront and cross-examine witnesses at a preliminary hearing, appellants are forced to argue that Utah Code Ann., § 77-15-19 is unconstitutional on its face or at least as applied in their case. First, respondent has already shown that there is no constitutional right to confront or cross-examine witnesses at a preliminary hearing under either the federal or state constitutions, and thus appellants' claim that § 77-15-19 is unconstitutional on its face is without merit. Secondly, as applied to the facts of this case, the magistrate properly admitted the hearsay affidavit of Ray Applegate under the statute. Perhaps the most important factor in the magistrate's decision was that the witness, Ray Applegate, did not reside within the State but was a resident of Oklahoma, and the

inconvenience of bringing him within the jurisdiction of Utah for the preliminary hearing, combined with the expense, appeared unnecessary in light of the affidavit and its admissibility under 77-15-19. Secondly, the reliability of the hearsay evidence, in this case, a sworn statement, which if incorrect or untrue, is prosecutable as a crime under Utah Code Ann., § 76-8-502 and § 76-8-506, coupled with the fact that Applegate would be available to testify at trial, further supports the magistrate's decision to admit the hearsay evidence.

Appellants complain that the State's introduction of the Affidavit was done to "circumvent the defendants' rights under Utah Code Ann., § 77-15-10" and as a result, "a valuable source of pre-trial discovery was foreclosed" (Appellants' Brief, p. 12, 13).

Respondent asserts that there is no right to criminal discovery. In a recent Utah case, State v. Nielsen, 522 P.2d 1366 (Utah, 1974), this Court held that the rules of civil procedure pertaining to discovery are inapplicable in criminal cases, stating:

The majority rule is to the effect that neither statutes nor rules of civil procedure providing for discovery or the inspection of evidence in the possession of an adverse party will be made applicable to criminal cases.

Citations omitted, Id. at 1367.

Finally, appellants imply that the State sought to have the evidence introduced to "circumvent" their rights under § 77-15-10. Respondent would like to point out that the magistrate accepted the State's motion to admit the hearsay evidence pursuant to 77-15-19 with the understanding that if the motion were denied and the hearsay evidence not admitted, the preliminary hearing would be post-poned to a later date and the witness made available (Prelim. H. Transcript, p. 17). Further, upon granting the State's motion, the Court expressed concern over the fact that Applegate was not there and the following conversation took place:

MR CALL: I have no objection to him talking to the witness. I do have some objection to us having him here two or three days early because someone is going to have to pay this man's expenses.

THE COURT: Let's say the day before. Probably you would want him in the day before. If the trial is set on a Tuesday in the District Court, I don't think it would be--surely it would be agreeable that he could be here.

MR. CALL: Trials of this matter in District Court are set any day in the week wherever there's a vacancy so it could be any time during the week.

THE COURT: Let's assume that the procedure was compatible, I see no reason why you should have a complaint to Mr. Lewis examining the witness the day before trial. I'm not talking

about evidence for preliminary,
we're talking about his right to
take a look at the witness, okay?

MR. CALL: I have no objection.

Thus, the Court exercised its discretion in admitting the hearsay evidence to establish probable cause, and in an effort to minimize any possible harm which might occur to appellants due to the absence of Applegate, made arrangements with the prosecutor on the record to have Applegate available one day prior to trial.

In summary, respondent submits there is no constitutional right to confrontation and cross-examination at a preliminary hearing under either the Utah or the United States Constitutions. Moreover, there is, at most, a very narrow and limited statutory right provided by Section 77-15-10 what has been severely restricted and modified by the recent enactment of Section 77-15-19(2), which was properly invoked and followed in the instant case. Thus, appellants were not effectively denied their right to a preliminary hearing.

POINT II.

UTAH CODE ANN., § 76-8-508 (1953),
AS AMENDED, IS NEITHER CONSTITUTIONALLY
VAGUE NOR OVERBROAD.

Appellants claim that Utah's witness tampering statute under which they were convicted is unconstitutionally vague and overbroad.

The well-established standard for vagueness requires that a criminal statute be declared void only when it is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328 (1926). See also, State v. Packard, 250 P.2d 561 (Utah, 1952).

The test for overbreadth was recently stated by this Court in Salt Lake City, v. Peipenburg, 571 P.2d 1299 (Utah, 1977). In Peipenburg, a criminal case involving the restriction of First Amendment freedoms, a challenge was made to the ordinance on vagueness and overbreadth grounds. In upholding the ordinance, Justice Crockett noted, in a concurring opinion, that the proper standard in such cases was that the statute must be "sufficiently clear and specific

that persons of ordinary intelligence, who desire to know what the law is, and to abide by it, would have no difficulty in understanding what is prohibited." (Id. at 1300-1301).

The statute under which appellants were convicted, Utah Code Ann., § 76-8-508 (1953), as amended, reads as follows:

A person is guilty of a felony of the third degree if:

(1) Believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:

(a) Testify or inform falsely . . .

Appellants commence their claim that the statute is impermissibly vague by merely stating that certain terms are undefined in the statute, to wit: "induce," "otherwise cause," "testify," and "inform." Appellants, however, fail to state why they feel the above terms are vague and develop no argument on this point other than their conclusory statement that the terms are vague because they are undefined. It is a well-established principle of statutory construction that common words carry a common meaning, (See Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 194, 61 L.Ed. 442, 453 (1917)). The above terms have common

usage in the English language and are found in Webster's Dictionary and respondent submits they clearly provide meaning to "men of common intelligence" so that they need not guess at the meaning and application of the terms. See State v. Packard, supra.

The main thrust of appellants' argument for vagueness and overbreadth, however, is their claim that the witness tampering statute contains no mens rea element requiring the actor to "knowingly, intentionally, willfully or recklessly" attempt to induce or otherwise cause a person to testify or inform falsely. Thus, they claim that without the inclusion of one of the above terms before the word "attempt" in the statute, persons of common intelligence are forced to guess at its meaning and the statute conceivably could apply to situations of lawful as well as unlawful conduct, thereby rendering the law overbroad.

Appellants concede at the outset of their mens rea argument that the statute does contain an intent element of "believing," but they argue that the term only describes the state of mind of knowing an official proceeding is pending or about to be instituted, and does not focus on the terms "attempts to induce or otherwise cause" which, they assert, are the major criminal elements of the witness tampering offense.

Respondent submits that the crime of witness tampering does contain an element of mens rea, both implicitly and explicitly, and that the word "believing" is highly relevant to show an implicit mens rea in the statute. Before a person may be convicted of witness tampering, he must believe that an official proceeding or investigation is pending. Then, with that knowledge or belief, he must make an attempt to induce or otherwise cause someone to testify or inform falsely. The terms "attempt," "induce", as well as "believe" are all defined in Webster's Dictionary, and each definition contains a notion that a person who does any of these things, does so with knowledge or intent. For example, the word "attempt" is defined as: "to make an effort to do . . . or effect;" "to induce" is "to move by persuasion or influence." Thus, when a person attempts to induce another to lie, "believing" that an official proceeding or investigation is pending, it follows that these elements work together to create an overall picture of a person who acts consciously, knowingly, purposefully, and with criminal intent, to induce or cause a person to testify or inform falsely. In short, respondent submits that it may be presumed that when one attempts to induce or otherwise

cause something to happen, having a prior belief of a certain set of facts, that it is implicit, as a matter of common sense, that they knowingly and intentionally do so.

This common sense approach is applicable to many criminal offenses. For example, the statute defining the crime of driving under the influence of alcohol or drugs, Utah Code Ann., § 41-6-44 (Supp., 1979), does not expressly contain an intent element, yet it is implicit within the statute. Section 41-6-44(a) reads as follows:

It is unlawful and punishable as provided in subsection (d) of this section for any person who is under the influence of alcohol . . . to a degree which renders the person incapable of safely driving a vehicle to drive or be in actual physical control of any vehicle within this state . . .

The predecessor to this statute was challenged for vagueness because of a lack of an express mens rea provision, to wit, failure of the law to state that the intoxicated person "intentionally" or "knowingly" drive. Yet this Court found the criminal intent implicit within the law. See Greaves v. State, 528 P.2d 805 (1974).

The mere fact that the statute itself does not contain the magic words "knowingly" or "intelligently" is not fatal. Indeed, as appellants concede at page 16 of their Brief, a state may even make certain acts criminal which are unaccompanied by a mens rea. See Powell v. State, 392 U.S. 514 (1968), and State v. Twitchell, 8 Utah 2d 314, 333 P.2d 1075 (Utah, 1959).

Thus, so long as the acts described are not impermissibly vague or overbroad due to lack of an express mens rea provision, the statute should be upheld where the mens rea element is implicit.

In any event, respondent submits that even if a mens rea element is not considered to be implicit within Section 76-8-508, Utah has explicitly provided a general mens rea provision in the Criminal Code which the Legislature has intended to be read in conjunction with statutes not expressly containing a mens rea. Utah Code Ann., §§ 76-2-101 and 102 provide as follows:

101: No person is guilty of an offense unless his conduct is prohibited by law and:

(1) He acts intentionally, knowingly, recklessly or with criminal negligence with respect to each element of the offense as the definition of the offense requires; or

(2) His acts constitute an offense involving strict liability.

102: Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. (Emphasis added).

Section 102 contemplates the situation where the statute does not specify the mens rea necessary to commit a crime and provides that where the statute does not specify a

culpable mental state, "intent, knowledge or recklessness" will suffice to establish the criminal responsibility. Thus, although the Legislature required that each offense not specifically designated a strict liability offense have a culpable mental state element, the Legislature did not go so far as to require that each statute defining a non-strict liability criminal offense expressly contain a mens rea requirement. Instead, § 76-2-102 was enacted as a general mens rea provision to be used in conjunction with, applied to, and read together with those non-strict liability statutes lacking an express intent provision. Thus, § 76-2-102 applies much like Utah's attempt statute, Utah Code Ann., § 76-4-101 (Supp. 1973), which is read together with other criminal statutes to provide all of the elements of a particular attempt crime. For example, the crime of attempted burglary is found by reading Utah Code Ann., § 76-4-101 together with § 76-6-202 (Supp., 1973). Moreover, even if Section 76-8-508 were perceived as not containing a mens rea provision at all, such is totally permissible as conceded by appellants at page 16 of their Brief. See Powell v. Texas, supra.

Thus, appellants were put on legal notice as to the requisite mens rea for the crime of witness tampering.

Moreover, it has been well established that:

[S]tatutes should not be declared unconstitutional if there is any reasonable basis upon which they may be sustained as falling within the constitutional framework . . . (cites omitted) . . . and that a statute will not be held void for uncertainty if any sort of sensible, practical effect may be given it.

State v. Packard, 122 Utah 369, 250 P.2d 561 (1952).

See Buhler v. Stone, 533 P.2d 292, 293-294 (Utah, 1975), and Greaves v. State, 528 P.2d 805, 806-807 (Utah, 1974).

In Wagner v. Salt Lake City, 29 Utah 2d 42, 504 P.2d 1007, 1012 (1972), this Court noted that:

It is a well-established rule of constitutional law that where there are two alternatives as to the interpretation of a statute, one of which would make its constitutionality doubtful and the other would render it constitutional, the latter will prevail.

Additionally, Utah Code Ann., § 68-3-2 (1953), as amended, directs that all laws and statutes of the state should be liberally construed "with a view to effect the objects of the statutes and to promote justice."

Assuming, arguendo, that Section 76-2-101 and 102 do not expressly provide a mens rea for the crime of witness tampering, and assuming further that a mens rea is not deemed to be implicit within Section 76-8-508 under a common sense theory, the only remaining concern is whether an alleged lack of a mens rea provision makes the statute impermissibly vague or overbroad. Respondent submits that it does not.

Appellants claim that without the mens rea provision, the statute (1) requires men of common intelligence to guess at its meaning and (2) feasibly covers lawful as well as unlawful acts. By way of example, appellants argue that all police interrogations involve a certain degree of compulsion and intimidation, and unless the witness tampering law requires that an officer "knowingly" attempt to induce or otherwise cause a person to testify or inform falsely, he could be guilty of the crime of witness tampering. The lack of logic in appellants' argument is obvious. Simply stated, the mere presence of authority, i.e., of a uniformed police officer, does not encourage or induce people to lie.

Further, the statute is presumed not to be intended to produce results such as appellants claim are likely, and where possible, the statute will be given a reasonable and sensible construction. See Curtis v. Harmon Electronics, Inc., 575 P.2d 1044 (Utah, 1978).

The statute clearly distinguishes between legitimate police investigations and illegitimate ones.

Moreover, under the facts of this case, the statute was correctly applied. Appellants, in their official capacity as Chief of Police and Justice of the

Peace were engaged in an oppressive interrogation of Ray Applegate over an incident which was not even a crime, i.e., appellants, by threatening to charge Applegate with the non-existent crime of "interfering with a police officer," sought to induce or force Applegate to make a false statement.

Respondent further submits that appellants lack the requisite standing to raise issues of vagueness and overbreadth. That is, an application of the statute to the facts of this case was so clearly appropriate that appellants should not be permitted to pose hypothetical situations which have no application to their own case. See Greaves v. State, 528 P.2d at 807-808.

In Broadrick v. Oklahoma, 413 U.S. 600 (1973), the United States Supreme Court considered a challenge to the Oklahoma Hatch Act. Appellants in that case claimed that portions of the act were impermissibly vague and uncertain. The Court in discussing the vagueness claim noted that the appellants were charged with "patent" violations of the act and stated:

In the context of this type of obviously covered conduct, the statement of Mr. Justice Holmes is particularly appropriate: if there

is any difficulty . . . it will be time enough to consider it when raised by someone whom it concerns.

(Cite omitted). (Emphasis added) 413 U.S. at 609.

The Court continued:

[E]ven if the outermost boundaries of § 818 may be imprecise, any such uncertainty has little relevance here; where appellants' conduct falls squarely within the hard core of the statute's proscriptions . . .

(Cites omitted). Id. at 608 (emphasis added).

Similarly, in Parker v. Levy, 417 U.S. 733, 756 (1974), a First Amendment case, the Court noted that: "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." (Emphasis added). This Court has adopted the same rule as noted in Greaves, supra, and in State v. Phillips, 540 P.2d 396 (Utah, 1975), wherein this Court stated:

Also important to be considered . . . is the principle that no one should be entitled to challenge a statute and have it declared void because it may unjustly affect someone else, but could properly do so only if his own rights are adversely affected.

(Emphasis added). Id. at 940.

Even if it is assumed in this case that the wording of Utah Code Ann., § 76-8-508, supra, might be construed in some hypothetical instances to include

interrogations made by police officers which might perceivably be outside the intended scope of the statute or that it might be unclear in some instances whether or not a certain act might be included, appellants' behavior clearly falls within the intended, explicit scope of the statute. That is, appellants, believing an official investigation or proceeding was pending, (as Chief of Police and Justice of the Peace they knew better than anyone else that an investigation was pending), attempted to induce or otherwise cause Ray Applegate to testify or inform falsely, to wit: appellants used threats and physical force to get Applegate to sign the false statements. It follows that appellants have no standing on this appeal to challenge the statute on the basis that it may have uncertain application to others. If uncertainty exists, it did not affect the rights of appellants since their conduct was clearly within the conduct the statute sought to prohibit.

Finally, it should be noted that appellants state in their Brief, at page 18, that other states have added to express mens rea elements to the witness tampering statute to bolster this argument that the Utah statute is vague and uncertain because it lacks a mens rea element. Respondent suggests that Utah has added the mens rea element

as well via the companion statute of Utah Code Ann., § 76-2-102, and thus appellants' claim is without merit.

Thus, it is apparent from the rules of statutory construction and the above-cited case law that appellants' claim that the statute in question, Utah Code Ann., § 76-8-508 supra, is unconstitutionally vague and overbroad is without support. Moreover, respondent submits that appellants' actions clearly fall within the conduct sought to be prohibited by the statute and the statute, both on its face and as applied to appellants, is clearly constitutional and that appellants lack requisite standing to challenge the statute on grounds of vagueness and overbreadth.

POINT III

JURY INSTRUCTION NOS. 6 AND 7 GIVEN BY THE TRIAL COURT WERE PROPER, AND THE COURT APPROPRIATELY REJECTED APPELLANTS' PROPOSED INSTRUCTION NOS. 2 THROUGH 6.

Appellants argue that the trial court's jury instruction Nos. 6 and 7 were inadequate and erroneous, and that the court committed error by not giving appellants' proposed jury instruction Nos. 2 through 6.

Instruction No. 6, given by the trial court, reads as follows:

Section 76-8-508 Utah Code Annotated 1953 as amended, provides in part as follows:

"Tampering with witness . . . A person is guilty of a felony of the third degree if:

(1) Believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:

(a) Testify or inform falsely. . . .

(R. p. 90).

Appellants concede that the court gave a verbatim statement of the witness tampering statute, Section 76-8-508, supra, in Instruction No. 6 (appellants' brief at p. 18). However, they renew the claims raised in Point II of their brief, that the statute was

impermissibly vague and overbroad because it had undefined terms and allegedly lacked an express mens rea element. Therefore, they argue that Jury Instruction No. 6 was likewise vague. Respondent, therefore, refers this Court to Point II of this brief which thoroughly deals with appellants' claims of vagueness and overbreadth, and respondent reasserts that the language of the statute is adequately clear, and thus the trial judge correctly used the verbatim wording of the statute in Instruction No. 6. He could have used his own words stating the offense, but when words involved are of common usage or understanding, which is the case here, further definition is unnecessary. See Caminetti v. United States, 242 U.S. 470 (1917); and State v. Jones, 512 P.2d 1262 (N.M. App. 1973). Moreover, undefined terms within a statute are to be given their common usage and meaning (Point II, supra). Thus, further definition in the instructions would have been superfluous and perhaps misleading. Appellants in their brief at pp. 18-19 again state mere conclusions as to the need for further definition but advance no logical reasons therefor.

Appellants also renew the claim raised in Point II of their brief that the statute lacked a specific mens rea provision, and thus Instruction No. 6 failed

to cure this defect. It should be noted, that appellants' objections at trial to the jury instructions (see T. 217-219) did not focus on the lack of mens rea as they now claim on appeal. Rather, appellants objected that Instruction No. 6, ". . . [w]as not followed up with specific instructions defining the terms that are used in the statute." (T. 217). Thus, appellants failed to preserve this issue for appeal. In any event, respondent again submits there was no need for additional elucidation of the elements of the statute (Point II, supra), and furthermore, the claimed lack of mens rea was cured by the trial court's Instruction No. 8 (R. 92) which expressly required the commission of an intentional act.

Appellants next argue that the trial court erred in giving its Instruction No. 7, claiming that it presents an inaccurate statement of the law in that the statute requires a person to induce or otherwise cause a person to "testify or inform falsely," yet the court used the term "make a false statement." Instruction No. 7 reads as follows:

To constitute the crime of tampering with a witness as it applies to the circumstances of this case, it must be established beyond a reasonable doubt:

1. That the defendants believed an official proceeding or investigation was either pending or about to be instituted pertaining to suspected illegal sale of liquor by Mr. James Garner, doing business as J & M Saloon, and

2. That they induced or otherwise caused Ray Applegate to make a false statement.

R. 91 (emphasis added).

Appellants would have this Court read Instruction No. 7 in a vacuum, isolated from all other instructions. However, the law is well-settled that instructions should be considered in their entirety, as a whole. Black v. McKnight, 562 P.2d 621 (Utah 1977). Moreover, the trial court expressly instructed the jury that all instructions "are to be considered and construed as one connected whole," and "each instruction should be read and understood in reference to . . . the entire charge and not as though any one sentence or instruction separately were intended to state the whole law of the case. . . ." Instruction No. 16 (emphasis added).

Thus, when Instruction No. 7 is read together with Instruction No. 6, which quoted the witness tampering statute verbatim and required the jury to find that appellants attempted to induce or otherwise cause [Applegate] to "testify or inform falsely," then the essential elements of the crime are made clear to the jury.

However, appellants now allege that "testify" and "inform" in the court's instruction No. 6 did not clarify No. 7 because those terms were not defined. Yet, the definitions of those two terms which they now espouse on appeal, are not the definitions which they requested the trial judge to give in their proposed jury instructions and are strained, narrow usages designed to confine and limit the jury in their findings far more restrictively than common usage or the statute would dictate.

Appellants' proposed Instruction No. 2 reads as follows: "Testify as used in the statute means to give evidence according to law." (R. 79). Yet on appeal, appellants assert that the word "testify" requires statements made "under oath or affirmation" and cite legal sources as to the legal definition of the word. Although appellants' proposed instruction makes no mention of the required "oath or affirmation" which they now stress on appeal, appellants claim their rejected instruction "substantially embodied" this concept (Appellants' brief at p. 20), and imply that their definition is far superior to a juror's common understanding of the term.

Respondent submits that appellants' "unrequested instruction," now improperly argued on appeal, only embodies one of the common usages or definitions of the word "testify."

Webster's New Collegiate Dictionary, 1979 Edition, defines "testify" as follows:

Testify: (1a) To make a statement based on personal knowledge or belief: (1b) bear witness: to serve as evidence or proof; (2) to express a personal conviction: (3) to make a solemn declaration under oath for the purpose of establishing a fact (as in a court). . . .

The explanatory notes to Webster's New Collegiate Dictionary at page 17a, contain the following explanation for reading the sense division of a specific word:

. . . Boldface Arabic numerals separate the senses of a word that have more than one sense:
[e.g.] quiz. . . 1. to make fun of:
mock 2: to look at inquisitively 3: to question closely.

Thus, the word "testify," according to Webster's, has three meanings, only one of which is to "make a solemn declaration under oath." Therefore, appellants' proposed Instruction No. 2 was unduly legalistic and overly restrictive.

Appellants' proposed Instruction No. 3, also rejected by the trial court, reads as follows:

Inform as used in the statute means to make an accusation against another whom he suspects of the violation of some penal statute.

(R. p. 80). On appeal, appellants again claim for the first time, that to "inform" also requires an "oath or affirmation." Yet, their own proposed Instruction No. 3 clearly did not embody this concept. Nevertheless, appellants claim at p. 22 of their brief that their proposed instruction "suggested" that an oath or affirmation be made. The above proposed instruction speaks for itself, and respondent submits that the requirement of an oath or affirmation was not even hinted in the instruction, and thus the issue was not properly preserved for appeal.

Assuming, arguendo, that the issue is properly before this Court, appellants claim that under the doctrine of ejusdem generis, the word "inform" must be given a more specific interpretation in view of the preceding allegedly high specific term "testify." Thus, they assert that to "inform" also requires an "oath or affirmation," which again neither their own proposed instruction required nor does common usage.

According to Webster's Dictionary, supra, "inform" means "to give information or knowledge," not to give evidence under oath or affirmation. Respondent submits that Webster's definition of inform would conform to the

to the common usage in every-day parlance.

Furthermore, ejusdem generis, is applicable only in situations where a statute lists several specific items followed by a general catch-all phrase, usually introduced by the words "or other." The general phrase may then be construed to be limited to things "of the same kind" (ejusdem generis) as the specific items. In this case, the statute simply states "testify or inform;" "inform" is not preceded by a list of words similar in kind to "testify" and in no way could be considered limited by the word "testify."

Returning to Instruction No. 7 as given by the trial court, respondent submits that if any party has cause to complain of the court's use of the term "make a false statement" rather than "testify or inform falsely," it would be the state in that any alleged inaccuracy certainly exists in appellants' favor. The Court's instruction narrowed the more inclusive words of "testify" or "inform falsely" found in the statute to the very specific element of "to make a false statement" as stated in the instruction; thus, making the possibility of conviction more restricted.

Finally, with respect to Jury Instruction No. 7, respondent submits that appellants make much ado about nothing due to the fact that under the witness tampering statute, the ultimate outcome of the attempted inducement is really irrelevant; the actor does not have to cause the victim to testify or inform falsely (or make a false statement) but merely "attempt" to induce or otherwise cause him to do so. Whether the victim ultimately testifies falsely or informs falsely is irrelevant to the commission of the crime. The word "attempt" along with other words in the statute, is one of common meaning and usage and thus, the statutory wording as stated in the instruction, although narrowed to a more specific act, making a "false statement," is sufficient to accurately inform the jury as to the elements of the crime. Further, giving of appellants' proposed Instructions No. 2 and 3 would have been error and may have confused the jurors as to the requisite elements of the crime.

Appellants' proposed Instruction No. 4 reads as follows:

If you find that the statements signed by Ray Applegate were voluntarily signed by him, you must find the defendants not guilty.

Appellants argue that due to the court's failure to give this instruction, their theory of the case was not presented to the jury. The law is well-settled that the defendant should be allowed to present his case to the jury. See State v. Ohio, 457 P.2d 618, 23 Utah 2d 70 (Utah, 1969), and State v. Ollison, 519 P.2d 393 (Or. App., 1974). However, the case law also recognizes that before the defendant is entitled to have the jury instructed on his theory of the case, there must be a certain quantum of evidence to support that theory.

Here, appellants have injected a new, additional and totally unworkable element into the crime of witness tampering. Nowhere within the witness tampering statute, Utah Code Ann., § 76-8-508, supra, is there the requirement that the victim involuntarily testify or inform falsely. Mere attempted inducement (whether by a money bribe, false promises, etc), is sufficient under the statute to constitute the offense. Thus, appellants' Instruction No. 4

was not only contrary to the law, but is grossly misleading and socially reprehensible. Under appellants' theory and their proposed Instruction No. 4, a corrupt individual could induce a person with money, favors, or other inducement to falsely accuse an innocent person of a crime, and even testify against that innocent person, and as long as the inducement was sufficient enough so that the witness voluntarily accepted the deal, the person inducing the one actually causing the illegal conduct, could not be prosecuted under the statute in question. The respondent submits that such a strained interpretation of the statute violates not only the intent of the legislature, but also common sense.

Thus, appellants' proposed Instruction No. 4 was an inaccurate statement of the law and was properly rejected by the trial court.

Appellants' proposed Instruction No. 5 states:

Should you find the statements signed by Applegate were not voluntarily signed, you must nevertheless find the defendants not guilty if you also find any of the following to be true:

1. That the statements signed were factually correct.

The statute in question only requires that the actor attempt to induce someone to testify or inform falsely, and appellants' proposed Instruction No. 5 goes far beyond the intent of the statute and is a misstatement of the law. If a person attempts to induce another to inform falsely, that person may be convicted even though the other person does not yield to the inducement and does not give a false statement. Appellants' Instruction would require an actual giving of a false statement, and would totally ignore the words "attempts to induce" in the statute.

Also, the proposed Instruction was not factually supported. Appellants threatened the victim with arrest for a non-existent crime and roughed him up to induce him to state that he personally had seen liquor being sold at a specific bar earlier that evening, which he had not seen. There was never a change in the victim's story; he never saw liquor being sold and there was no evidence presented at trial that he had.

Appellant's Proposed Instruction No. 6 states:

When you are considering the credibilities and ability to remember of a witness you may take into consideration, among other things, the state of intoxication of the witness and the extent to which it has affected his ability to remember events and occurrences.

Respondent submits that Instruction No. 11, given by the trial court, more than adequately notifies the jury of all of the factors to consider in assessing the credibility of witnesses without inappropriately emphasizing one factor over the other. (See State v. Smith, 543 P.2d 834 (N.M. 1975).) Instruction No. 11 reads as follows:

You are the sole judges of the weight of the evidence, the credibility of the witnesses and the facts. In considering the testimony of a witness you may consider his appearance and demeanor, his apparent frankness and candor, or the want of it; his opportunity to observe, his ability to understand and his capacity to remember; you may consider the interest, if any is shown, which any witness may have in the result of the trial; and also any bias he may have, or any motive or probable motive which any witness may have to testify for or against either party.

If you believe any witness has wilfully testified falsely, as to any material fact in the case, you are at liberty to disregard the whole of the testimony of such witness, except as he may have been corroborated by other credible witnesses or credible evidence. You are not bound to believe all that the witnesses may have testified to nor are you bound to believe any witness; you may believe one witness against many, or many as against one. In the light of the above observations it is your privilege to judge the weight to be given the testimony of the witnesses and to determine what the facts are.

The jury heard the evidence as to Applegate's state of intoxication at the time of the incident involved. As exclusive judges of the credibility of witnesses, they were solely within their province to weigh the evidence

and the credibility of each witness. See State v. James, 89 Pac. 460 (Utah 1907); State v. Green, 911 Pac. 987 (Utah 1908). Further, the jury may accept or reject all or any part of the witness' testimony. People v. Gardner, 530 P.2d 496 (Colo. 1975).

In this case, the jury received complete, adequate and accepted instructions regarding all criteria to be used in judging the credibility of witnesses in Instruction No. 11. The Court properly rejected the superfluous proposed instruction which would have improperly emphasized one criterium over all others.

POINT IV

THE STATE'S EVIDENCE WAS SUFFICIENT TO ESTABLISH APPELLANTS' GUILT BEYOND A REASONABLE DOUBT.

Appellants argue that they cannot be guilty of violating Section 76-8-508, supra, as a matter of law because the state failed to prove certain elements of the offense. However, respondent submits that each of the "alleged" elements appellant claims were not proved are not, in fact, elements of the witness tampering statute. Appellants' claim is really three-fold, to-wit:

1. The state failed to show that appellant's written statement was "evidence given according to law under oath or affirmation;"
2. The state failed to show that Applegate's written statement was subsequently used in an official proceeding or investigation; and
3. The state failed to show that Applegate actually falsely informed to someone other than appellants.

With respect to appellants' first claim, much depends on how this Court resolves the issues raised in Point III of this appeal. Appellants asserted in Point III that the terms "testify" and "inform" in Section 76-8-508 must be given a very restrictive legal meaning to include only situations where the declarant makes the

statement "under oath or affirmation." Respondent has shown in Point III that this is an unduly restrictive interpretation of the meaning of the terms "testify" and "inform." Moreover, appellants' own jury instructions attempting to define those terms, did not go that far. Rather, appellants have asserted this new requirement or element for the first time on appeal, and accordingly it should be rejected. Respondent submits that when the terms "testify" and "inform" are given their common usage and meaning, it is clear that the prosecution established the elements of the offense of witness tampering by showing that appellants attempted to, and in fact, induced or otherwise caused Applegate to inform falsely--by giving a false written statement--during the course of Appellants' own police investigation which they obviously knew was pending or about to be instituted.

Appellants' next claim is that the state was required to prove that Applegate's written statement was, in fact, subsequently used in an official proceeding or investigation. Respondent submits that even if this were an element of the offense, which it is not, that element was proved by the state in that Appellants, by their own admission at page 26 of their Brief, concede that they were engaged in a pending police investigation when the

false statement was procured. Thus, Applegate's statement was, in fact, part of a pending official "proceeding or investigation."

More significantly, however, is the fact that actual, eventual use of the induced false statement in an official proceeding or investigation is not a requirement of the witness tampering statute. Section 76-8-508 merely provides that:

Believing that an official proceeding or investigation is pending or about to be instituted, he [the actor] attempts to induce or otherwise cause a person to:

(a) Testify or inform falsely.

(Emphasis added.)

Actual use of the criminally procured statement in the proceeding or investigation is not required.

Appellant's construction of the statute would clearly defeat the purposes for which the statute was enacted, i.e., to protect witnesses from being harassed or threatened by officials or others in an attempt to induce the witness to make a false statement or to inform falsely. If one were to accept appellants' premise, that they were innocent because the State failed to establish that the written statement signed by Applegate was actually used in an official

proceeding, then surely the statute would lead to ridiculous results inconsistent with the purpose and intent of the statute. For example, under appellants' interpretation, a policeman could literally beat a potential witness or bribe him with money, and unless the extracted statement were actually used in a subsequent official proceeding, the policeman would not have to answer for his actions under Section 76-8-508.

The statute is designed to punish even those persons who merely attempt to induce or otherwise cause a person to testify or inform falsely--whether this attempt is successful or in vain is irrelevant--the crime has been committed once the attempt has been made, not when the false statement is given or when and if the person's statement is used in an official proceeding. (Of course, in the instant case, appellants were shown to have not only attempted the inducement but to have completed the act.)

It is well-settled in the law that the words of a statute must be given their common meaning unless it appears from the context that a different meaning should control. See State v. Amett, 579 P.2d 547, 119 Ariz. 38 (Ariz. 1978); Crist v. Bishop, 520 P.2d 196 (Utah 1974), and Grant v. Utah State Land Bd., 485 P.2d

1035, 26 Utah 2d 100 (Utah 1971). Utah Code Ann. § 76-8-508 clearly states that a person is guilty if "he attempts to induce or otherwise cause a person to testify or inform falsely." Giving those words their ordinary meaning or common usage, appellants' actions, upon a reading of the trial transcript and the evidence admitted, clearly fall within the conduct subject to criminal sanctions.

A recent Utah case, State v. Danker, No. 16200, rendered August 22, 1979, dealt with the same statute. In Danker, the defendant had been convicted under Utah Code Ann. § 76-8-508 of witness tampering for dissuading her seven year old daughter from testifying in court against a male who had been charged with committing forcible sodomy upon the daughter. The Court noted that under Section 76-8-508, "the state has the burden of proving beyond a reasonable doubt: that the defendant knew an official investigation was in progress; that she knew her daughter would be a witness in any subsequent proceedings; and that she told her daughter not to testify."

In this case, applying this same requirement of proof beyond a reasonable doubt, appellants by their own admission, had heard rumors that alcohol was being sold

at the J and M Saloon and they were investigating the claim. In their positions as Chief of Police and Justice of the Peace, surely their efforts would constitute an "investigation" within the intent of the statute. The fact that they were conducting the investigation leads to the conclusion they knew that an investigation was "pending or about to be instituted." That appellants knew Applegate could be a witness in subsequent proceedings is obvious: It was Applegate's statement that would give appellants the necessary information to proceed. As to whether appellants "attempted to induce or otherwise cause" Applegate to testify or inform falsely, that evidence is a matter of record in the trial transcript and also the version of the facts believed by the jury in finding beyond a reasonable doubt that appellants were guilty.

Appellants' final claim is that the state failed to show that Applegate was requested to inform or in fact informed falsely to someone other than appellants. Once again, appellants have attempted to add a new element to the offense which simply is not there. There is no requirement that the victim of the crime eventually inform "another" falsely. The mere act of making the false statement which might eventually be used later is sufficient even if the statement is never actually used. Just because

the state discovered the attempted inducement to procure a false statement early before it was communicated to another and actually became part of an official proceeding should not bar prosecution for witness tampering. Further, appellants' own proposed jury instructions did not even suggest a requirement that the false statement be communicated to someone other than defendants. Accordingly, this claim should be summarily rejected.

In conclusion, respondent submits that the state proved every element which is actually contained within Utah's witness tampering statute beyond a reasonable doubt, and appellants' attempt to add elements which are not part of the statute, and then claim that the state failed to prove these new elements should be rejected.

POINT V

IMMUNITY GRANTED TO APPELLANT
BRACKENBURY UNDER UTAH CODE ANN. §
77-45-21 DOES NOT PRECLUDE HIS
PROSECUTION.

Utah Code Ann. § 77-45-21 (1953), as amended,
empowers prosecutors to grant immunity to witnesses who
may be called upon by the State to support the
investigation or prosecution of a case. The relevant
portion of that statute reads:

In any investigation or prosecution
of a criminal case, the attorney general
and any district attorney or county attorney
shall have the power to grant immunity from
prosecution to any person who is called or
who is intended to be called as a witness
in behalf of the State of Utah whenever the
attorney general, district attorney or
county attorney deems that the testimony of
such person is necessary to the investigation
and prosecution of such a case. No
prosecution shall be instituted against
the person for any crime disclosed by
his testimony which is privileged under
this action, provided that should the
person testify falsely, nothing herein
contained shall be construed to prevent
prosecution for perjury.

Utah Code Ann. § 77-45-21 (1953), as amended (emphasis added).

Appellants correctly state in their brief that
while two types of immunity traditionally exist-transactional
(which precludes prosecution for any transaction revealed
by his testimony), and use and derivative use (which only
precludes the use of privileged testimony in a subsequent

prosecution, but does not preclude future prosecution), the Utah statute leaves in question which type of immunity exists in this state.

The most authoritative statement by this Court on the subject of immunity is in State v. Ward, 571 P.2d 1343 (Utah 1977) (hereinafter Ward). Ward involved the improper grant of immunity by county attorney deputies. The Court held that, in "fairness to the defendant and the interests of justice. . . the prosecution should not be entitled to rely on nor to make use of" the testimony given by defendant Ward. Id. at 1347.

In Ward, the majority opinion made several significant rulings regarding Section 77-45-21, specifically, and the status of immunity in Utah generally. As to the statute itself, the Court held:

Due to the considerations just discussed as to the seriousness of the responsibility imposed, and the fact that it departs from the ideals of equal justice, it is our opinion that the power to grant immunity is of such character that it should not be extended by implication or otherwise beyond the express terms of the statute.

Id. at 1346.

Thus, immunity must always be dealt with in the most narrow and strict sense and must not be casually

given nor received. It must not be considered to expand into areas of a witness' testimony unless expressly given by the statute or the officer granting the immunity.

The court then further stated, with regard to immunity in general, that:

The grant of immunity is supposed to be for a quid pro quo in the form of information from the grantee, who is or may be involved in crime. That is, it is in essence a contract. It is fundamental that when any agreement is entered into it should reflect a meeting of the minds of the parties who enter into it; and this in turn includes knowledge of the foundational facts out of which the agreement arises and comes into being.

Id. at 1346.

Using the Court's analogy of immunity as a contract in the present case, it is clear that the parties involved had no meeting of the minds with regards to the narrow privilege of immunity offered to appellant Brackenbury. The transcript of the Brackenbury deposition reveals the following dialogue between Harold Call, the Wasatch County Attorney and Jerry Ungritch, appellant Brackenbury's attorney:

MR. CALL: Well, the County Attorney's office will grant Mr. Brackenbury immunity as to the testimony regarding the incident in the bar and involving James Garner and as to nothing else.

MR. UNGRITCH: Is that going to be the limit of the scope of examination at this time?

MR. CALL: Well, to the extent that we're able to go beyond that in some detail, but we have other areas we'd like to go into, but we will grant immunity only to the incident relating to the bar and to James Garner and to his activities as Justice of the Peace in relation to the arrests and the people brought before him.

Brackenburg Deposition at 4.

Assuming that the immunity statute authorizes grants of transactional immunity, the prosecution of appellant Brackenburg does not violate the immunity actually granted. The County Attorney expressly stated that immunity was granted as to the "incident in the bar . . . and as to nothing else." Supra. Later in a paragraph stating that the prosecution would like to be able to go into other things, it could be argued that immunity was apparently expanded "to his [appellant's] activities as Justice of the Peace in relation to the arrests and the people brought before him." Appellants argue that this "expansion" covered the incident in question. Appellants' Brief at 29. However, the "expansion," if it is one, could only have pertained to persons arrested and brought before appellant Brackenburg as Justice of the Peace as illustrated by the questioning which followed the immunity. Appellant Brackenburg was questioned about the bar incident, among other things, then the county attor

delved into the serious concerns covered by the additional immunity. For example, he questioned appellant extensively about whether persons arrested for speeding violations and brought before him as Justice of the Peace, had alleged that they were not speeding at all. Brackenbury deposition at 26; he questioned about arrested persons complaining that they were improperly arrested outside city limits, Brackenbury deposition at 26-27, 29; he discussed place of arrest and the boundaries of the city, Brackenbury deposition at 26-30, etc.

The incident for which appellant was prosecuted did not concern an "arrest" of anyone; no one was "brought before him" as Justice of the Peace, nor was he acting in what anyone could consider as "activities as Justice of the Peace." The victim, Applegate, was never under arrest. Appellant admits that himself. Brackenbury deposition at 15 and 21. The victim, Applegate, was never "brought before him" for arraignment or for any other purpose relating to appellant's duties as Justice of the Peace. During the intimidation of the victim, Applegate, appellant was certainly not functioning in "activities as Justice of the Peace." Appellant himself even admits that:

Q. How do you function as a Judge impartial when you write the statements of the witnesses?

A. Well, I just wrote what he was telling me about it.

Q. As a Judge, you shouldn't even be involved in this until it comes to trial, should you?

A. Right. I understand that.

Q. Why were you writing witnesses's statements on a case that was going to come before your court?

A. Well, Roger asked me to write it, and I just wrote down what the statements was coming up to.

Q. Would you agree now you shouldn't have done it?

A. Right.

Brackenbury Deposition at 23.

Thus, the additional language in the grant of immunity could in no way apply to the incident at hand, but to complaints by "arrested" traffic violators or others who were "brought before" appellant in his "activities as Justice of the Peace."

In addition, if the County Attorney's statement was misunderstood by appellant Brackenbury's attorney, the contractual grant of immunity was never properly formed in the first place since there was no clear meeting of the minds. (Ward, supra). This disagreement and misunderstanding is apparent from the present two briefs. No "contract" of immunity was ever entered into (Ward, supra), and thus appellant Brackenbury cannot claim any such privilege.

In addition, respondent urges that a careful reading of the quoted dialogue reveals that the County Attorney's offer of immunity appears to have gone only to the "incident in the bar involving James Garner and as to nothing else." Respondent contends that the first statement made by the County Attorney after the prodding of Mr. Ungritch demonstrates the narrowness of the offered grant of immunity, if transactional. Mr. Call responded, "Well, to the extent that we're able to go beyond that [the scope of the offered immunity], we will." (Deposition, at p. 4). He forthrightly indicated that he was prepared to question Brackenbury as to incidents other than the events which occurred in the bar. His use of the phrase "go beyond that" indicates that his idea of what he offered as immunized testimony was not as broad as appellant argues.

CONCLUSION

Based upon the foregoing points and authorities, respondent submits that appellants' convictions and sentences were proper and should be affirmed.

Respectfully submitted,

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