1998

West Valley City v. Edward Peck : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No.981343-CA
v.	:	
	:	Priority No. 2
EDWARD PECK,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF THE APPELLEE

Appeal from the Third Judicial District Court,
West Valley Department,
in and for Salt Lake County, State of Utah;
the Honorable Anthony B. Quinn

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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to §78-2a-3(2)(e), Utah Code Annotated.

STATEMENT OF THE ISSUES

ISSUE I. WERE SUFFICIENT FACTS PRESENTED AT TRIAL TO SUPPORT THE TRIAL COURTS DENIAL OF PECK'S MOTION TO DISMISS?

A trial court's ruling on a motion to dismiss is a question of law that should be reviewed for correctness. *State v. Taylor*, 884 P.2d 1293 (Utah App. 1994). See also, *State v. Maestas*, 652 P.2d 903 (Utah 1982).

ISSUE II. WAS THE EVIDENCE PRESENTED TO THE TRIAL COURT SUFFICIENT TO SUSTAIN A GUILTY VERDICT ON BOTH CHARGES OF VIOLATING A PROTECTIVE ORDER? WAS A MISTAKEN COMMENT OF THE TRIAL COURT JUDGE HARMLESS ERROR?

When reviewing the findings of a trial judge sitting without a jury, an appellate court will overturn a guilty verdict only if it is clearly erroneous. *State v. Taylor*, 818 P.2d 1030 (Utah 1991). Harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that the outcome of the proceedings would be affected. *State v. Hamilton*, 827 P.2d 232 (Utah 1992).

ISSUE III. DOES THE DIRECT EVIDENCE PRESENTED TO THE TRIAL COURT NEGATE ANY REASONABLE HYPOTHESIS OF INNOCENCE?

This issue is similar to a allegation of insufficient evidence and, therefore, should be reviewed in a light most favorable to the verdict and the verdict should be reversed only if the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must entertain a reasonable doubt. *State v. Lyman*,352 Utah Adv. Rep 13(Utah App. 1998).

ISSUE IV. DOES PECK'S BRIEF FAIL TO MARSHAL THE EVIDENCE AGAINST HIM SUPPORTING THE VERDICTS OF THE TRIAL COURT?

When attacking the findings of fact of a trial court the appellant must marshal all of the evidence in support of the trial court's findings of fact, and then demonstrate that the evidence, including all reasonable inference drawn therefrom, is insufficient to support the findings against an attack. *State v. Moosman*, 794 P.2d 474 (Utah 1990).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCE, AND RULES

§76-5-108, Utah Code Annotated

§ 76-5-108. Protective orders restraining abuse of another - Violation.

(1) Any person who is the respondent or defendant subject to a protective order or ex parte protective order issued under Title

30, Chapter 6, Cohabitant Abuse Act, or Title 78, Chapter 3a, Juvenile Courts, Title 77, Chapter 36, Cohabitant Abuse Procedures Act, or a foreign protective order as described in Section 30-6-12, who intentionally violates that order after having been properly served, is guilty of a class A misdemeanor, except as a greater penalty may be provided in Title 77, Chapter 36, Cohabitant Abuse Procedures Act.

(2) Violation of an order as described in Subsection (1) is a domestic violence offense under Section 77-36-1 and subject to increased penalties in accordance with Section 77-36-1.1.

NATURE OF THE CASE

This case involves a prosecution and conviction for two violations of §76-5-108, Utah Code Annotated, "Protective Orders Restraining Abuse of Another-Violation", in the Third District Court, West Valley Department, Salt Lake County, State of Utah.

COURSE OF PROCEEDINGS

Informations charging three separate violations of a protective order and one charge of telephone harassment were filed against Edward Peck ("Peck") during the spring of 1997. The cases were consolidated and on March 9, 1998, a bench trial on the consolidated charges was held before the Honorable Anthony B. Quinn of the Third District Court.

DISPOSITION IN TRIAL COURT

At trial, Peck was convicted of two counts of Protective Orders Restraining Abuse of Another-Violation. The third protective order violation and the telephone harassment charge resulted in a verdict of not guilty. Peck was sentenced to serve fifteen days in jail which was suspended, was fined $100, and was put on probation to the Court for a period of twelve months. (Record P. 11)

A Notice of Appeal in this case was filed on June 15, 1998. Due to a defect in the sentence and judgment documents of the trial court, that appeal was dismissed by Memorandum Decision of the Court of Appeals in Case No. 980209-CA issued June 4, 1998. The defect was corrected and a second Notice of Appeal was filed on April 2, 1998.

STATEMENT OF THE FACTS

1. On December 30, 1996, Amanda Eaby ("Eaby") obtained a protective order against Peck. The protective order granted temporary custody of the parties' minor children to Eaby. Also, the issuing judge modified the standard no contact provisions of the protective order by adding the handwritten notation, "except as it relates to visitation." (Transcript P. 5, Lines 11-17; P. 6, Lines 4-10; P. 14, Lines 7-25; P. 15, Lines 1-16; P. 26, Lines 19-25; P. 27, Lines 1-8.)

2. On February 2, 1997, Eaby was awakened by a telephone call at her home at approximately 1:00 AM. (Transcript, P. 6, Lines 11-25, P. 7, Lines 21-25, P. 8, Lines 1-7.) The phone stopped ringing before she could answer it, so she entered a direct call-back code on her telephone to determine the source of the telephone call. The call-back feature indicated that the telephone call had come from Mr. Peck's residence. (Transcript, P. 7, Lines 3-8.)

3. On February 20,1997, at approximately 11:00 PM, Eaby received a telephone call from Peck. (Transcript P. 9, Lines 2-5, 15-17.) Eaby answered the telephone, "Hello," whereupon Peck stated her name. Peck asked if the parties could talk, to which Eaby responded, "No, we cannot." After a pause, Peck then stated, "We can't speak for a minute?" Eaby replied, "No." and after a further pause hung up the phone. (Transcript, P. 9, Lines 20-25; P. 10, Lines 1-5; P. 18, Lines 7-25; P. 19, Lines 1-3.) This conversation was marked by several extended pauses or moments of silence between the parties. (Transcript, P. 9, Lines 22-25; P. 10, Lines 1-3; P. 18, Lines 6-9, 10-22; P. 19, Lines 2-3.)

4. During the conversation that took place during the February 20, 1997, telephone call, Peck's demeanor appeared to be such that he was upset or something was wrong. (Transcript, P. 10, Lines 9-14.)

5. Approximately one half hour after the telephone call, Eaby discovered a funeral program for a friend of Peck's that had been

left in her car. (Transcript, P. 10, Lines 15-25.) The deceased individual was one of Peck's closest friends and Peck was listed as a pall bearer at the funeral. (Transcript, P. 12, Lines 1-9.) Peck was the only individual who knew both Eaby and the deceased and was also privy to Eaby's address. (Transcript, P. 12, Lines 5-6; P. 22, Lines 11-22.)

6. On March 24, 1997, Eaby received a telephone call from Peck at approximately 1:00 or 1:30 AM. (Transcript, P. 12, Lines 15-23.) Upon hearing and recognizing Peck's voice, Eaby hung up the telephone.

7. At the time of each of the above described calls, the parties' children were with Eaby, and Peck did not discuss visitation, nor did he have any known reason to be calling to discuss visitation. (Transcript, P. 10,Lines 6-8; P. 12, Line 25; P. 13, Lines 1-8; P. 23, Lines 22-25.)

8. During the period encompassed by these telephone calls, the parties' had no contact regarding visitation. Visitation was handled through the respective mothers of Eaby and Peck. This was a system that had been agreed upon in Court at the time of the issuance of the protective order. (Transcript, P. 13, Lines 1-15, P. 28, Lines 16-21.)

SUMMARY OF THE ARGUMENTS

I. SUFFICIENT FACTS WERE PRESENTED AT TRIAL TO SUPPORT THE TRIAL COURTS DENIAL OF PECK'S MOTION TO DISMISS.

Sufficient evidence was presented during the prosecution's case in chief to support each of the elements of the crime "Protective Orders Restraining Abuse of Another-Violation," §76-5-108, Utah Code Annotated. Eaby testified that she received a series of late night/early morning telephone calls from Peck. During the call she received on February 20, 1997, the parties engaged in a short conversation interspersed with several lengthy moments of silence. At no time during this conversation did Peck raise the issue of visitation, which was the only reason he was permitted to contact Eaby. During this call, Peck appeared to Eaby to be upset. Shortly after the call, Eaby found in her vehicle a funeral notice for a close friend of Peck's. She testified that she believed Peck could be the only person who would place such a notice in her vehicle.

The other conviction was based upon a call from Peck received by Eaby on March 24, 1997. This call occurred at approximately 1:00 or 1:30 AM. Upon hearing and recognizing Peck's voice, Eaby hung up the telephone. With respect to both this call and the previous call, Eaby testified that the parties' children were with her at the time of the call, that there was no need for a discussion with

Peck regarding visitation, that in fact, no discussions with Peck regarding visitation occurred at any time during this time period, and that the parties had arranged visitation through their respective mothers.

Based on the foregoing, the City had established a *prima facie* case as to each element of the offense charged.

II. THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS SUFFICIENT TO SUSTAIN A GUILTY VERDICT ON BOTH CHARGES OF VIOLATING A PROTECTIVE ORDER. A MISTAKE IN THE FINDINGS OF THE TRIAL COURT JUDGE WAS HARMLESS ERROR.

The trial court judge made an incorrect statement in his post verdict discussion as to one of the reasons why he believed Eaby's testimony to be more credible than Peck's. Given the substantial evidence contained in the record and the other reasons regarding credibility that were stated by the judge, this mistaken comment constitutes harmless error.

Also, it appears from the transcript that the source of the judge's mistake was an incorrect characterization of the evidence by Peck's defense attorney during closing argument. Since parties cannot take advantage of errors which they lead the court into committing, this issue should be disregarded.

III. THE DIRECT EVIDENCE PRESENTED TO THE TRIAL COURT NEGATES ANY REASONABLE HYPOTHESIS OF INNOCENCE.

Peck's argument that the judge was required to acquit him because there existed a reasonable hypothesis of innocence is based upon an overbroad reading of *State v. Layman*, 953 P.2d 782 (Utah App. 1998) and is in conflict with the evidence presented at trial. The reasonable hypothesis of innocence ruling set forth in the *Layman* case is only applicable where the evidence consists solely of undisputed, circumstantial evidence and it does not require the prosecutor to disprove every reasonable hypothesis. In this case, there is direct evidence of the elements of the crime. Eaby testified that Peck made telephone calls to her. She also testified that during their conversation, albeit a brief one, the only allowable topic, visitation, was not discussed. Finally, both Eaby and Peck testified that they did not discuss visitation during the time period that the phone calls were made. Peck's own testimony provides direct evidence rebutting his "reasonable hypothesis of innocence." Peck testified that he did not make the telephone calls at all. This puts him in the obviously untenable position of arguing that the calls may have been made for the allowed purpose of visitation and yet, at the same time testifying under oath that the calls were not made at all.

IV. PECK'S BRIEF FAILS TO MARSHAL THE EVIDENCE AGAINST HIM SUPPORTING THE VERDICTS OF THE TRIAL COURT.

All of the issues raised by Peck in this appeal have the common theme of attacking the factual findings of the trial court. When challenging the findings of fact of the trial court on appeal, the appellant must show that the findings of fact were clearly erroneous. In order to show error, the appellant must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack. *State v. Moosman,* 794 P.2d 474 (Utah 1990). Peck has failed to adequately marshal the evidence against him in this case which constitutes a separate and valid reason for affirming the decision of the trial court.

DETAIL OF THE ARGUMENTS

I. SUFFICIENT FACTS WERE PRESENTED AT TRIAL TO SUPPORT THE TRIAL COURTS DENIAL OF PECK'S MOTION TO DISMISS.

Defendant was convicted of two counts of violating §76-5-108, Utah Code Annotated, "Protective Orders Restraining Abuse of Another." There are two elements to this crime. First, the defendant must be subject to a properly served protective order issued pursuant to one of the applicable co-habitant abuse acts. Second, the defendant must have intentionally violated the terms of the order.

In this case, there was ample evidence presented relating to each of these elements to support the trial court's denial of a motion to dismiss. The evidence presented by the prosecution's case in chief clearly demonstrated a *prima facie* violation of §76-5-108 on both February 20th and March 27th, 1997.

The facts presented in the prosecution's case in chief (found on pages 5-24 of the Transcript)are as follows:

February 20, 1997 Violation

1. The victim, Amanda Eaby, testified that at approximately 11:00 PM on February 20, 1997, she received a telephone call from Peck.
2. Eaby testified that after she said "hello", Peck said her name. She further testified that at that point, since she was shocked to be contacted by Peck, she did not respond. She testified that after a pause, Peck then stated, "Can we talk for a minute?" Eaby replied, "No, we cannot," and there was again a pause in the conversation. Eaby then stated, "Okay, I'm going to hang up now." Eaby further testified that Peck then stated, "We can't speak for a minute?" To which she replied, "No," paused again, and then hung up the phone.
3. Eaby testified that during this conversation, there was "...a lot of silence on the phone...," and "...there were

great moments of, you know, no talking and sitting there."

4. In response to a question regarding her ability to tell Peck's emotions from his voice during the call, Eaby testified, "He seemed like something was wrong, like he wanted to speak with me. And it bothered me to have him on the phone and sound upset like that."

5. Eaby further testified that approximately one half hour after the telephone call, she went out to lock up her car. During that process she found a funeral program for a friend of Peck's that had not been in her car prior to the phone call. She also testified that the funeral described in the program was for one of Peck's closest friends. Finally, she testified that she knew of no one, besides Peck, who would have any reason to put that funeral announcement in her car, that the funeral notice was the only notification she received of the death of Peck's friend, and that other friends of Peck, who also knew the deceased, did not know where she lived.

6. On the subject of visitation, Eaby testified that at no time during the aforementioned telephone call did Peck mention their children or visitation. She also testified that at the time the protective order was issued, the parties had agreed to arrange visitation through their

respective mothers. The children were with her at the time of the call since they did not have over night visits with Peck, and she also testified that she and Peck had no direct contact whatsoever, regarding visitation, during the time period encompassing the three telephone calls which were the subject of the prosecution.

March 24, 1997.

1. Eaby testified that on or about March 24, 1997, she received a telephone call from Peck at approximately 1:00 or 1:30 AM.

2. With regard to the conversation during this telephone call, Eaby testified, "As well as some of the other instances as soon as I answered the phone and heard his voice and recognized who it was and what it was about, I hung up the phone."

3. With respect to the content of this telephone call, Eaby testified, "I can't imagine that it would be anything about visitation in the middle of the night while I'm sleeping..." As she had previously testified, visitation had been arranged through the parties' respective mothers and she never arranged visitation with Mr. Peck by phone during this period.

The evidence presented by the prosecution's case in chief, as set forth above, clearly makes a *prime facie* case as to each element of the offense charged.

The first element of the crime is not at issue. Eaby obtained a protective order on December 30, 1996, and Peck was present in court and was fully aware of the order. Among other things, the protective order prohibited any contact, including telephone contact, between the parties. Paragraph 3, the no contact section of the order, however, had been modified by the issuing judge with the phrase, "Except for purposes of visitation." Therefore, the no contact provision of the protective order was not absolute and contact was allowed between the parties for purposes of visitation.

The second element of this crime is whether or not Peck intentionally violated the modified no contact provision of the protective order. The above described testimony of Ms. Eaby sets forth strong evidence for finding that Peck intentionally violated the protective order.

With respect to the February 20, 1997, telephone call, the testimony showed that Eaby received a late night telephone call from Peck. According to her testimony, this call included at least some conversation and included several long pauses during which nobody spoke. Finally, Eaby hung up the telephone. She testified that there was no discussion of visitation with Peck during this telephone call, nor did she discuss any visitation with Peck by

telephone during this time period. Based upon her description of the telephone conversation, it is clear that Peck had ample opportunity to state his business and he utterly failed to do so. The clear terms of the protective order allowed Peck to contact Eaby by telephone for purposes of visitation, and for that purpose only. Despite having the opportunity of several seconds of silence during various parts of the conversation, Peck failed to state the purpose of his call. Obviously a call such as this violates the terms of the protective order. Peck cannot simply call, not state his business, yet remain on the phone and then, when confronted with a violation of the order, fall back on the notion that he possibly would have raised visitation issues at some point during the call.

The fact that this call had nothing to do with visitation is corroborated by other evidence. Eaby testified that Peck seemed upset when she was talking to him. Also, she found the funeral notice for Peck's friend in her car shortly after the telephone call. She testified that it was her belief that the only person that could have left the notice there was Peck since none of Peck's other friends would have known where she lived. Also, she testified that she had received no other notice regarding this funeral.

Finally, an additional corroborating factor is that Eaby and Peck apparently never had a discussion regarding visitation. She testified that visitation was handled through their respective

mothers, as had been arranged at the time of the issuance of the protective order, and that she and Peck never discussed visitation by telephone during this period. If Peck has been calling for visitation reasons, it seems that those reasons mysteriously disappeared.

Taken as a whole, the above evidence is sufficient to defeat Peck's Motion to Dismiss the February 20, 1997, violation.

Many of the same arguments can be made with respect to the March 24, 1997, telephone call. This call was also clearly a violation of the protective order.

Ms. Eaby's testimony was that on March 24, 1997, she received a telephone call from Peck at approximately 1:00 or 1:30 in the morning. While the parties had very little conversation during this call, there is every indication from the evidence that this call had nothing to do with visitation.

First, the timing of the call is important. Eaby testified that this call woke her up at approximately 1:00 or 1:30 AM in the morning. This followed the pattern of the previous two phone calls which she received on February 20, 1997, and February 2, 1997. All of these calls occurred either very late at night (11:00 PM on February 20, 1997) or in the early morning hours (1:00 AM on February 2, 1997, and 1:00 AM or 1:30 AM on March 24, 1997). The timing of this call, when combined with the fact that there were no discussions regarding visitation during the call, nor were there

any other discussions by telephone regarding visitation during this time period, demonstrate that this call is simply one more in a series of late night telephone calls. Such late night calls are naturally frightening to a victim who has had to resort to obtaining a protective order from the caller. Since Eaby had her children with her at the time and there were no discussions with Peck during this period regarding visitation, there was obviously no emergency, and in fact, no visitation motive whatsoever, for Peck to call Eaby at 1:00 or 1:30 AM. From this evidence, the judge correctly inferred that it was not Peck's intent to discuss visitation and therefore, the call was in violation of the statute.

Based on the foregoing, it is clear that the City had established a *prima facie* case with respect to each violation. The parties had agreed that the protective order was in place, and the evidence that was presented made it obvious that it was not Peck's intention to discuss visitation because of the timing and nature of the calls and the supporting evidence. The trial court judge correctly denied Peck's Motion to Dismiss.

II. THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS SUFFICIENT TO SUSTAIN A GUILTY VERDICT ON BOTH CHARGES OF VIOLATING A PROTECTIVE ORDER. A MISTAKE IN THE FINDINGS OF THE TRIAL COURT JUDGE WAS HARMLESS ERROR.

Peck asserts that the court's judgment in this case is not supported by the evidence. His basis for this contention is one of the court's post verdict comment regarding Peck's credibility. The

trial court judge commented that Mr. Peck stated, "I don't recall making such calls," with respect to certain questions he had been asked. A review of the transcript reveals that Peck is correct and the trial court judge was mistaken in his recollection of that statement. However, in light of the source of the judge's confusion and the other substantial evidence that supports the verdict, trial judge's mistaken recollection is harmless error.

This issue was not preserved in the record below by any objection or other action by Peck. In essence, the issue that is being raised now on appeal is really just a challenge to the sufficiency of the evidence. In a criminal case a challenge to the sufficiency of the evidence is governed by a clear and ambiguous standard. The Utah Supreme Court has articulated that standard as follows:

> When reviewing the findings of a trial judge sitting without a jury, this court will overturn a guilty verdict only if it is clearly erroneous. *State v. Walker,* 743 P.2d 191, 192-193 (Utah 1987).The basis of this standard is Rule 52 (a), Utah Rules of Civil Procedure, "Findings by the Court":
>
> In all actions tried upon the facts without a jury... the court shall find the facts specially and state separately its conclusions of law thereon... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

State v. Taylor, 818 P.2d 1030 (Utah 1991)(Footnote omitted).

The Utah Supreme Court has defined the "clearly erroneous" standard as follows:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been committed.
>
> Further clarification is offered by Wright and Miller: The appellate court... does not consider and weigh the evidence *de novo*. The mere fact that on the same evidence the appellant court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law.

State v. Walker, 743 P.2d 191, 193 (Utah 1987).

Finally, the Utah Court of Appeals has followed the guidance of the Utah Supreme Court in *State v. Germonto*, 886 P.2d 50 (Utah 1983), by stating:

> In considering the challenge to the sufficiency of the evidence, we review the evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict... If, during the review, we find some evidence or inferences upon which findings of all the requisite elements of the crime can reasonably be made, we affirm.

State v. Perry, 871 P.2d 576, 581 (Utah App. 1994).

In this case, the evidence presented to the trial court was more than sufficient to sustain the conviction. The bulk of that evidence is set forth in Argument I above and was presented in the City's case in chief. In addition, a crucial portion of that

evidence was corroborated by the testimony of Peck. Peck admitted that he had not talked to Eaby regarding visitation during the period of the telephone calls. Peck was asked:

Q. "Now, subsequent to all of this, have you had some times when you've talked to her, communicated with her with respect to the subject of visitation?"

A. "I haven't."

Q."Or any subject?"

A. "No."

Transcript, P. 28 Lines. 16-21.

The mistaken comment made by the trial court judge was but one of several comments made by the judge in explaining his verdict. A close examination of the transcript reveals the potential source of the judge's confusion. In closing argument, Peck's defense attorney stated, "He says he didn't call her on these occasions, *or didn't recall calling her on those occasions.*" He also stated, "That could have been February 2d, but we don't know and he doesn't have specific memory for the dates."

Transcript, P. 35, Lines 4-6 and 8-10.

These statements by Peck's defense attorney appear to be the obvious source of the judge's mistaken comment.

Peck should not be allowed to profit from a mistaken comment of the judge if it appears that Peck was the source of the mistake. Parties cannot take advantage of errors when the party led the

court into committing the error. *State v. Dunn*, 850 P2d 1201 (Utah 1993).

In any event, the error by the trial court judge is harmless. Harmless errors are those errors which are sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceedings. *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992). The burden of showing that an error has been harmful rests with the complaining party. *State v. Robertson*, 923 P.2d 1219 (Utah 1997). Peck has not carried that burden. To the contrary, as has been demonstrated, there is ample evidence in the record to support the convictions. The trial court stated several other reasons for finding Ms. Eaby's testimony to be more credible than Mr. Peck's. Among these were Mr. Peck's failure to recall even the approximate date of his alleged "accidental" call to Ms. Eaby, and the corroborating evidence of the funeral notice that was found in her car.

Also, with respect to the funeral notice, the judge correctly recognized that Peck was never questioned and, therefore, never provided testimony about the notice. As a result, the only evidence before the Court regarding the funeral notice was the testimony of Ms. Eaby as to where and when it had been found and her belief that it could have no source other than Mr. Peck. The court's reliance on this testimony is proper and is a natural consequence of Peck's

failure to deny or explain the testimony of Eaby. *State v. Romero,* 554 P.2d 216, 219 (Utah 1976).

Based on the above, and the evidence as set forth in the previous argument, the verdict of the trial court is supported by the evidence, is not clearly erroneous and, therefore, should be affirmed.

III. THE DIRECT EVIDENCE PRESENTED TO THE TRIAL COURT NEGATES ANY REASONABLE HYPOTHESIS OF INNOCENCE.

Peck relies on the case of *State v. Layman,* 953 P.2d 782 (Utah App. 1998), in advancing a theory that a reasonable hypothesis of innocence exists and, therefore, the trial court should have acquitted Peck. This reliance on *Layman* is misplaced, since a close reading of the case indicates that it is simply not applicable to the case at bar.

The reasonable hypothesis of innocence ruling set forth in the *Layman* case has very clearly defined parameters for its use. It applies only to cases where the evidence consists solely of undisputed, circumstantial evidence and it does not require the prosecutor to disprove every reasonable hypothesis. *Layman* at P.786; see also *State v. Lyman,* 352 Utah Adv. Rep 13, Footnote 3 (Utah App. 1998.)

The *Layman* case was such a case where the only evidence was undisputed and circumstantial. *Layman,* at Footnote 3.

In this case, there is direct evidence of the elements of the crime. Eaby testified that Peck made telephone calls to her. She also testified that during their conversation, albeit a brief one, the only allowable topic, visitation, was not discussed. Finally, both Eaby and Peck testified that they did not discuss visitation during the period that the phone calls were made.

The majority of the Court in *Layman* recognized that, "'The existence of one or more alternate reasonable hypothesis does not necessarily prevent the [*fact finder*] "from concluding that defendant is guilty beyond a reasonable doubt.' *State v. Blubaugh,* 904 P.2d 688, 695 (Utah Ct. App. 1995, cert. denied, 913 P.2d 749 (Utah 1996)", *Layman,* at Footnote 4. The *Layman* Court also approvingly quoted the *Blubaugh* decision with regard to conflicting evidence supporting different hypothesis. The Court stated, "We also note that in *Blubaugh,* the jury was presented with conflicting evidence supporting the different hypothesis; in such instances, 'it is within the province of the jury to judge the credibility of the testimony, assign weight to the evidence, and reject these alternative hypothesis.'" *Layman,* at Footnote 4.

The case at bar is a case with conflicting evidence supporting different hypothesis. However, there is no evidence supporting the hypothesis that Peck advances in his brief. Peck's own testimony at trial directly conflicts with the reasonable hypothesis of innocence that he now claims. Peck testified at trial that he did

not make the telephone calls. This is direct evidence rebutting the notion that the calls may have been made for visitation purposes, his "hypothesis of innocence." Peck is arguing that the calls may have been made for the allowed purpose and yet at the same time has testified that the calls were not made. Peck cannot have it both ways.

Peck's contention that a reasonable hypothesis of innocence exists in this case is not founded upon evidence presented to the trial court and should therefore, be disregarded.

IV. PECK'S BRIEF FAILS TO MARSHAL THE EVIDENCE AGAINST HIM SUPPORTING THE VERDICTS OF THE TRIAL COURT.

All of the issues raised by Peck in this appeal have a common theme. The trial court's reasoning in denying the Motion to Dismiss, the assertion that the court's findings are not supported by the record, and the allegation that the court ignored a reasonable hypothesis of innocence, are all essentially attacks upon the sufficiency of the evidence and the factual findings of the trial court. The law of the State of Utah on this subject is well settled. When challenging the findings of fact of the trial court on appeal, the appellant must show that the findings of fact were clearly erroneous. In order to show error, the appellant must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to

support the findings against an attack. *State v. Moosman,* 794 P.2d 474 (Utah 1990).

Much of the evidence presented to the trial court which supports the verdict and/or corroborates the testimony of Eaby is absent from Peck's brief. Peck's failure to adequately marshal the evidence against him is a separate and valid reason for affirming the decision of the trial court.

CONCLUSION

There is sufficient evidence to support both the trial court's denial of Peck's Motion to Dismiss and the ultimate verdicts in this case. Also, Peck's argument regarding the "reasonable hypothesis of innocence" is in direct conflict with the testimony provided by him at trial. Finally, Peck has failed to adequately marshal the evidence against himself and then demonstrate that the trial court reached a clearly erroneous decision. The verdicts of the trial court should be affirmed.

DATED this 16TH day of FEBRUARY, 1999.

WEST VALLEY CITY

J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 16TH day of February, 1999, I served upon Jerome H. Mooney, Attorney for Defendant/Appellant, two (2) copies each of the Brief of the Appellee, by causing said Briefs to be mailed to them, by first class mail, with sufficient postage prepaid, to the following addresses:

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