

1980

## State of Utah v. Edward G. Robichaux : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. JEROME H. MOONEY; Attorney for Appellant Robert B. Hansen, Craig Barlow ; Attorneys for Respondents

---

### Recommended Citation

Brief of Respondent, *Utah v. Robichaux*, No. 16667 (Utah Supreme Court, 1980).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/1961](https://digitalcommons.law.byu.edu/uofu_sc2/1961)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE  
STATE OF UTAH

-----  
STATE OF UTAH,

Plaintiff-Respondent,

-vs-

EDWARD G. ROBICHAUX,

Defendant-Appellant.

Case No.  
16667

-----  
BRIEF OF RESPONDENT  
-----

APPEAL FROM THE JUDGMENT OF THE  
JUDICIAL DISTRICT COURT, IN AND FOR  
LAKE COUNTY, STATE OF UTAH, THE  
PETER F. LEARY, JUDGE, PRESIDING.

ROBERT L. MOONEY  
Attorney for Respondent

CRAIG L. MOONEY  
Assistant Attorney

216 State Street  
Salt Lake City, Utah

Attorneys for Respondent

JEROME H. MOONEY

356 South 300 East  
Salt Lake City, Utah 84111

Attorney for Appellant

## TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	2
STATEMENT OF THE FACTS-----	2
ARGUMENT	
POINT I:     IT WAS PROPER TO INSTRUCT THE JURY THAT THE LAW PRESUMES A PERSON INTENDS THE REASONABLE AND ORDINARY CONSEQUENCES OF HIS ACTS-----	4
POINT II:    THE JURY INSTRUCTION THAT APPELLANT COULD BE FOUND GUILTY OF THEFT IF HE ACTED INTENTIONALLY OR KNOWINGLY WAS PROPERLY GIVEN-----	16
CONCLUSION-----	21

## CASES CITED

Brunson v. Strong, 17 Utah 2d 364, 412 P.2d 451 (1966)--	10
County Court of Ulster City v. Allen, 99 S.Ct. 2213 (1979)-----	8-10,12
In re Winship, 397 U.S. 358 (1970)-----	5
Ortega v. Thomas, 14 Utah 2d 296, 383 P.2d 406 (1963)-----	21
Sandstrom v. Montana, 99 S.Ct. 2450 (1979)-----	13,14
State v. Coffey, 564 P.2d 777 (Utah 1977)-----	15
State v. Curtis, 542 P.2d 744 (Utah 1975)-----	5
State v. Eagle, No. 16129 (Utah Sup. Ct., May 6, 1980)-----	14-15
State v. Kazda, 545 P.2d 190 (Utah 1976)-----	19-20
State v. Peterson, 22 Utah 2d 377, 453 P.2d 696 (1966)--	6-7
Taylor v. Johnson, 18 Utah 2d 16, 414 P.2d 575 (1966)---	10

## STATUTES CITED

Utah Code Ann. § 76-2-103 (1953), as amended-----	18
Utah Code Ann. § 76-6-401 (1953), as amended-----	18
Utah Code Ann. § 76-6-404 (1953), as amended-----	1,17

IN THE SUPREME COURT OF THE  
STATE OF UTAH

-----  
)  
STATE OF UTAH, :  
Plaintiff-Respondent, )  
-v- : Case No. 16667  
EDWARD G. ROBICHAUX, )  
Defendant-Appellant. :  
)

\_\_\_\_\_  
BRIEF OF RESPONDENT

\_\_\_\_\_  
STATEMENT OF THE NATURE OF THE CASE

The appellant was charged with one count of theft in violation of Utah Code Ann. Section 76-6-404 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty on August 6, 1979, in Third Judicial District Court, the Honorable Peter F. Leary, presiding. The Trial Court sentenced appellant to an indeterminate term of not less than one nor more than fifteen years in the Utah State Prison. The appellant was granted a stay of execution of the sentence upon the

condition that he serve ninety days in the Salt Lake County Jail and pay restitution to the complainant in an amount to be determined by the Department of Adult Probation and Parole. The execution of the ninety-day jail sentence was suspended, pending the outcome of this appeal.

#### RELIEF SOUGHT ON APPEAL

The respondent seeks an order of this Court, affirming the judgment of the jury at trial and the sentence of the Trial Court.

#### STATEMENT OF THE FACTS

In the summer of 1975, the appellant, Dave Felger, and three other men, formed North American Financial Corporation. One of the projects of the corporation was a real estate development called Foxbridge. Appellant's chief responsibility in the corporation was to obtain funding for Foxbridge. (T.226) Appellant approached Deseret Federal Savings and Loan about obtaining a loan. (T.182) to the tight money market, appellant had, on previous occasions, obtained certificates of deposit (hereinafter CD's) which were placed in lending institutions to encourage them to make loans. (T.182-83) Appellant represented to Felger that it would be necessary to obtain CD's to get funding for Foxbridge. (T.126-27)

Accordingly, on September 3, 1975, Felger obtained a second mortgage on a home he owned. (T.125) A Cashier's Check for \$11,700 was made payable to the appellant. (T.126) Appellant told Felger he would be repaid out of the appellant's fee when funding for Foxbridge was obtained. (T.128, 161) On the same day, appellant Felger and Ed Eldredge drove to Zions First National Bank in downtown Salt Lake City where appellant was to transfer \$11,700 to a New York City bank, which would dispense certificates of deposit to be placed with Deseret Federal Savings and Loan. (T.127, 170) Appellant and Eldredge entered the bank while Felger waited in the car. (T.129) Upon returning to the car, appellant told Felger "everything was taken care of." (T.130)

On September 3, 1975, appellant opened a personal account with an initial deposit of \$11,000 (State's Exhibit 11-P) and obtained \$700 in cash (Exhibit 12-P). On that same day, he gave Eldredge a check for \$4,680 from the account. (T.172, Exhibit 13-P) Within two weeks, appellant had expended nearly \$11,000 from the account. (Exhibits 13-P through 18-P)

No certificates of deposit were obtained for placement with Deseret Federal Savings and Loan. (T.175) No

funding was received through that bank, and Felger has not recovered any of the \$11,700 given to appellant. (T.131) North American Financial Corporation subsequently dissolved, and the funding for Foxbridge was obtained through another source. (T.232)

The trial judge instructed the jury on all elements of the crime of theft. He further instructed the jury that, since intent is not always susceptible of direct proof, it must ordinarily be inferred from acts, conduct, statements and circumstances. Accordingly, the Court stated the law presumes a person intends the reasonable and ordinary consequences of his own acts. The Court added that this presumption could be overcome by evidence to the contrary. The Trial Court further instructed that no person could be found guilty of an offense unless his conduct was prohibited by law and he acted intentionally or knowingly.

#### ARGUMENT

##### POINT I

IT WAS PROPER TO INSTRUCT THE JURY THAT THE LAW PRESUMES A PERSON INTENDS THE REASONABLE AND ORDINARY CONSEQUENCES OF HIS ACTS.

It is well established that the prosecution in a criminal case has the burden of proving all elements of

the crime beyond a reasonable doubt. This burden was reaffirmed by the United States Supreme Court in In re Winship, 397 U.S. 358 (1970), as follows:

Lest there be any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

397 U.S. at 364. Accordingly, the only burden placed upon the defendant in any criminal case is to present evidence sufficient to raise a reasonable doubt about his guilt in the minds of the jurors. Commenting upon the weight of evidence required to raise a defense, this Court observed:

... it is to be kept in mind that the burden of proving the defendant's guilt beyond a reasonable doubt is always upon the state both initially and ultimately. Therefore, the only requirement on the defense ... is that it be sufficient to raise a reasonable doubt.

State v. Curtis, 542 P.2d 744, 746 (Utah 1975).

The principal issue in the present case was whether the appellant acted with the requisite intent to be guilty of theft. In order to prove intent, the State was required to show appellant had the "purpose to permanently deprive another of his property." The appellant



objects to a portion of Jury Instruction No. 6, which reads:

Intent or purpose, being a state of mind, is not always susceptible of proof by direct and positive evidence and must ordinarily be inferred from acts, conduct, statements and circumstances. The law presumes that a person intends the reasonable and ordinary circumstances of his own acts. However, this presumption is a rebuttable presumption and may be overcome by evidence to the contrary.

Appellant contends that this language could be interpreted by the jury as requiring the defense to prove absence of intent. Thus, the appellant claims this instruction relieved the prosecution from the burden of proving all elements of the offense beyond a reasonable doubt in violation of due process guarantees. Respondent rejects the contention and asserts that the instruction was proper.

This Court recognized the value of making reasonable inferences from proven facts in State v. Peterson, 22 Utah 2d 377, 453 P.2d 696 (1969). The defendant in that case was convicted of assault with a deadly weapon with intent to do bodily harm. On appeal, defendant contended that the intent to do bodily injury was not sufficiently established by the proven fact that defendant made a slashing motion

toward his victim with a hunting knife, injuring the victim's hand. This Court affirmed the conviction, stating:

... It is true that the State was unable to prove directly what was in the defendant's mind relative to doing harm to the victim; and that he in fact denied having any such intent. However, his version does not establish the fact, nor does it even necessarily raise sufficient doubt to vitiate the conviction. If it were so, it would lie within the power of a defendant to defeat practically any conviction which depended upon his state of mind. As against what he says, it is the jury's privilege to weigh and consider all of the other facts and circumstances shown in evidence in determining what they will believe. This includes not only what was said and what was done, but also the conduct shown, which in this instance they may well have regarded as speaking louder than the defendant's later defensive claims as to what his intentions were. This is in accord with the elementary rule that a person is presumed to intend the natural and probable consequences of his acts.

22 Utah 2d at 378, 453 P.2d at 697. (emphasis added)

Allowing the jury to make reasonable inferences from proven facts does not relieve the prosecution of its burden to prove all elements of an offense beyond a reasonable doubt. The instruction that a person intends the reasonable and ordinary consequences of his acts recognizes the fact that direct evidence of a person's intent is seldom available. As a result, intent, like any other fact, must often be

inferred from evidence of the surrounding circumstances. In the present case, the challenged instruction merely allowed the jury to reach reasonable conclusions based upon facts proven beyond a reasonable doubt by the prosecution.

It is well established that due process guarantees require a criminal conviction to be based upon proof beyond a reasonable doubt of all elements of the crime charged. In re Winship, 397 U.S. 358 (1970). Accordingly, the ultimate test for judging the constitutional validity of a presumption is to determine whether it undermines "the factfinders' responsibility ... to find the ultimate facts beyond a reasonable doubt." County Court of Ulster City v. Allen, 99 S.Ct. 2213, 2224 (1979). The starting point in applying this test is to determine whether the presumption under review is permissive or mandatory. A mandatory presumption "tells the trier of fact that ... they must find the elemental fact based upon proof of the basic fact." 99 S.Ct. at 2224. When a permissive inference is used, the prosecution does not rest its case entirely upon the presumption but "may rely upon all of the evidence in the record to meet the reasonable doubt standard." 99 S.Ct. at 2229.

In the Ulster case, the United States Supreme Court upheld a New York statute which provided that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons occupying the vehicle. The jury was instructed that,

... upon proof of the presence of the machine gun and the hand weapons, you may infer and draw conclusions that such prohibitive /sic/ weapon was possessed by each of the defendants who occupied the automobile at the time such instruments were found. The presumption ... is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.

99 S.Ct. at 2227. The jury in Ulster was also instructed on the presumption of innocence, the necessity to find intent coupled with constructive possession, and the need to find all elements of the crime beyond a reasonable doubt.

99 S.Ct. at 2227. Despite the fact that the instruction called for the defendant to raise "substantial evidence" contradicting the presumed fact, the Court concluded that the inference was permissive since the jury instructions as a whole "directed the jury to consider all the circumstances tending to support or contradict the inference... ."

99 S.Ct. at 2227.

Having made this determination, the Supreme Court stated that the standard to be used in judging a permissive inference was whether,

... There is a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former.

99 S.Ct. at 2228.

Respondent submits the jury instruction that "a person intends the reasonable and ordinary consequences of his own acts" given in the present case created a permissive inference which did not undermine the jury's duty to find all elements of the crime beyond a reasonable doubt. Respondent further contends that this instruction satisfies the rational connection standard noted in Ulster, since, under the circumstances of this case, it is "more likely than not" that appellant's actions demonstrated his intent to deprive another of property.

Viewed as a whole, the jury instructions clearly indicated that the presumption was to be treated as a permissive inference. It is established by Utah law that jury instructions must be reviewed in context. Brunson v. Strong, 17 Utah 2d 364, 412 P.2d 451 (1966); Taylor v. Johnson, 18 Utah 2d 16,

414 P.2d 575 (1966).

The appellant, however, bases his contention upon one paragraph of one instruction which he alleges was improper and ignores the import of the instructions as a whole. The jury was carefully instructed upon the presumption of innocence, the need to find guilt beyond a reasonable doubt (R.42), and the defenses available to the defendant. (R.45) Furthermore, language within the disputed instruction itself shows that the jury could not have interpreted the presumption as conclusive. First, the jury was instructed that the purpose to deprive meant to have the "conscious object to withhold property permanently, or for so extended a period that a substantial portion of its economic value ... would be lost." It is not likely that a juror could conclude appellant had the conscious object to deprive another of his property, simply because this resulted from his actions. Second, prior to directing that the law presumes a person intends the reasonable and ordinary consequences of his acts, the Court stated that intent "must ordinarily be inferred from acts, conduct, statements and circumstances." (R.43) The effect of using presume and infer interchangeably would indicate to lay

jurors that they were free to accept or reject the presumption. The Court went on to state that the presumption was rebuttable and could be overcome by evidence to the contrary. This instruction allowed the jury to reject the presumption if any evidence to the contrary was presented. This burden is no greater than the burden of creating a reasonable doubt which always rests upon the defendant. Finally, the instruction states that "no person is guilty of an offense unless ... he acts intentionally or knowingly." (R.43) These instructions, as a whole, make it improbable that the jury could find appellant intended to deprive another of property based solely on the presumption that he intended the consequences of his acts. The jury instructions in this case merely allowed the jury to make reasonable inferences about appellant's intent based upon facts presented in the State's case.

The permissive inference included in the jury instructions at issue satisfies the rational connection standard of the Ulster case, supra. Satisfaction of this standard requires a showing that the fact presumed is "more likely than not to flow from" the facts that the prosecution proved. 99 S.Ct. at 2228. In the present case, proof of appellant's acts indicates it is more likely than not he

acted with the purpose to permanently deprive another of property. First, after representing that money obtained from Felger would be used to obtain certificates of deposit (CD's) to induce the lender to make a loan, appellant placed the funds in a private account. Second, within roughly two weeks of its deposit, most of the funds had been spent for private purposes, and no CD's had been obtained. Third, appellant had not repaid any portion of the money he received from Felger. It was more likely than not that the appellant's acts would result in Felger's being deprived of his property. Thus, there is a rational connection between the facts proved and the presumption that appellant intended to deprive Felger of his property.

The appellant cites Sandstrom v. Montana, 99 S.Ct. 2450 (1979), in support of his contention that, if the disputed instruction could have been interpreted by a reasonable jury to shift the burden of persuasion to the defense, the instruction violated due process guarantees. However, the instruction reviewed in Sandstrom is significantly different from the instruction in the present case. As the Court noted in Sandstrom,



Sandstrom's jurors were told that 'the law presumes that a person intends the ordinary consequences of his voluntary acts.' They were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it.

The Court held that, since a reasonable juror could interpret this instruction either as a mandatory presumption or as a presumption shifting the burden of proving intent to the defense, it violated due process. 99 S.Ct. at 2459-60. However, the Court expressly stated it was not reaching the question of the validity of a presumption when the jury is instructed that it may be rebutted by evidence to the contrary. 99 S.Ct. at 2455.

The Utah Supreme Court recently reviewed the Sandstrom holding in the case of State v. Eagle, No. 16129 (Utah Sup. Ct., May 6, 1980). In that case, the Court reviewed the instruction that:

A person's state of mind is not always susceptible of proof by direct and positive evidence, and, if not, may ordinarily be inferred from acts, conduct, statements, or circumstances.

This Court concluded that, since the jurors were instructed that intent could be inferred rather than presumed, the instruction was valid. Language similar to that reviewed in

State v. Eagle, supra, was included in the disputed instruction. Regardless of the fact that the Trial Court also used language of presumption, respondent submits that the instruction would clearly indicate to jurors that they could accept or reject the presumption based upon all the evidence presented.

The jury in the present case was also instructed that it was a defense to theft if the appellant "acted in the honest belief that he had a right to obtain or exercise control over the property." Accordingly, in reaching a guilty verdict, the jury weighed evidence supporting the presumption against appellant's testimony that he had been authorized to use the funds for personal expenses. Recognizing the jury's duty as finder of fact, this Court stated in State v. Coffey, 564 P.2d 777 (Utah 1977):

... it is the responsibility of the jury to determine whether the elements of the crime have been proved beyond a reasonable doubt. The court on appeal examines the evidence in the light most favorable to the verdict; and if it appears that the jury acted fairly and reasonably, the judgment will not be disturbed.

564 P.2d at 778-9.

Based on the evidence offered by the State, the jury

reasonably concluded that the appellant's acts indicated his intent to deprive Dave Felger of his property.

In conclusion, the instruction that a person is presumed to intend the reasonable and ordinary consequences of his own acts did not violate due process, since it was clearly intended to be a permissible inference and not the sole basis for finding intent. This permissive inference satisfies the rational connection test given by the United States Supreme Court in the Ulster case, supra. Finally, the present instruction was not improper under the Supreme Court's recent ruling in Sandstrom v. Montana, supra.

#### POINT II

THE JURY INSTRUCTION THAT APPELLANT COULD BE FOUND GUILTY OF THEFT IF HE ACTED INTENTIONALLY OR KNOWINGLY WAS PROPERLY GIVEN.

The appellant contends the Trial Court erred by giving a jury instruction that:

In such a case as this, under the law, no person is guilty of an offense unless his conduct is prohibited by law and he acts intentionally or knowingly. A person acts intentionally under the law, either with respect to the nature of his conduct or to the result of his conduct, when it is that persons's conscious objective or desire to engage in the conduct or cause the result. A person acts knowingly when he is aware of the nature of his conduct or the existing circumstances or that his conduct is reasonably certain to cause the result. (R.43)

The appellant contends that, since the statutory definition of theft includes the specific intent element of purpose to deprive another of his property, the jury should not have been instructed that the appellant could be found guilty if he acted knowingly. The appellant further claims that this instruction made it possible for the jury to find appellant guilty if they concluded he engaged in reckless conduct which was reasonably certain to deprive another of his property. This instruction did not constitute error, and even if the Court had erred in giving the instruction, the error was harmless under the circumstances of this case.

The appellant was charged with theft, which is defined in Section 76-6-404 of the Utah Code Ann. (1953), as amended, as follows:

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

The Trial Court instructed the jury on each element of the offense, defining purpose to deprive as,

... to have the conscious object to withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost... .

The source of this definition is Utah Code Ann. Section 76-6-401 (1953), as amended. Inclusion of the statutory definition of purpose to deprive in the same instruction with the disputed language makes it impossible the jury could have found appellant guilty, based upon reckless conduct which was substantially certain to result in deprivation of another's property. In reaching a guilty verdict, it was necessary that the jury find appellant acted with the conscious object to deprive another of property. In accordance with the jury instructions, such a conclusion necessarily would be based upon a finding appellant acted at least with awareness of the nature of his conduct, knowing that it was reasonably certain to result in depriving another of property. (R.43) Thus, the conclusion that appellant had the purpose or conscious object to deprive another of property cannot, as appellant contends, rest upon a finding that he engaged in reckless conduct which was reasonably certain to result in deprivation of property. Utah Code Ann. Section 76-2-10 (1953), as amended, states that a person acts recklessly,

... when he is aware of but consciously disregards a substantial and unjustifiable risk that ... the result will occur.

Acting in conscious disregard of a substantial risk does not

approach the culpability of acting with the conscious object or purpose to deprive another of property permanently, or for an extended period. Therefore, appellant's contention that the disputed instruction allowed the jury to base its verdict upon a showing of reckless conduct is without merit.

Even if the disputed instruction had been given improperly, it was a harmless error since there was ample evidence that the appellant acted with the purpose to deprive another of property. The State's evidence showed that Felger gave appellant \$11,700 for the express purpose of obtaining certificates of deposit. Appellant placed the funds in a private account and wrote checks for his personal use. No certificates of deposit were ever placed with the lender, and Felger has not been repaid. The evidence clearly shows that these acts were intended to or reasonably certain to deprive Felger of his property. The only evidence to the contrary was the appellant's testimony that he was told he could use the money for his expenses. The jury was also instructed on this theory of defense, and chose not to accept it.

This Court encountered a similar claim in State v. Kazda, 545 P.2d 190 (Utah 1976). The defendant in that case

was charged with theft of copper wire from telephone poles. The Trial Court instructed the jury that "no person is guilty of an offense unless .. he acts intentionally, knowingly, recklessly, or with criminal negligence... ."

In reviewing this instruction on appeal, this Court stated:

... we concede that we do not see the applicability of the terms 'recklessly or with criminal negligence' to the particular circumstances involved here. The critical issue of fact centered upon whether, as defendant Kazda said: There was a 'Mr. Johnson' who gave him a contract to remove the wires, or whether, as other evidence showed, that story was a fiction protective of the defendant... . The jury whose prerogative it is to choose what evidence it will believe, chose to believe that of the State. Despite defendant's brave efforts to make it appear to the contrary, we do not see how under the circumstances shown, and the other instructions given, the inclusion of the terms complained of could have been prejudicial to the defendant.

545 P.2d at 192.

In the present case, the jury also chose to accept the State's version of the evidence. The appellant presented his defense to the jury and the jury was instructed on the law regarding mistake as a defense to theft. Nevertheless, this testimony was not sufficient to raise a reasonable doubt in the minds of the jury.

The rule regarding reversible error was stated by this Court in Ortega v. Thomas, 14 Utah 2d 296, 383 P.2d 406 (1963), as follows:

In order to justify reversal, the appellant must show error that was substantial and prejudicial in the sense there is at least a reasonable likelihood that in the absence of the error the result would have been different.

383 P.2d at 408.

For appellant to prevail on appeal, he must show that the Trial Court's instruction as to the necessary intent for the offense was such prejudicial error that "there is at least a reasonable likelihood" that, excluding such an error, the result would have been different. In view of the substantial evidence showing the relationship between the appellant's acts and the result of depriving Felger of his property, the respondent submits that any alleged error in instructing the jury was harmless.

#### CONCLUSION

The jury instruction that a person presumes the reasonable and ordinary consequences of his acts did not result in a denial of due process under recent decisions of the United States Supreme Court, since this instruction,



viewed in context, created a permissive inference which did not undermine the jury's duty to base its verdict upon proof beyond a reasonable doubt of all elements of the crime.

The instruction that, in order to be guilty of theft, a person must act intentionally or knowingly was properly given since the jury was adequately instructed in all elements of the crime and given statutory definitions of each element. For the foregoing reasons, the respondent urges this Court to affirm the conviction and sentence the accused.

Respectfully submitted,

ROBERT B. HANSEN  
Attorney General

CRAIG L. BARLOW  
Assistant Attorney General  
Attorneys for Respondent