

1999

Utah v. Robert W. Stringham and Gale I. Stringham : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

vs.

**ROBERT W. STRINGHAM and
GALE I. STRINGHAM,**

Defendant and Appellant.

Case No. 990630-CA

Priority No. 2

BRIEF OF APPELLEE

AN APPEAL FROM A JUDGMENT OF CONVICTION FOR THIRTEEN/SIX COUNTS OF COMMUNICATIONS FRAUD, EACH A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-10-1801 (1990), AND ONE COUNT OF RACKETEERING, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-10-1603 (1990), IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH, SALT LAKE COUNTY, THE HONORABLE ANTHONY B. QUINN PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

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vs.

**ROBERT W. STRINGHAM and
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Defendant and Appellant.

Case No. 990630-CA

Priority No. 2

BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

Defendant Robert W. Stringham appeals from a judgment of conviction for thirteen counts of communications fraud, all second degree felonies, in violation of Utah Code Ann. § 76-10-1801 (1990), and one count of racketeering, a second degree felony, in violation of Utah Code Ann. § 76-10-1603 (1990). Defendant Gale I. Stringham appeals from a judgment of conviction for five second degree felony counts of communications fraud and one second degree felony count of racketeering. This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES

The following issues are presented to the Court for review, together with the respective standards of appellate review:

FIRST ISSUE ON APPEAL. Were defendants entitled to specific performance of a tentative plea offer which was, in any event, rescinded by the prosecutor before it was submitted to the trial court for approval?

Standard of Review. The trial court's findings pertaining to the parties' plea negotiations are questions of fact reviewable by this Court under a clearly erroneous standard. *See State v. Nine Thousand One Hundred Ninety-nine Dollars, United States Currency*, 791 P.2d 213, 216 (Utah App. 1990). The trial court's ruling as to whether or not an alleged plea bargain is enforceable is a question of law reviewed for correctness. *See State v. Patience*, 944 P.2d 381, 384-85 (Utah App. 1997) (holding that whether or not the State is entitled to rescind the plea agreement is a question of law).

SECOND ISSUE ON APPEAL. Having properly instructed the jury regarding the mens rea element of communications fraud, was the trial court correct in refusing to give defendants' proposed "good faith" jury instruction?

Standard of Review. The appellate court reviews a judge's refusal to give a jury instruction for correctness. *State v. Parra*, 972 P.2d 924, 927 (Utah App. 1998); *accord State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992).

THIRD ISSUE ON APPEAL. Was the evidence sufficient at the close of the State's case to warrant proceeding with trial against defendant Gale Stringham, and if so, was the evidence sufficient to support her convictions for communications fraud and racketeering?

Standard of Review. The denial of a motion to dismiss for failure to establish a prima facie case is a question of law which this Court reviews for correctness. *State v. Spainhower*,

1999 UT App. 280, 988 P.2d 452. Defendant's challenge to the trial court's denial of her motion to dismiss is reviewed under the same standard as that applied to her claim that the evidence is insufficient to support the jury's verdict. *See State v. Dibello*, 780 P.2d 1221, 1225 (Utah 1989). Accordingly, this Court will uphold the trial court's denial of the motion to dismiss, as well as the jury's verdict, "if, upon reviewing the evidence and all inferences that can be reasonably drawn from it, [the Court] conclude[s] that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *Id.*

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The constitutional provisions, statutes, and regulations that are relevant to a determination of this case include sections 76-2-103 and 76-10-1801, Utah Code Annotated. Section 76-2-103 is set out in Addendum A and Section 76-10-1801 is set out in Addendum B.

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS BELOW

Defendant Robert Stringham was charged by information with thirteen counts of communications fraud and one count of racketeering. RS: 1-13; GS: 211-20.¹ His wife,

¹The trial court maintained a separate pleadings file for each defendant. In large part, the files are identical, containing the original pleading or a copy. Citations generally will be to the file containing the original record. Records in Robert Stringham's file will be cited as "RS" followed by the record index number (e.g., RS: 12). Records in Gale Stringham's file will be cited as "GS" followed by the record index number (e.g., GS: 12). Testimony at trial will be cited according to the index number assigned to each volume of the transcript followed by the internal transcript number (e.g., R. 363: 12).

defendant Gale Stringham, was charged with five counts of communications fraud and one count of racketeering. RS: 1-13; GS: 211-20. All counts were charged as second degree felonies. RS: 1-13. Because all judges of the Fourth District Court were recused from the case, and to avoid unnecessary travel by the majority of witnesses, the attorneys for both parties, and the judge reassigned to the case, venue was changed from Utah County to Salt Lake County and the case was reassigned to the Third District Court. RS: 43-45. Following a preliminary hearing, defendants were bound over for trial on all counts. GS: 53-54.

Four days before the start of trial, defendants filed a Motion to Enforce Plea Bargain Agreement. RS: 139-40. The State filed affidavits denying that an agreement was reached, GS: 183-86, and, after taking proffered testimony and hearing oral argument, the trial court denied the motion. R. 363: 3-13. Following a seven-day trial, the jury convicted defendants as charged. RS: 282-84; GS: 299-300; R. 368: 1440-44. On defendants' motion and pursuant to section 76-3-402, Utah Code Annotated, the trial court entered a judgment of conviction for third degree felonies for each charge. RS: 289-90, 321; GS: 335.

The trial court sentenced defendants to concurrent prison terms of zero-to-five years on each count, but suspended the prison terms and ordered that defendants serve 60 days of home confinement. RS: 319, 321-23; GS: 333A, 335. The trial court placed defendants on supervised probation for 36 months and ordered each to provide 100 hours of community service and pay a \$700 fine. RS: 319, 323-24; GS: 333A, 336-37. Both defendants timely appealed. RS: 334; GS: 342.

SUMMARY OF FACTS

UTAH TREATMENT AND ADDICTION HEALTH SERVICES

Organization. In the fall of 1992, defendants Robert and Gale Stringham, together with Carolyn and Bruce Edwards, organized Utah Treatment and Addiction Health Services (UTAHS), a business that would provide counseling for those with substance abuse and domestic violence problems. R. 363: 131-33; R. 367: 1151. Carolyn Edwards was president and Gale Stringham vice-president of the company. R. 363: 133; R. 367: 1255. Although Carolyn Edwards was listed as president of UTAHS, she maintained that position in title only. R. 363: 133. Defendants controlled and directed the business. R. 363: 133, 225. Robert Stringham administered the business operations. R. 363: 133-34. He was generally responsible for the company's accounting. R. 363: 133-34. Compensation for the four was not fixed, but determined by Robert Stringham periodically after he paid the organization's bills. *See* R. 363: 225-26. Although Robert Stringham normally handled the billings, Gale Stringham was also aware of the company's billing practices and instructed employees, as well as Bruce and Carolyn Edwards, regarding billing procedures. R. 363: 133-34, 166-67, 225, 241-42. Carolyn Edwards never handled the billing except as instructed by defendants. R. 363: 166-67, 206-07, 224-25.

Staffing. Both defendants performed counseling services at UTAHS. R. 363: 133, 142, 144, 146, 153-54. Although Robert Stringham was a certified alcohol and drug counselor, he was not licensed by the State in any profession or occupation. R. 364: 306. Gale Stringham received her Ph.D. in psychology in 1993 but was not licensed. SE1; R. 364:

412-13; R. 367: 1113. However, she was working towards licensure at UTAHS under the supervision of Dr. Geri Alldredge, a licensed psychologist. R. 364: 410-11, 415; SE1. Carolyn Edwards was a certified alcohol and drug counselor, but was not licensed by the State in any profession or occupation. R. 363: 130, 138; SE1.

UTAHS hired William Seifrit, Shauna Orullian, Mark Hibler, Beverly Edington, and Deborah Class as counselors, none of whom were licensed in any profession or occupation. R. 363: 142, 175, 227-28; R. 364: 454; R. 365: 568-69; SE1. UTAHS also retained a number of college interns, who were also unlicensed, to assist in the counseling, including Susan Hollenbeck, Annette Proctor, Kenneth Seely, Clifford Harris, and Eric Ewell. R. 363: 203-04, 228; R. 366: 971, 996, 1018.² Although she was not licensed, Gale Stringham supervised Harris and Ewell who conducted group therapy sessions for children. R. 366: 1020-21.

Dr. Charles Walton. In December 1992, UTAHS retained the services of Dr. Charles Walton to co-facilitate domestic violence groups on Wednesday nights with Carolyn Edwards. R. 363: 135-38, 181; R. 366: 906. In exchange for Dr. Walton's services and pursuant to his request, UTAHS provided Dr. Walton with health insurance coverage. R. 363: 138. Although Dr. Walton did not have any training in domestic violence counseling, as a licensed physician, he supervised Carolyn Edwards in their Wednesday night groups. R. 366: 909-13. Dr. Walton did not participate in any other groups or supervise any other person. R. 363: 139; R. 366: 912-13. On rare occasions, Dr. Walton consulted with a patient

²Although Susan Hollenbeck was a licensed social worker (LSW) in 1993, she did not become a licensed clinical social worker (LCSW) until 1995. R. 366: 996; SE1.

referred to him by other counselors to determine whether the patient needed a prescription for an anti-depressant or Antabuse. R. 366: 914, 959.

At Robert Stringham's request, Dr. Walton provided him with a signature stamp to make it easier for defendant, who handled billing in Orem, to bill Dr. Walton's patients. R. 366: 919-20.³ Dr. Walton made it clear to defendant that the stamp was only to be used for billings pertaining to clients whom Dr. Walton was personally treating, either in group therapy with Carolyn Edwards, or in the rare cases of individual counseling. R. 366: 919-20. Dr. Walton did not authorize use of his stamp to endorse checks made payable to him. R. 366: 925. Indeed, he was unaware that insurance claims would be submitted under his social security number or that any checks from insurance carriers would even be made out to him. R. 366: 925-27, 945.

Contract to Provide Counseling for Domestic Violence Offenders. In November 1992, UTAHS procured a contract with the Utah State Department of Human Services ("DHS") to "provide domestic violence therapy to victims, perpetrators, and children." R. 366: 1047; DE81. As such, UTAHS provided counseling to perpetrators of domestic violence who had been ordered by a criminal court to undergo counseling as a result of the Cohabitant Abuse Act. DE81 (Attachment E, ¶ 4); *see also* R. 363: 236; R. 366: 943, 1003; R. 367: 1163. Under the DHS Contract, UTAHS represented that it met "all applicable

³Robert Stringham told Dr. Walton that he needed the stamp because there were "quote, 'a few clients'—coming through who had insurance" and that it would be helpful to have his stamp so defendant could stamp the claim forms when those clients' names came through. R. 366: 920.

licensing or other standards required by Federal and State laws or regulations” and agreed that it would “continue to comply with such licensing or other applicable standards” for the duration of the contract. DE81 (Attachment B, ¶ 1).

Licensing Requirements. When UTAHS was initially organized in 1992, the State had no licensing requirements for domestic violence counseling. R. 364:303-04, 306-08. However, in November 1992, a rules committee, which included Robert Stringham, proposed rules regulating domestic violence counseling. R. 363: 303-04; SE15. The proposed rules went into effect on December 15, 1992 following the statutory public comment period and remained consistent through at least February 1994. *See* R. 365: 547-49, 562. The rules required that domestic violence treatment be given by a licensed physician, psychologist, clinical social worker (LCSW), psychiatric nurse, or marriage and family therapist (collectively referred to herein as “licensed professionals”). R. 364: 307-08; SE15; Utah Admin. Code R501-3-4 (1993). A graduate student working toward licensure could also provide treatment, as could a licensed social services worker, so long as they did so under the supervision of a licensed professional. SE15; Utah Admin. Code R501-3-4 (1993).

PATIENT BILLINGS

William Carter. William Carter was court-ordered to undergo domestic violence treatment with UTAHS in February 1993. R. 364: 462-63, 470. Carter quit attending group counseling after the fifth or sixth session, but later resumed the therapy when the criminal court again ordered him to do so. R. 364: 464, 466, 474-75. The counselors who led Carter’s group sessions were not licensed to provide the domestic violence counseling.

Carolyn Edwards performed Carter's initial "intake" and sat in on some of the group therapy sessions, but did not lead the sessions. R. 364: 477-78. Defendant Robert Stringham led the first few sessions. R. 364: 465. Bill Seifrit, a Ph.D. in communications, led the balance of the group sessions attended by Carter. *See* R. 363: 135, 142, 175, 227; R. 364: 454, 477-78; R. 365: 568. Dr. Walton did not attend or otherwise supervise any of the counseling. R. 363: 139; R. 364: 467; R. 366: 912-13.

UTAHS submitted bills for Carter's therapy to Jenson Administrative Services ("JAS"), a third-party administrator of Carter's employee insurance fund. R. 364: 485, 488. The JAS policy dictated that only individual therapy by a physician or licensed therapist be paid; JAS did not pay for group therapy. R. 364: 493, 495-96, 499. Although Carter participated only in group therapy, UTAHS billed his insurance provider for fifteen *individual* psychotherapy sessions plus his initial intake. *See* R. 364: 488-89; SE18. Moreover, UTAHS identified Dr. Walton as the person who provided the counseling even, though he provided neither group nor individual counseling. R. 364: 494. In all, UTAHS billed Carter's insurance provider \$1,440. R. 364: 496; SE18.

Marty Hooker. Marty Hooker obtained counseling for domestic violence at UTAHS at the suggestion of his employer. R. 364: 510-11. Hooker attended approximately 26 group therapy sessions from March to November 1993. R. 364: 511, 515, 526; SE22. Hooker paid \$15 per session and his insurance carrier, PEHP, generally paid \$40 per session. R. 364: 515-16; SE 22. Dr. Walton did not provide any counseling in the group therapy sessions attended by Hooker. R. 364: 513-14. Nonetheless, UTAHS submitted claim forms to PEHP

representing that Dr. Walton provided the counseling or supervised the counseling. R. 364: 527; SE22. PEHP would not have paid for the services had it known that Dr. Walton neither provided the counseling nor supervised the services. R. 364: 527. In all, UTAHS billed PEHP \$840, \$370 of which was paid by the insurance provider. R. 364: 528; SE22.

Anthony Weed. Pursuant to a court order, Anthony Weed began attending group counseling for domestic violence in March 1993. R. 365: 590-91. Weed attended weekly group therapy intermittently for at least six months. R. 365: 592, 594; SE20. Weed made a \$10 co-payment to UTAHS on each visit and the remainder was billed to his insurance carrier, IHC. R. 365: 593; SE20. He received no counseling whatsoever from Dr. Walton, nor did he receive any counseling from Carolyn Edwards. R. 364: 513-14; 365: 593, 597-98. Nevertheless, UTAHS represented to IHC on the claims forms that Dr. Walton provided the counseling. R. 365: 602-05, 612; SE20. IHC would in no case pay a claim for therapy provided by an individual who was not licensed or under the immediate personal supervision of someone who was licensed. R. 365: 602-03, 622-23. In all, UTAHS billed IHC \$600 for 15 group therapy sessions. R. 365: 603-04; SE20. IHC did not pay any claim submitted by UTAHS in this case because Dr. Walton was not a contracted IHC provider. R. 365: 604; SE20. Because Dr. Walton was a licensed physician, he would have otherwise qualified for payment but for the fact that he did not have a contract with IHC. R. 365: 617-18.

Jan Kohler Thorn. UTAHS invited Jan Kohler Thorn to attend group counseling after her husband had been court-ordered to attend. R. 365: 635. Defendant Robert Stringham led the group therapy sessions and he was assisted by an intern, but no one else.

R. 365: 638-39, 642, 649. Defendant Robert Stringham represented to the group that he was a “Ph.D.” and a licensed therapist and that they could call him “Dr. Bob.” R. 365: 640. Carolyn Edwards provided some individual therapy to Thorn for her depression. R. 365: 648, 656-57. In all, Thorn received counseling from UTAHS for approximately fifteen months. R. 365: 656. UTAHS billed Crime Victims Reparations (CVR) \$720 for 18 group therapy sessions and \$1,200 for 15 individual therapy sessions. SE28. Although CVR did not receive or approve a treatment plan, the bill submitted by UTAHS to CVR represented that Dr. Walton provided the counseling. R. 365: 699-700; *see* SE28.⁴ Although CVR generally does not make payments without approving a treatment plan, it nevertheless paid UTAHS \$1,440 in claims. R. 365: 699, 702; SE28. Had CVR known that Dr. Walton did not conduct the therapy sessions, it would not have paid for the counseling. R. 365: 700.

Lona Allen. For just over a year, Lona Allen received group therapy at UTAHS with her husband who had been court-ordered to receive counseling. R. 365: 659-60. She received group alcohol abuse counseling on Mondays from Carolyn Edwards and group domestic violence counseling on Wednesdays from both Dr. Walton and Carolyn Edwards. R. 365: 662-63, 679-80.⁵ She never received any therapy from Defendant Gale Stringham or Dr. Geri Alldredge. R. 365: 665. Nevertheless, defendant Gale Stringham submitted a

⁴Although the Active Patient Ledger submitted with the bill indicated that Kohler attended one individual therapy session with defendant Gale Stringham, it does not appear that UTAHS billed CVR for that particular session. *See* SE28; *see also* R. 365: 700.

⁵Allen testified that Dr. Walton conducted the Wednesday night therapy sessions “sometimes.” R. 365: 679-80.

treatment plan to CVR representing that she had and would provide the counseling under the supervision of Dr. Geri Alldredge. *See* R. 365: 689-91; SE27. Had CVR known that defendant Gale Stringham had not provided any of the services or that Dr. Alldredge had not supervised any of the counseling, it would not have paid the claims and CVR would have required the submission of a new treatment plan for review. R. 365: 691. The bills submitted by UTAHS to CVR also indicated that defendant Gale Stringham had provided the counseling services. R. 365: 695; *see also* Active Patient Ledgers attached to SE27. In all, CVR paid the entire \$2,405 billed by UTAHS for counseling services. R. 365: 697.

Ken Fisk. Pursuant to a court order, Ken Fisk attended group counseling for domestic violence at UTAHS for approximately six months beginning in March 1993. R. 365: 732. Defendant Robert Stringham and Carolyn Edwards led the group therapy sessions and they were usually joined by an intern. R. 365: 735, 752. Dr. Walton did not conduct any of the therapy sessions. R. 364: 513-14; R. 365: 736. Fisk made a \$20 co-payment to UTAHS for each session and the balance was submitted to his insurance carrier, First Health. R. 365: 735, 749. Although Dr. Walton neither provided any counseling nor supervised any counseling, UTAHS submitted eleven claims for nineteen dates of service representing that Dr. Walton provided the services. R. 365: 757; SE32. In all, UTAHS billed First Health \$1,005 for services by Dr. Walton. R. 365: 758; SE32. First Health paid UTAHS \$302.50. R. 365: 758; SE32. Had First Health known that Dr. Walton did not provide or supervise the services, it would not have paid any of the claims. R. 365: 758, 774.

Debbie Frank. Debbie Frank attended group counseling for domestic violence with her husband Ken Fisk. R. 365: 781. Dr. Walton did not conduct or otherwise attend any of the therapy sessions involving Frank. R. 365: 785. After attending just five sessions, Frank quit attending, walking out on the fifth session because she was upset that the counselors made her feel that she was at fault for her husband's violence against her. R. 365: 784-85, 793, 798-800. Frank's husband, Ken Fisk, handled the insurance claims for Frank. R. 365: 784-85. Defendant Robert Stringham, who asked the group to call him Dr. Stringham, conducted the therapy sessions attended by Frank, and Carolyn Edwards assisted Stringham. R. 365: 784, 811. Nevertheless, defendant Gale Stringham submitted a treatment plan to CVR representing that she had provided the counseling under the supervision of Dr. Geri Alldredge. See R. 365: 692; SE29. In all, UTAHS billed CVR \$505 for 10 counseling sessions, only five of which Frank actually attended. R. 365: 697-98; SE29.⁶ Had CVR known that defendant Gale Stringham did not provide any of the services or that Dr. Alldredge had not supervised any of the counseling, it would not have paid the claims. R. 365: 691-92. UTAHS also billed First Health for the same therapy, again representing that Dr. Walton provided or supervised the therapy. R. 365: 759-60; SE31. First Health paid \$302.50 of those claims. See SE31. Had First Health known that Dr. Walton did not provide or supervise the therapy, it would not have paid any of the claims. R. 365: 760.

⁶Although defendant Gale Stringham billed CVR \$245 for an initial intake on March 17, 1993, Frank testified that she simply attended group therapy on that day. R. 365: 789-90; SE29.

Richard McGuire and Children. Pursuant to a court order, Richard McGuire received group counseling for domestic violence at UTAHS from April 1993 to January 1994. R. 366: 824, 831. His children also received group counseling at UTAHS during that period. R. 366: 825-27, 831. McGuire made a \$5 or \$10 co-payment on each visit and the remainder was billed to his insurance carrier, Educators Mutual. R. 366: 829. In all, UTAHS billed Educators Mutual \$2,720 for group therapy received by McGuire and four of his children. R. 366: 852-53. Educators Mutual paid UTAHS \$1,240 on those claims. R. 366: 852-53. Carolyn Edwards usually provided McGuire's therapy. R. 366: 827. Dr. Walton never provided or supervised any therapy for McGuire or his children. R. 364: 513-14; R. 366: 827, 830. Nonetheless, in each of the forty-six claims, UTAHS represented that Dr. Walton provided or supervised the therapy, and as a result, Educators Mutual made each of the checks payable to him. R. 366: 847-48, 857; SE34-38. Educators Mutual pays only for therapy provided by licensed psychiatrists, psychologists, physicians, and clinical social workers. R. 366: 855. Educators Mutual would not have paid the claims had it known that the therapy was not provided or supervised by Dr. Walton. R. 366: 848-51, 855.

SUMMARY OF ARGUMENT

Alleged Plea Agreement. Defendant has failed to demonstrate clear error in the trial court's finding that no plea agreement was reached. The prosecutor's offer was tentative and did not include all the necessary details of a plea agreement, such as the payment of restitution. Moreover, a binding plea agreement was not entered because it was never presented to the trial court for approval. Defendants' convictions were not the result of the

wrongful inducement of a plea offer by the prosecution, but they were result of a duly rendered jury verdict. Accordingly, defendants suffered no prejudice from the prosecutor's withdrawal of the tentative offer and they have no constitutional right to specific performance of any alleged agreement.

Proposed Good Faith Instruction. The trial court adequately instructed the jury regarding the requisite mental state required to find defendants guilty of communications fraud. The court instructed the jury that a guilty verdict could only be rendered if the State proved beyond a reasonable doubt that the representations or material omissions were made or omitted by defendants intentionally, knowingly, or with reckless disregard for the truth. The trial court then gave the jury detailed instructions regarding each mental state under which defendants could be convicted. These instructions, taken as a whole, provided defendants with the necessary framework to assert their good faith defense. Such a holding is consistent with the overwhelming majority of federal courts of appeals that have addressed the issue.

Sufficiency of the State's Evidence. Reviewing the evidence and all reasonable inferences that may be drawn from the evidence in a light most favorable to the guilty verdict, the State presented sufficient evidence in its case in chief to warrant submission of the matter to the jury. Defendant controlled and directed UTAHS with her husband and specifically instructed an employee who did billing for the company to identify Dr. Walton as the service provider even though Dr. Walton did not conduct or supervise the counseling. Such evidence was more than sufficient to proceed with the trial. Moreover, defendant's

claim that she honestly believed it was standard practice to identify the medical director as the service provider was not supported by the State's evidence nor defendant's expert. Accordingly, the evidence was also sufficient to support the jury verdict.

ARGUMENT

I. DEFENDANTS WERE NOT ENTITLED TO SPECIFIC PERFORMANCE OF A TENTATIVE PLEA OFFER WHICH WAS RESCINDED BY THE PROSECUTOR BEFORE IT WAS SUBMITTED TO THE TRIAL COURT FOR APPROVAL.

Without citing to the record, defendants allege that through their attorney, they accepted a plea offer from the prosecutor which would have resulted in defendant Robert Stringham's guilty plea to three third degree felony counts and in the court's dismissal of the remaining charges, including all counts against defendant Gale Stringham. Aplt. Brf. at 5, 7-8. Defendants contend that the trial court erred in refusing to order specific performance of the alleged plea agreement between defendants and the prosecutor. Aplt. Brf. at 7. Defendants' claim fails on two fronts. First, defendants do not demonstrate clear error in the trial court's finding that a final agreement was not reached. Second, even had an agreement been reached between the parties, it is not enforceable because it had never been presented to and accepted by the trial court.

A. The Trial Court's Finding that No Plea Agreement Was Reached Was Not Clearly Erroneous.

In seeking specific performance of the alleged plea agreement, defendant submitted to the trial court an affidavit from his defense attorney stating that the prosecutor and defense counsel agreed that the three-count plea by defendant Robert Stringham would be "an

appropriate disposition of the case.” RS: 145. Defense counsel stated that at the prosecutor’s request and “to avoid any misunderstandings,” he signed the yellow pad where the prosecutor had written the terms of the contemplated agreement. RS: 145-46. Finally, defense counsel alleged that after obtaining his clients’ consent, he left a message on the prosecutor’s voice mail indicating defendants’ “acceptance of the plea bargain agreement.” RS: 146. The State, however, disputed defendants’ allegations of an acceptance.⁷ The prosecutor’s paralegal, who retrieved defense counsel’s voice mail message, maintained that defense counsel “did not affirmatively accept the plea offer,” but simply said, “I think we’re close on the plea agreement.” R. 363: 12; GS: 186; RS: 146.

On the day of trial, the court heard argument on the motion. R. 363: 3-13. In proffering his own testimony, defense counsel described the nature of the plea negotiations. R. 363: 8. He represented to the court that he told the prosecutor he would “have to talk to [his] clients but [he] thought that [the three-count plea] might possibly work.” R. 363: 7. He represented that after obtaining defendants’ consent, he left a message at the telephone number provided by the prosecutor indicating: “I believe we’ve got a deal. I talked my clients into it. Let’s get together.” R. 363: 8-9. Based on the foregoing, the trial court denied the motion, finding that “there wasn’t an unequivocal acceptance of the offer.” *See* R. 363: 10.

⁷The State also disputed that a firm plea offer had been made. RS: 184. The trial court, however, did not expressly reach that issue. *See* R. 363: 3-13.

The trial court's determination that the voice mail message did not constitute an acceptance is a finding of fact which will not be reversed unless clearly erroneous. *Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1378 (Utah 1995); *see also Nine Thousand One Hundred Ninety-nine Dollars*, 791 P.2d at 216 (holding that the trial court's findings pertaining to a prosecutor's plea agreement based on extrinsic evidence will not be disturbed unless clearly erroneous). Under contract law, "[a]n acceptance is a manifestation of assent to an offer, such that an objective, reasonable person is justified in understanding that a fully enforceable contract has been made." *Cal Wadsworth*, 898 P.2d at 1376. An offer does not become binding until the offeree affirmatively and unequivocally accepts the offer. *See R.J. Daum Const. Co. v. Child*, 122 Utah 194, 200, 247 P.2d 817, 820 (Utah 1952) (holding that an acceptance "must be clear, positive and unambiguous"). A review of the facts before the court reveals that the trial court's ruling was supported by the evidence.

In this case, the prosecutor denied receiving any form of acceptance from defense counsel. GS: 184. The prosecutor's paralegal further stated in her affidavit that in defense counsel's voice mail message, he only said that he thought they were "close on the plea agreement." GS: 186. Although defense counsel denied in his proffer that he only indicated they were "close" to a deal, R. 363: 9-10, his proffer retreated from the language of his affidavit. In his proffer, defense counsel represented that he said in his message: "I believe we've got a deal. I talked my clients into it. Let's get together." R. 363: 8-9. Thus, counsel's statement that he "believed" they had a deal suggested that although a plea

agreement appeared probable, some doubt remained. Accordingly, he asked that the two sides get together again.

In light of the foregoing, it was not clear error for the trial court to find that defense counsel's voice mail message did not constitute an unequivocal acceptance so as to create a binding plea agreement. It cannot be said that defense counsel's message was "such that an objective, reasonable person [would be] justified in understanding that a fully enforceable contract [had] been made." *Cal Wadsworth*, 898 P.2d at 1376.

The trial court also concluded that the parties' failure to discuss the terms of restitution was fatal to a finding of a final agreement. R. 363: 10-11. The court's conclusion that failure to reach agreement on such an essential term as restitution is supported by contract law. Where "the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out[,] . . . the preliminary negotiations and agreements do not constitute a contract." *Daum Const.*, 247 P.2d at 200 (*quoting* Restatement of the Law of Contracts, Vol. 1, Ch. 3, Sec. 26). Defense counsel's message indicating that he again wanted to "get together" on the matter supports a conclusion that not all the necessary details had been finalized, at least one of which was the payment of restitution.

In short, resolving all disputed evidence "in a light most favorable to the trial court's determination," the trial court's finding that defendants did not accept the alleged plea offer was adequately supported by the record and this Court should therefore affirm the court's decision. *See State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994).

B. Defendants Have No Constitutional Right to a Plea Agreement That Was Not Presented to or Accepted by the Trial Court.

In any event, the application of contract law to plea agreements is inherently limited because plea agreements are not contracts. *Patience*, 944 P.2d at 387. The underlying right implicated in a plea agreement is constitutionally based rather than contractually based. *Id.* Therefore, the enforceability of an alleged plea agreement must be examined under the constitution. *Id.* Although “[p]rinciples of contract law provide a useful analytical framework’ in cases involving plea agreements, . . . [they] ‘cannot be blindly incorporated into the criminal law in the area of plea bargaining.’” *Patience*, 944 P.2d at 387 (quoting *United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980)); see also *State v. Gladney*, 951 P.2d 247, 248 (Utah App. 1998) (observing that “[c]ontract analysis has some application to plea agreements”).

Defendants contend that specific performance of the alleged plea agreement is required under the “fundamental right to fairness” guaranteed by the United States Constitution. See Aplt. Brf. at 8-9. Defendants’ contention is without support. The seminal decision addressing a defendant’s right to enforce a plea offer that is rescinded after acceptance by the defendant is *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543 (1984). In *Mabry*, the prosecutor offered to make a favorable sentencing recommendation if the defendant pled guilty to the charge of accessory after a felony murder. Three days later, defense counsel informed the prosecutor that his client accepted the offer. *Id.* at 506, 104 S.Ct. at 2545. After defense counsel communicated his client’s acceptance of the offer, the

prosecutor withdrew the offer and made a counteroffer involving a less favorable sentencing recommendation. *Id.* The defendant initially rejected the latter offer and proceeded to trial. *Id.* at 506, 104 S.Ct. at 2545-46. However, when the judge declared a mistrial on the second day of trial, the defendant accepted the offer and the court sentenced him accordingly. *Id.*

On appeal from the denial of defendant's federal habeas petition, the Supreme Court upheld the conviction, rejecting the defendant's claim that constitutional "'fairness' precluded the prosecution's withdrawal of a plea proposal once accepted" by defendant. *Id.* In so concluding, the High Court held that "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Id.* at 507-08, 104 S.Ct. at 2546 (footnote omitted).

Although the defendant's conviction in *Mabry* was based on a plea rather than a jury verdict as in this case, his complaint on appeal was no different than that of defendants here—the lost opportunity of a more favorable outcome. The Supreme Court rejected the defendant's complaint in *Mabry* because the "plea was in no sense induced by the prosecutor's withdrawn offer," and therefore was "in no sense the product of governmental deception." *Mabry*, 467 U.S. at 510, 104 S.Ct. at 2548. Likewise, defendants' conviction in this case was in no sense the product of government wrongdoing, but rather the result of the duly rendered verdict of a jury. Accordingly, this Court should also reject defendants' claim.

Citing to the Fourth Circuit Court of Appeals decision in *United States v. Cooper*, 594 F.2d 12 (4th Cir. 1979), defendants contend that they have a constitutional right to enforcement of the alleged plea agreement even though it was not presented to and accepted by the trial court. *See* Aplt. Brf. at 9. Defendants do not acknowledge *Mabry* nor do they acknowledge the Fourth Circuit's subsequent conclusion that *Mabry* "overruled [its] decision in *Cooper*." *Plaster v. United States*, 789 F.2d 289, 292-93 (4th Cir. 1986). In so concluding, the Fourth Circuit held that under *Mabry*, "a criminal defendant's acceptance of a prosecutor's proposed plea bargain does not create a constitutional right to have the bargain specifically enforced where the prosecutor withdraws the offer prior to the acceptance of the guilty plea." *Id.*

Defendants reliance on the Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971), is also misplaced. *See* Aplt. Brf. at 8-9. In *Santobello*, the prosecutor recommended that defendant be sentenced to the maximum one-year term even though the defendant had entered a guilty plea more than six months earlier based on the State's agreement not to make a sentencing recommendation. *Id.* at 258-59, 92 S.Ct. at 497. The High Court reversed the defendant's conviction because the plea was obtained by the State's inducement. *Id.* at 261, 92 S.Ct. at 499. Unlike *Mabry* and the facts of this case, the defendant's conviction in *Santobello* was the product of governmental inducement. As such, *Santobello* is inapposite. As held by the Supreme Court in *Mabry*, the Constitution "is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." 467 U.S. at 511, 104 S.Ct. at 2548.

The Utah Supreme Court has held that “plea agreements are binding on the parties and the court once the plea is entered and accepted.” *State v. Kay*, 717 P.2d 1294, 1304 (Utah 1986). As discussed above, *Mabry* makes clear that a plea agreement is *not* binding until the plea is entered and accepted. That ruling is consistent with this Court’s decision in *State v. Moss*, 921 P.2d 1021, 1027 (Utah App.), *cert. denied*, 929 P.2d 250 (Utah 1996), in which the Court held that “so long as defendant took no actions in reliance on the illegal plea agreement which would substantially affect a retrial, defendant is not prejudiced.” Defendants can claim no prejudice here. Defendants have no inherent right to a plea bargain. *United States v. Hernandez*, 948 F.2d 316, 325 (7th Cir. 1991). Thus, even where “the government and the defendant reach a plea agreement, the court is not required to accept it.” *Id.* Given the authority of a trial court to reject a plea agreement, defendants cannot complain that they have suffered prejudice by a rescission which occurred before the plea agreement was ever presented to the trial court for approval.

II. THE TRIAL COURT PROPERLY REFUSED TO GIVE DEFENDANTS’ PROPOSED GOOD FAITH INSTRUCTION.

Defendants maintained at trial that they believed it was proper for them to bill all services provided in their Salt Lake office under Dr. Walton’s name because he was the purported medical director of UTAHS. R. 367: 1126. On appeal, defendants contend that the trial court erred in refusing to give defendants’ proposed “good faith” instruction, which read: “You are instructed that a representation that is made by an individual who has a good

faith belief in the correctness or truth of the representation is not a fraudulent representation.”

GS: 166. Defendants’ claim lacks merit.

“A trial court has a duty to instruct the jury on the law applicable to the facts of the case.” *Hamilton*, 827 P.2d at 238. Accordingly, the trial court “can refuse to give an instruction that misstates the law.” *Id.* On the other hand, “[i]f there is sufficient evidence to justify a proposed jury instruction on any given issue, the trial court has a duty to adequately instruct the jury on that issue.” *State v. Smith*, 706 P.2d 1052, 1058 (Utah 1985). Nevertheless, “the framing of instructions lies in the trial judge’s discretion.” *State v. Standiford*, 769 P.2d 254, 266 (Utah 1988). A trial court’s instructions are adequate so long as they “g[ive] defendant the legal framework for his theory of the case.” *Id.*

An examination of the instructions in this case reveals that the trial court adequately instructed the jury, correctly advising them on the law and allowing defense counsel to argue his theory of the case. Defendants were charged with devising a scheme to obtain money from insurance providers by knowingly, intentionally, or recklessly making false or fraudulent representations on the claim forms. GS: 244-79; *see also* Utah Code Ann. § 76-10-1801 (1990). Whether or not defendants had a good faith belief that it was proper for them to stamp Dr. Walton’s signature on claim forms directly goes to the issue of intent and was therefore adequately covered in the instructions regarding the requisite intent.

The State concedes that the United States Court of Appeals for the Tenth Circuit has required a separate good faith instruction in criminal cases that involve intentional or willful misconduct. *See United States v. Haddock*, 956 F.2d 1534, 1547 (10th Cir. 1992) (charging

misapplication of bank funds). However, as the Tenth Circuit observed in *Haddock*, the overwhelming majority of federal circuits have not so required.⁸ *Haddock*, 956 F.2d at 1548 n. 11; *see, eg., United States v. Dockray*, 943 F.2d 152, 154-55 (1st Cir. 1991) (charging mail and wire fraud); *United States v. McElroy*, 910 F.2d 1016, 1026 (2nd Cir. 1990) (charging misapplication of bank funds); *United States v. Gross*, 961 F.2d 1097, 1102-03 (3rd Cir.) (charging defendant with willfully making false statements to the SEC), *cert. denied*, 506 U.S. 965, 113 S.Ct. 439 (1992); *United States v. Fowler*, 932 F.2d 306, 316-17 (4th Cir. 1991) (charging conversion of United States property); *United States v. Giraldi*, 86 F.3d 1368, 1376 (5th Cir. 1996) (charging bank fraud and willful misapplication of bank funds); *United States v. McGuire*, 744 F.2d 1197, 1201-02 (6th Cir. 1984) (charging fraud), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1866 (1985); *United States v. Given*, 164 F.3d 389, 394-95 (7th Cir.) (charging mail fraud), *cert. denied*, — U.S. —, 120 S.Ct. 132 (1999); *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984) (charging mail fraud), *cert. denied*, 474 U.S. 925, 106 S.Ct. 259 (1985); *United States v. Sirang*, 70 F.3d 588, 593-94 (11th Cir. 1995) (charging bank fraud and wire fraud); *United States v. Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981); *compare United States v. Casperson*, 773 F.2d 216, 223-24 (8th Cir. 1985) (requiring good faith instruction in mail and wire fraud case) *with United States v. Ribaste*, 905 F.2d 1140, (8th Cir. 1990) (rejecting defendant’s proposed good faith instruction and finding “no

⁸Because the proposed instruction does not involve an issue implicating the federal constitution, the Tenth Circuit’s holding is no more persuasive than the opinions of other federal circuit courts on the matter. Moreover, as explained *infra*, at 26-27, the rationale of the majority is consistent with this Court’s analysis of jury instructions.

difficulty in concluding that the jury was adequately instructed” by the instruction that the jury must find that the defendant “made the false statements at issue knowingly and not out “of mistake or accident or other innocent reason”). The United States Supreme Court has also concluded that where the trial judge adequately instructs the jury on willfulness, “[a]n additional instruction on good faith [is] unnecessary.” *United States v. Pomponio*, 429 U.S. 10, 12-13, 97 S.Ct. 22, 24 (1976) (reviewing a conviction for willfully filing false income tax returns).

The rationale of the majority rule is that a good faith instruction is not required as long as the jury is properly instructed on the intent element of the crime. In such cases, a “good faith defense instruction is merely surplusage.” *Gross*, 961 F.2d 1103. Courts that follow the majority rule evaluate jury instructions “in the context of the charge as a whole,” and recognize “no absolute right [in defendant] to the use of particular language.” *Dockray*, 943 F.2d at 154. As aptly observed by the First Circuit, “[t]here is nothing so important about the words ‘good faith’ that their underlying meaning cannot otherwise be conveyed.” *Id.* at 155 (quoting *New England Enterprises, Inc. v. United States*, 400 F.2d 58, 71 (1st Cir. 1968), *cert. denied*, 393 U.S. 1036, 89 S.Ct. 654 (1969)). “Thus,” the First Circuit continued, “where the court properly instructs the jury on the element of intent to defraud—essentially the opposite of good faith—a separate instruction on good faith is not required.” *Id.*

Although this Court reviews for correctness a trial court’s refusal to give a jury instruction, *Hamilton*, 827 P.2d at 238, “the framing of instructions lies in the trial judge’s discretion.” *Standiford*, 769 P.2d at 266. Like those courts adhering to the majority rule, this

Court “review[s] jury instructions in their entirety to determine whether the instructions, taken as a whole, fairly instruct the jury on the applicable law.” *State v. Stringham*, 957 P.2d 602, 608 (Utah App. 1998) (*quoting Laws v. Blanding City*, 893 P.2d 1083, 1084 (Utah App.), *cert. denied*, 910 P.2d 425 (Utah 1995)); *accord State v. Robertson*, 932 P.2d 1219, 1231 (Utah 1997). The trial court need not give a proposed instruction “if the point is properly covered in the other instructions.” *State v. Sessions*, 645 P.2d 643, 647 (Utah 1982).

“In reality, a criminal defendant’s good faith defense is the affirmative converse of the government’s burden of proving his intent to commit a crime.” *United States v. Kimmel*, 777 F.2d 290, 293 (5th Cir. 1985). In this case, the trial court correctly instructed the jury regarding the intent element of communications fraud and defendant did not contend and has not contended otherwise. The court instructed the jury that the State must establish beyond a reasonable doubt that “the pretenses, representations, promises, or material omissions made or omitted were made or omitted intentionally, knowingly, or with a reckless disregard for the truth.” GS: 244-79; *see* Utah Code Ann. § 76-10-1801(7).

In Instruction 40, attached in Addendum C, the trial court also gave detailed instructions regarding the three mental states under which defendants could be convicted, instructing the jury as follows:

You are instructed that “intentionally” means to do something purposely or willfully, and with a conscious objective or desire to engage in the conduct or cause the result. *Not accidentally or involuntarily.*

You are instructed that “knowingly” means with knowledge, or consciously, intelligently, willfully, or intentionally. An individual acts knowingly when he acts with awareness of the nature of his conduct or the existing circumstances. A person acts knowingly with respect to the result of

his conduct when he is aware that his conduct is reasonably certain to cause the result.

You are instructed that “reckless disregard for the truth” means that the *defendant is aware of but consciously disregards a substantial and unjustifiable risk that the pretenses, representations, promises or material omissions of the scheme or artifice to defraud are false*. The risk must be of such nature and degree that its disregard constitutes *a gross deviation* from the standard of care that an ordinary person would exercise under all the circumstances *as viewed from the actor’s standpoint*.

GS: 282. The trial court further instructed the jury in Instruction 39 as follows:

A false or fraudulent pretense can be *a false representation of fact calculated to induce confidence on the part of one to whom the representation is made*, and is accompanied by a promise to do something in the future. A false or fraudulent pretense can also be a false representation of an existing fact, made with knowledge of its falsity, and *which is adapted to deceive the person to whom it is made*.

GS: 281. The foregoing instructions embodied the applicable law and defendant has not contended otherwise. *See Utah Code Ann. § 76-2-103 (1995); R. 367: 1174-78.*

The instructions covering the requisite intent were, in substance, the flip side of a good faith instruction, more precisely articulating the State’s affirmative duty to prove beyond a reasonable doubt that defendants did *not* act in good faith—that they acted intentionally, knowingly, or with reckless disregard for the truth. As pointed out in defendants’ brief, a finding of good faith negates a finding that defendants acted with the mental state required for communications fraud. *Aplt. Brf. at 17, 19*. Therefore, because “the point was properly covered in the other instructions” covering intent, the trial court did not err in refusing to give the proposed good faith instruction. *Sessions, 645 P.2d at 647*. In

short, the proposed instruction “was an unnecessary embellishment of an otherwise adequate statement” of the law. *State v. Davis*, 711 P.2d 232, 233 (Utah 1985).

Moreover, as noted above, this Court will find a trial court’s instructions adequate if they “g[ive] defendant the legal framework for his theory of the case.” *Standiford*, 769 P.2d at 266. Instructions will be sufficient so long as they correctly state the law and “allow[] defendant to argue his theory of the case.” *Davis*, 711 P.2d at 233. The instructions in this case clearly pass this test. In closing, defense counsel argued:

So what you’ve got to ultimately decide with regards to this case: What did they know? What did they believe? What intent did they operate with?

Now, I suspect that Mr. Gunnarson is going to come up and he’s going to try to make a big thing out of the fact that, well, they don’t have to necessarily have to know it’s wrong, that, as long as it’s reckless disregard—and you’ve got a definition in there for what reckless disregard is—then that’s okay. That meets the standard for communications fraud.

I submit to you nothing can be reckless disregard if the evidence supports the fact that the same conduct is widespread. If other people are doing the same thing and you’re doing what you learned about the places, then is that a reckless disregard, if you have an industry-wide reckless disregard, do you then pull out a couple of people and say, “Okay, these are the ones we’re going to make an example out of,” some number of years later? Or if you do what appears that the industry was doing, do you publish articles, do you send out letters to people, or do you say, “This is a practice that’s going on that appears to be improper and incorrect and we want you to fix it?” That’s what you do?

You know, ***I think the evidence establishes that these people operated in good faith***, that they did what they thought was the right thing to do. They thought that they were coming in line and complying with the rules.

R. 368: 1395-96 (emphasis added). This argument met no objection and was consistent with the court’s instructions on intent. Accordingly, the instructions allowed defendants to argue their theory of the case that they in good faith represented to the insurance carriers that Dr.

Walton was the service provider, or in other words, that the mis-identification of the service provider was not made knowingly, intentionally, or with reckless disregard for the truth.

Furthermore, to the extent, if any, that someone could act with a reckless disregard for the truth and also act in good faith, the proposed instruction would also constitute a misstatement of the law, allowing defendants to avoid criminal liability for conduct prohibited under the statute. Defendant appears to make just such an argument in his brief, contending that a good faith belief need not be rationale. Aplt. Brf. at 15. However, a person commits communications fraud under the statute if he or she acts with reckless disregard for the truth. *See* Utah Code Ann. § 76-10-1801(7). The jury was therefore instructed that defendants could be found guilty of communications fraud if they were “aware of but consciously disregard[ed] a substantial and unjustifiable risk that the pretenses, representations, promises or material omissions of the scheme or artifice to defraud [were] false.” GS: 282. The instruction defining intent, which was not challenged by defendant, further stated that “[t]he risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an *ordinary person* would exercise under all the circumstances as viewed from the actor’s standpoint.” GS: 282 (emphasis added). Such an instruction is consistent with the statutory definition of recklessness. *See* Utah Code Ann. § 76-2-103(3) (1995). Therefore, defendants’ proposed good faith instruction would not be appropriate to the extent that it could be read to require a jury to disregard consideration of the standard of care “that an ordinary person would exercise under all the circumstances viewed from the actor’s standpoint.” *Id.*

In summary, “[t]he issue of good faith was clearly placed before the jury, even if those precise words were not used.” *McGuire*, 744 F.2d at 1201. The instructions covering intent “conveyed the essence of a ‘good faith defense’ instruction, and the court’s refusal to give the requested instruction provides no basis for reversal.” *McElroy*, 910 F.2d at 1026.

III. THE EVIDENCE WAS SUFFICIENT TO WARRANT SUBMISSION OF THE CASE AGAINST GALE STRINGHAM TO THE JURY AND TO SUSTAIN HER CONVICTION.

Defendant Gale Stringham contends that the trial court erred in refusing to dismiss the charges against her at the close of the State’s case. Aplt. Brf. at 19-25.⁹ Alternatively, she contends that the evidence was insufficient to support the jury verdict. Aplt. Brf. at 26-29. This Court reviews both claims under the same standard. *Dibello*, 780 P.2d at 1225. The Court will uphold the court’s denial of the motion to dismiss, as well as the jury verdict, so long as “some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt.” *Id.* (citing *State v. Verde*, 770 P.2d 116, 124 (Utah 1989)) (other citations omitted). In its review, the Court examines the evidence and all reasonable inferences that may be drawn from the evidence in a light most favorable to either the court’s denial of the motion or the jury verdict. *Id.*; *State v. Petree*, 659 P.2d 443, 444 (Utah 1983).

A. The Trial Court Correctly Concluded That the State’s Evidence Was Sufficient to Warrant Submission of the Matter to the Jury.

⁹Defendant Robert Stringham has not challenged the sufficiency of the evidence against him. Accordingly, reference to “defendant” in this point refers to Gale Stringham.

The State must “present some evidence of every element needed to make out a cause of action” to warrant submission of the matter to the jury. *State v. Noren*, 704 P.2d 568, 570 (Utah 1985). On appeal, defendant only challenges the sufficiency of the State’s evidence pertaining to the element of intent—that she intentionally, knowingly, or with reckless disregard for the truth, represented to the insurance carriers that Dr. Walton provided or supervised therapy provided to the patients even though he in fact did not. Aplt. Brf. at 25. A review of the evidence reveals that it was more than sufficient to warrant submission of the matter to the jury, or, at defendant’s election, to proceed with the introduction of evidence in her defense.

Defendant was one of four principal organizers of UTAHS. R. 363: 131-33. She, together with her husband defendant Robert Stringham, controlled and directed the business. R. 363: 133; R. 367: 1255. The evidence further established that defendant was not only aware of the organization’s billing practices, but also instructed others in the procedures of the organization’s billing. For example, in the spring of 1993, Bruce and Carolyn Edwards went to the defendants’ home to assist them in completing insurance claim forms. R. 363: 166. At the meeting, both defendant and her husband instructed the Edwards on how to complete the forms. R. 363: 167.

Although the Edwards were not instructed at the spring meeting to complete the signature block on the claim form—indicating who supplied the therapy, other evidence established defendant’s role and intent in the scheme. Polly Tyacke, who assisted with insurance billings and made appointments for UTAHS and other providers officed in the

Orem building, testified that the signature block on claim forms should have only been stamped with the signature of the therapist who provided the counseling or of the therapist's supervisor. R. 364: 267-68, 274. Yet, Kim Platt, who was hired by UTAHS to help do the billing and trained by Tyacke, testified that *both* defendants instructed her to stamp Dr. Walton's name in the supplier block on all claim forms out of the Salt Lake office. R. 363: 197, 237, 241-42. She was so instructed even though Dr. Walton only supervised Carolyn Edwards, an alcohol addiction counselor, on Wednesday nights. R. 366: 909-13. Dr. Walton did not participate in any other groups or supervise any other person. R. 363: 139; R. 366: 912-13. Inasmuch as defendant directed and controlled the business with her husband, the jury could reasonably infer that defendant was well aware of Dr. Walton's limited role in the organization—that he only supervised Carolyn Edwards in her Wednesday night sessions.

That defendant possessed the requisite intent in the scheme was also evidenced by two plans she submitted to Crime Victim Reparations. Although only her husband was charged in connection with these two submissions, they demonstrate defendant's motive and intent to defraud the insurance carriers and others paying for the counseling. A treatment plan for Debbie (Fisk) Frank was submitted to CVR under defendant Gale Stringham's signature. R. 365: 692; SE29. In the plan, defendant falsely represented that she had provided counseling for Ms. Frank under the supervision of Dr. Alldredge. R. 365: 692; SE29. In fact, defendant Robert Stringham, with the assistance of Carolyn Edwards, provided the counseling. R. 365: 784, 811. Likewise, a treatment plan for Lona Allen was submitted to CVR under defendant's signature. R. 365: 689-91; SE27. As in the case of Frank, however, defendant

had not provided any counseling to Ms. Allen as represented in the plan, nor did she after submission of the plan. R. 365: 665.

The foregoing evidence was more than sufficient to require defendant to proceed with her defense or submit the matter to the jury. The trial court did not therefore err in denying defendant's motion to dismiss for failing to establish a prima facie case.

B. The Evidence Against Gale Stringham Was Sufficient to Support the Jury Verdict.

Defendant claims in the alternative that the evidence was insufficient to support the jury verdict. Aplt. Brf. at 26-28. However, the evidence introduced by defendants in their defense only strengthened the State's case. For example, Carolyn Edwards again testified that both defendants instructed the Edwards on how claim forms should be completed. R. 367: 1082. Moreover, defendant acknowledged in her testimony that she knew Dr. Walton's stamp was being used on claim forms for patients seen in the Salt Lake office. R. 367: 1257-58, 1277-78.

Defendant maintained that the billing under Dr. Walton's name was acceptable, stating her belief that claim forms are stamped, as a matter of course in the industry, by the medical director of a mental health care organization. R. 367:1124. In support of her claim that she did not have the requisite intent, defendant testified that she only became aware of the proper billing procedure in the summer of 1994 after reading an article in "The Utah Psychologist" by Dr. Chris Wehl, chairman of the Utah Psychological Association Insurance Committee. R. 367:1095, 1244; DE84. The article, however, cuts against defendant's

defense. Dr. Wehl stated that “[t]he APA Ethics Committee (1988) wrote [that] “common wisdom” dictates that if the service is being performed by a psychological assistant, intern, or other unlicensed person, it is necessary to clearly indicate who actually provided the service.” DE84 (Chris K. Wehl, *Insurance News*, The Utah Psychologist, Summer 1994 (v. 4 no. 10), at 15-16) (emphasis added). Accordingly, that fact was common knowledge in the industry as early as 1988.

Dr. Wehl also testified for the defense. However, like the article, his testimony often cut against defendant’s claim that she was justified in billing under Dr. Walton’s name. For example, Dr. Wehl testified that it would be inappropriate to bill under a provider who knew nothing about the patient and was not supervising the therapy. R. 367: 1103. He also testified that it would be inappropriate to bill for therapy provided by unqualified and unsupervised individuals. R. 367: 1101.

When the company first organized, UTAHS listed Dr. Roger A. Brown as its medical director. R. 363: 140. Although Dr. Walton does not remember ever being made the medical director, UTAHS began representing him as such in April 1993. R. 366: 140, 180; R. 366: 949, 951, 958; DE41; DE73. The medical director, however, was not assigned to supervise others conducting therapy or counseling at UTAHS. By defendant Gale Stringham’s own account, the medical director at UTAHS was “a physician who was willing to serve as someone who screened individuals for Antabuse” and see a “client that didn’t have a private physician that might need to be evaluated for an anti-depressant.” R. 367: 1159-60. As explained by Gale Stringham, Dr. Walton “started taking over [Dr. Brown’s] Antabuse and

medication duties” because Dr. Walton was more accessible to patients than Dr. Brown. R. 367: 1160. Dr. Walton acknowledged at trial that on rare occasions, he would consult a patient referred to him by other counselors to determine whether the patient needed to be prescribed an anti-depressant or Antabuse. R. 366: 914, 959. However, he did not provide the services of a medical director as typically understood in the profession. R. 366: 959. The evidence established that a medical director has the overall supervision of the clinical aspect of the operation. R. 366: 959. The director typically reviews all client charts to ensure that intakes have been done adequately and that appropriate treatment plans are implemented. R. 366: 960. The director also ensures that termination of a patient’s treatment is appropriate. R. 366: 960. As such, even if it could be argued that claims could be legitimately billed under the medical director’s name, Dr. Walton did not fit that description, regardless of the title he was given.

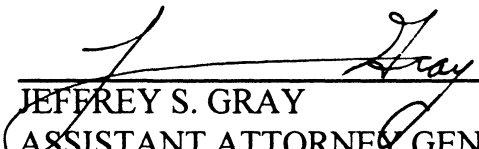
Based on the foregoing evidence, it cannot be said that the evidence “was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust” and this Court should therefore affirm defendant Gale Stringham’s conviction. *State v. Heaps*, 2000 UT 5, ¶ 19, 386 Utah Adv. Rep. 31 (internal quotation marks and citations omitted).

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendants' convictions.

Respectfully submitted this 2nd day of June, 2000.

JAN GRAHAM
UTAH ATTORNEY GENERAL

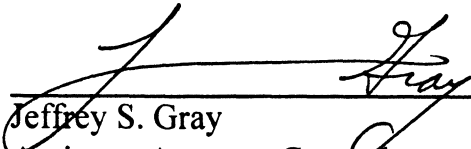


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Attorneys for Appellee, State of Utah

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2000, I served two copies of the attached Brief of Appellee upon the appellants, ROBERT W. STRINGHAM and GALE I. STRINGHAM, by causing the same to be [] hand delivered [☒] mailed, via first class mail, postage prepaid, to their counsel of record as follows:

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ADDENDA

Addendum A

76-2-103. Definitions of “intentionally, or with intent or willfully”; “knowingly, or with knowledge”; “recklessly, or maliciously”; and “criminal negligence or criminally negligent.”

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

History: C. 1953, 76-2-103, enacted by L. 1973, ch. 196, § 76-2-103; 1974, ch. 32, § 4.

NOTES TO DECISIONS

ANALYSIS

Criminal negligence.

—Expert testimony.

Malice.

Proof of intent and malice.

Recklessness.

Willfulness.

Cited.

Criminal negligence.

The bending down of a stop sign at an intersection so that it was not visible to traffic was sufficient to constitute criminal negligence. *State v. Hallett*, 619 P.2d 335 (Utah 1980).

The sole difference between reckless manslaughter and negligent homicide is whether the defendant actually knew of the risk of death or was not, but should have been, aware of it. In both cases, a defendant's conduct must be a “gross deviation” from the standard of care exercised by an ordinary person. Thus, ordi-

nary negligence, which is the basis for a civil action for damages, is not sufficient to constitute criminal negligence. *State v. Standiford*, 769 P.2d 254 (Utah 1988).

—Expert testimony.

While expert testimony is not required to prove the mental state of a criminal defendant accused of homicide, expert testimony is required where criminal negligence is alleged and the nature and degree of risk are beyond the ken of the average layperson. *State v. Warden*, 784 P.2d 1204 (Utah Ct. App. 1989), rev'd on other grounds, 813 P.2d 1146 (Utah 1991).

Trial court committed no abuse of discretion in allowing physicians to testify at defendant physician's trial for negligent homicide involving the death of an infant after a premature home delivery. *State v. Warden*, 784 P.2d 1204 (Utah Ct. App. 1989), rev'd on other grounds, 813 P.2d 1146 (Utah 1991).

Addendum B

76-10-1609. Prospective application.

The amendments to the Utah Pattern of Unlawful Activity Act are prospective in nature and apply only to civil causes of action accruing after the effective date of this act. However, crimes committed prior to the effective date of this act may comprise part of a pattern of unlawful activity if at least one of the criminal episodes comprising that pattern occurs after the effective date of this act and the pattern otherwise meets the definition of pattern of unlawful activity as defined in Section 76-10-1602.

History: C. 1953, § 76-10-1609, enacted by date of this act" means April 27, 1987, the effective date of Laws 1987, ch. 238, § 7.
Compiler's Notes. — The phrase "effective

PART 17**CABLE TELEVISION PROGRAMMING DECENCY ACT**

(Repealed by Laws 1988, ch. 5, § 1.)

76-10-1701 to 76-10-1708. Repealed.

Repeals. — Laws 1988, ch. 5, § 1 repeals Cable Television Programming Decency Act, effective April 25, 1988. For present provisions, see § 76-10-1229.
§§ 76-10-1701 to 76-10-1708, as enacted by Laws 1983, ch. 207, §§ 1 to 8, entitled the Ca-

PART 18**COMMUNICATIONS FRAUD****76-10-1801. Communications fraud.**

(1) Any person who has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and who communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice is guilty of:

(a) a class B misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is \$100 or less;

(b) a class A misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is more than \$100 but does not exceed \$1,000;

(c) a third degree felony when the value of the property, money, or thing obtained or sought to be obtained is more than \$1,000 but does not exceed \$10,000;

(d) a second degree felony when the value of the property, money, or thing obtained or sought to be obtained is more than \$10,000 but does not exceed \$100,000;

(e) a second degree felony when the object of the scheme or artifice to defraud is other than the obtaining of something of monetary value; and

(f) a first degree felony when the value of the property, money, or thing obtained or sought to be obtained is \$100,000 or more.

(2) The determination of the degree of any offense under Subsection (1) shall be measured by the total value of all property, money, or things obtained or sought to be obtained by the scheme or artifice described in Subsection (1) except as provided in Subsection (1)(e).

(3) Reliance on the part of any person is not a necessary element of the offense described in Subsection (1).

(4) An intent on the part of the perpetrator of any offense described in Subsection (1) to permanently deprive any person of property, money, or thing of value is not a necessary element of the offense.

(5) Each separate communication made for the purpose of executing or concealing a scheme or artifice described in Subsection (1) is a separate act and offense of communication fraud.

(6) To communicate as described in Subsection (1) means to bestow, convey, make known, recount, impart; to give by way of information; to talk over; or to transmit information. Means of communication include, but are not limited to, use of the mail, telephone, telegraph, radio, television, newspaper, computer, and spoken and written communication.

(7) It is an affirmative defense to prosecution under this section that the pretenses, representations, promises, or material omissions made or omitted by the defendant were not made or omitted knowingly or with a reckless disregard for the truth.

History: C. 1953, 76-10-1901, enacted by
L. 1985, ch. 157, § 2.

PART 19

MONEY LAUNDERING AND CURRENCY TRANSACTION REPORTING

76-10-1901. Short title.

This part is known as the Money Laundering and Currency Transaction Reporting Act.

History: C. 1953, 76-10-1901, enacted by
L. 1989, ch. 241, § 1.

Effective Dates. — Laws 1989, ch. 241, § 9
makes the act effective on April 1, 1989.

76-10-1902. Definitions.

As used in this part:

(1) "Conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.

(2) (a) "Currency" means the coin and paper money of the United States or of any other country that is designated as legal tender, that circulates, and is customarily used and accepted as a medium of exchange in the country of issuance.

(b) "Currency" includes United States silver certificates, United States notes, Federal Reserve notes, and foreign bank notes customarily used and accepted as a medium of exchange in a foreign country.

Addendum C

INSTRUCTION 40

If you determine from the evidence that a pretense, representation, promise or material omission was made or omitted by the defendant, in order to find the defendant guilty of communications fraud, you must determine that it was made or omitted:

- a) intentionally; or,**
- b) knowingly; or,**
- c) with a reckless disregard for the truth.**

You are instructed that it is sufficient for you to find that only one of the three mental states listed above existed.

You are instructed that "intentionally" means to do something purposely or willfully, and with a conscious objective or desire to engage in the conduct or cause the result. Not accidentally or involuntarily.

You are instructed that "knowingly" means with knowledge, or consciously, intelligently, willfully, or intentionally. An individual acts knowingly when he acts with awareness of the nature of his conduct or the existing circumstances. A person acts knowingly with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

You are instructed that "reckless disregard for the truth" means that the defendant is aware of but consciously disregards a substantial and unjustifiable risk that the pretenses, representations, promises or material omissions of the scheme or artifice to defraud are false. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.