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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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STATE OF UTAH, Plaintiff and Respondent, vs. ZOLLA HALES, Defendant and Appellant.	:	Case No. 18083

---oooOooo---

BRIEF OF APPELLANT

---oooOooo---

Appeal From a Judgment of Conviction Entered in the Fourth Judicial District Court in and for Utah County.

Honorable J. Robert Bullock

---oooOooo---

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FILED

FEB - 8 1982

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF UTAH

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BRIEF OF APPELLANT

---oooOooo---

STATEMENT OF THE CASE

Appellant appeals from a conviction of a violation of § 76-8-412 U.C.A. (1953 as amended). Appellant claims this statute is improperly applied since the same conduct is proscribed by § 76-6-504, a Class B misdemeanor. Appellant also claims that reversible error was committed at trial by the state prosecutor. This Third Degree felony was first prosecuted in the Fourth Judicial District Court of Utah County and was tried before a jury on August 19th and 20th, 1981. The trial resulted in a conviction and a judgment by Judge J. Robert Bullock after referral of the Defendant to the adult probation and parole board.

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RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment and conviction and a re-trial under the correct section of the Utah Code.

STATEMENT OF THE FACTS

Defendant, Zolla Hales, was employed by the Town of Oak Ridge, formerly Salem Hills, as Town Recorder from December 1976 until January 1980, at which time she was to turn the office over to a newly appointed Recorder. On February 11, 1980, while the books were being prepared for an audit prior to their transfer to the new Recorder, some of the books and records were destroyed by fire at Mrs. Hales' residence. After contacting her husband, Mrs. Hales waited a short while until he arrived home and attempted to contact other members of the Town Council, but was unsuccessful. She then contacted the new Recorder who also came to the Hales' residence. After her arrival, Mr. Hales contacted the Mayor who in turn called the Sheriff's Office and the County Fire Marshall. Subsequently, the damage was inspected by the Mayor, a Deputy Sheriff, the town volunteer fire chief, and the State Fire Marshall, and the charges were then raised against Mrs. Hales under § 76-8-412 Utah Code Annotated. Defendant submitted a motion to dismiss the information based on the fact that the overlapping statutes § 76-6-504 and § 76-8-412 U.C.A. imposed different penalties for the same

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conduct and Defendant was charged under the statute imposing the greater penalty. The motion was denied. Defendant also submitted jury instructions to the effect that the correct choice of laws was a jury question. However, those instructions were not given, and trial proceeded exclusively under § 76-8-412 U.C.A. Although Defendant maintained that the fire was accidental, the trial resulted in a conviction under the specified code section. This is an appeal of that conviction.

ARGUMENT

POINT I

COMMENTS BY THE PROSECUTOR ABOUT THE DEFENDANT'S CHOICE NOT TO TESTIFY VIOLATED THE DEFENDANT'S FIFTH AMENDMENT PRIVILEGE AND CONSTITUTED REVERSIBLE ERROR.

In a 1965 landmark decision in Griffin v California, 380 U.S. 609 (1965), the U.S. Supreme Court held that comments by the prosecutor about the failure of a Defendant to testify can effectively abridge the Defendant's Fifth Amendment rights to refuse to testify and therefore can constitute reversible error. At the same time the Supreme Court decided that this principle applied to state criminal trials by the Fourteenth Amendment:

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> We said in Malloy v Hogan, supra, p. 11, that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. 380 U.S. at 615.

The reason the prosecutor cannot properly comment on the Defendant's failure to testify is clearly stated in Griffin. A rule allowing prosecutor comments "[I]s in substance a rule of evidence that allows the state the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations, but the prosecution's comments and the Court's acquiescence are the equivalent of an offer of evidence and its acceptance." 380 U.S. at 613.

This is further clarified by the Supreme Court in Wilson v United States, 149 U.S. 60 (1893):

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one,

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> however honest, who would, therefore, willingly be placed on the witness stand. The statute in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him. 149 U.S. at 66.

The Court in Griffin goes on to say, "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected; for comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' Murphy v Waterfront Comm'n, 378 U.S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 613, 614.

Comments by the prosecutor which violate Zolla Hales' Fifth Amendment privilege are found in two places in the transcript of the trial. First, in commenting on the testimony of the Defendant's husband, the prosecutor makes a clear allusion to the Defendant's failure to testify, and thereby implies that her purpose was to conceal something. His statement was as follows, "Now, with regard to Mr. Hales' testimony, he has not been accused in this case, he's not on

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trial, but he wasn't even a witness to the burning or to the aftermath of the burning, the immediate aftermath. But yet he is the one who tells the story." Transcript at 128.

Second, the prosecutor made a much more prejudicial comment when he stated the following:

> Now the only testimony, really, if testimony it is regarding how it occurred, how the burning occurred, comes from the statement of the Defendant that you will have as an exhibit. She would be the only one to come in and say how it happened, because apparently her husband was not home at the time, and yet he's the one who testifies as to what occurred. Now it seems to me the Defendant's argument to you is asking you to absolutely disregard your senses with regard to who has proved what. I'm surprised he made no comment on the issue of motive. That's strange. Transcript at 142, 143.

These remarks are remarkably similar to some of the comments made by the prosecutor in the Griffin case. Some of these comments were as follows:

> "The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her....
>
> "These things he has not seen fit to take the stand and deny or explain.
>
> "And in the whole world, if anybody would know, this Defendant would know.
>
> "Essie Mae is dead, she can't tell you her side of the story. The defendant won't." 380 U.S. at 610, 611.

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The U.S. Supreme Court found that such comments were not permissible and were of a nature to require reversal of a murder conviction.

The Utah Supreme Court in State v Nomeland, 581 P.2d 1010 (Utah 1978), made clear that it supports the Griffin case with the following statement:

> A number of states have considered the problem, but the thrust of the better-reasoned cases is set out in State v Jefferson, wherein it was said: "In order that there be a violation of Griffin, it must appear that the language used by the prosecutor... was manifestly intended or was of such character that a jury would naturally and necessarily construe to amount to a comment on the failure of the accused to testify...." 581 P.2d at 1011.

This Court also qualified its support of the Griffin doctrine by stating in State v Eaton, 569 P.2d 1114 (Utah 1977):

> Accepting the proposition that the remarks complained of were improper, the question of more grave concern is whether, in the light of the total picture as presented in this case, that impropriety should be regarded as a prejudicial error and justify reversal of the conviction. We note our awareness that there should be no such reversal merely to criticize a prosecutor who, perhaps in the ardor of advocacy in the trial, oversteps the bounds of propriety, nor merely because error has been committed. Id., at 1116.

The Court further stated:

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> [W]e believe that, on appeal, when there is a reasonable doubt as to whether the error below was prejudicial, that doubt should be resolved in favor of the defendant. This is especially true where the error involved is one which transgresses against the exercise of a constitutional right. Consequently, the rule which we have numerous times stated is that if the error is such as to justify a belief that it had a substantial adverse effect upon the defendant's right to a fair trial, in that there is a reasonable likelihood that in its absence there may have been a different result, then the error should not be regarded as harmless; and conversely, if the error is such that it is clear beyond a reasonable doubt that it was harmless in that the result would have been the same, then the error should not be deemed prejudicial and warrant granting a new trial. Id., at 1116.

In light of the evidence offered by the State against Zolla Hales, the outcome of the trial could well have been different in the absence of the prosecutor's prejudicial comments. This is especially obvious when the testimony of the arson investigator is reviewed. It can be found from page 75 to page 86 of the trial transcript.

Therefore, the comments made by the prosecutor were prejudicial and violated the defendants constitutional right to remain silent, and are grounds for reversal of the Defendant's conviction.

POINT II

SECTIONS 76-6-504 U.C.A. AND 76-8-412 U.C.A. ARE

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OVERLAPPING STATUTES PROSCRIBING THE SAME CONDUCT AND THEREFORE ONLY THE STATUTE IMPOSING A LESSER PENALTY CAN APPLY.

A settled point of law in Utah is that when more than one statute proscribes the same or similar conduct, only the statute which carries the lesser sentence may be imposed. See, State v Shondell, 22 Utah 2d 343, 453 P.2d 146 (1969); State v Loveless, 581 P.2d 585 (Utah 1978). The Utah Legislature codified this principle in § 77-17-1 U.C.A. (as amended 1953) which states as follows:

> When it appears the defendant has committed a public offense and there is reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lower degree.

This principle is solidly based on the equal protection clause of the Fourteenth Amendment to the United States Constitution. To allow the courts to apply indiscriminately or on the whim of the prosecutor either of two overlapping statutes which carry different penalties for the same offense would be a clear violation of equal protection. State v Shondell, 22 Utah 2d 343, 345, 453 P.2d 146, 148 (1969).

Since Shondell, the Utah Supreme Court has consistently applied this principle of law. Examples of this

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application are cases such as State v Fair, 23 Utah 2d 34, 456 P.2d 168 (1969), in which this Court imposed the lesser of two sentences prescribed by two separate but overlapping statutes. In other cases such as Rammell v Smith, 560 P.2d 1108 (Utah 1977) this Court has refused to impose the lesser of two penalties prescribed by different statutes but only because the two related statutes did not deal with the same conduct.

In § 76-6-504 of the Utah Code, it states:

> (1) Any person who, having no privilege to do so, knowingly falsifies, destroys, removes, or conceals any writings, . . . or record, public or private, with intent to deceive or injure any person or to conceal any wrongdoing is guilty of tampering with records.
>
> (2) Tampering with records is a class B misdemeanor.

In § 76-8-412 of the Utah Code, it states:

> Every officer having the custody of any record, map, or book, or of any paper or proceedings of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering, falsifying, removing, or secreting the whole or any part thereof, or who permits any other person so to do, is guilty of a felony of the third degree.

Section 76-8-412 noted above is followed by § 76-8-413, which simply states that it is a Class A misdemeanor for

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someone not in official custody of public records to do the same acts specified in § 76-8-412 of the Code. Section 76-6-504 and sections 76-8-412 and 413 proscribe virtually identical conduct - the destruction of public records. Section 76-6-504 U.C.A. makes the destruction of public records a Class B misdemeanor, where § 76-8-412 makes it a Third Degree felony. Surprisingly, the requirements of proof for the misdemeanor are more strict than those for the felony. Section 76-6-504 requires proof that the destruction of the records by any person be with the intent of concealing some wrongdoing or of deceiving or injuring any person. Section 76-8-412 requires simply that the records be willfully destroyed by someone holding them in an official capacity. In the absence of § 76-8-413, a case could be made for the proposition that the legislature simply meant to punish a custodian more severely. Reading §§ 412 and 413 together, however, defeats that possibility. The conduct sought to be prohibited by both statutory schemes is the destruction of public records. Both of these overlapping statutes apply equally well to Zolla Hales if either one in fact applies. This is supported by the prosector in his comments on page 130 of the trial transcript where he says, "It is the state's

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contention, it is our contention that the evidence will show that this fire was deliberately set to cover up earlier wrongdoings. That's the motive."

The distinction drawn by the legislature between these two statutes is insufficient to mandate the application of one of these two statutes in preference to the other, therefore, the statute with the lesser penalty must apply. In the Shondell case, the justification for applying the lesser penalty was much less clear than in this case. The act which imposed a misdemeanor penalty for its violation, § 58-33-4(a), states clearly in another section, § 58-33-6(g), that when an offense under that act was also prohibited under any other statute, "that offense shall not be punishable under this act, but under such other provision of law." The same activities with which the Defendant was charged in Shondell were also prohibited under § 58-13a-2 U.C.A. and a significantly heavier penalty was provided. However, this court found it necessary, in spite of § 58-33-6(g) to choose between the overlapping statutes and to choose the statute with the lesser penalty.

In the two overlapping statutes, §§ 76-6-504 and 76-8-412, which prohibit the destruction of public records but which impose significantly different punishments, there is no applicable section similar to § 58-33-6(g). Therefore,

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only § 76-6-504 should apply.

As this Court said in Shondell:

> The well-established rule is that a statute creating a crime should be sufficiently certain that persons of ordinary intelligence who desire to obey the law may know how to conduct themselves in conformity with it. A fair and logical concommittant of that rule is that such a penal statute should be similarly clear, specific and understandable as to the penalty imposed for its violation. 453 P.2d at 148.

That basic rule of law would make it impossible to sustain either § 76-6-504 or § 76-8-412 in the absence of § 77-17-1 U.C.A. which states:

> When it appears the defendant has committed a public offense and there is reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lower degree.

Therefore, if either statute applies in this case, only the Class B misdemeanor of § 76-6-504 could apply to the Defendant Zolla Hales.

CONCLUSION

Because of the prejudicial statements made before the jury by the prosecutor, the court should reverse the conviction of Zolla Hales and order a new trial, and because of the overlapping statutes applicable to this case, the court should also order that only § 76-6-504 U.C.A. should apply in any further proceedings.

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Respectfully submitted this 8th day of February, 1982.

W. Andrew McCullough
Attorney for Defendant
and Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed two (2) true and correct copies of the foregoing Brief of Appellant, postage prepaid, to David L. Wilkinson, Attorney General, Attorney for Plaintiff and Respondent, 236 State Capitol, Salt Lake City, Utah 84114, this 8th day of February, 1982.

Tracy E. Thomas

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