1982

State of Utah v. Zolla Hales : Brief of Respondent

Utah Supreme Court

W. Andrew McCullough; Attorney for Defendant and Appellant;
David L. Wilkinson; Attorney for Plaintiff;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18083
ZOLLA HALES,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a Judgment of Conviction entered in the Fourth Judicial District Court in and for Utah County, the Honorable J. Robert Bullock, Judge, presiding.

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TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT.	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS.	2
ARGUMENT	
POINT I. THE PROSECUTOR'S COMMENTS REGARDING THE STRENGTH OF THE DEFENSE EVIDENCE DID NOT VIOLATE THE DEFENDANT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION . . .	5
POINT II. UTAH CODE ANN., §§ 76-6-504 AND 76-8-412 (1953), AS AMENDED, DO NOT PROSCRIBE THE SAME CONDUCT; APPELLANT WAS PROPERLY CONVICTED UNDER THE APPROPRIATE STATUTE AND THEREFORE THE CONVICTION SHOULD STAND.	14
CONCLUSION.	23

Cases Cited

Chapman v. California, 386 U.S. 18 (1967)	7,8,10
Griffin v. California, 380 U.S. 609 (1965).	6-8,10
People v. McAtee, 95 P.2d 471 (Cal. 1939)	20
Rammell v. Smith, Utah, 560 P.2d 1108 (1977).	21
State v. Eaton, Utah, 569 P.2d 1114 (1977).	10,12
State v. Jefferson, R.I., 353 A.2d 190 (1976)	10,14
State v. Kazda, Utah, 540 P.2d 949 (1975)	8-9,11
State v. Nomeland, Utah, 581 P.2d 1010 (1978)	10,13-14
State v. Shondell, 22 Utah 2d 343, 453 P.2d 146 (1969)	15
Tuscan v. Smith, Me., 153 A. 289 (1931)	20
United States v. Prescott, 3 How. (U.S.) 578 (1845) .	20

Table of Contents

	Page
Statutes Cited	
Utah Code Annotated, § 76-2-103 (1953), as amended	17
Utah Code Annotated, § 76-6-504 (1953), as amended	14-18 21,22
Utah Code Annotated, § 76-8-412 (1953), as amended	1,14-18 21,22
Utah Code Annotated, § 76-8-413 (1953), as amended	21,22
Utah Code Annotated, § 76-10-503 (1953), as amended	19

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Plaintiff-Respondent,	:	
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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Zolla Hales, appeals from a conviction of wilfully destroying public records in the Fourth Judicial District Court in and for Utah County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, Zolla Hales, was charged with wilfully destroying public records over which she had custody in violation of Utah Code Ann., § 76-8-412 (1953), as amended, a third-degree felony. On the 20th day of August, 1981, the appellant was found guilty of the charge by a jury. After referral to the Adult Probation and Parole Department for a pre-sentence investigation report, the appellant was sentenced to eighteen months' probation and $1,000.00 in fines.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the conviction and judgment pronounced below.

STATEMENT OF FACTS

The appellant, Zolla Hales, was charged with wilfully destroying the Elk Ridge town financial records in a fire occurring on or about February 11, 1980.

The appellant served as the Elk Ridge Town Recorder from December 1976 until January 1980. She was authorized to have personal custody of the financial records in her home since the town had no depository facility in which to house the records. Her duties included the receipt, recording and disbursement of Elk Ridge town funds (T. 20). From 1977 until April, 1970 the appellant's husband served on the Elk Ridge City Council. In this capacity he was authorized to countersign checks drawn on public funds issued by the appellant (T. 20).

Following the announcement of her resignation in November, 1979, the appellant was to prepare the financial records for audit and transfer to the succeeding recorder (T. 21, 22). The transfer should have occurred when the successor took office in January, 1980. At the time of the fire on February 11, 1980, the appellant still had not transferred the records to the auditor. The appellant's successor never received any financial records from the appellant (T. 32).

At trial the appellant contended that on February 11, 1980, she completed the record for audit in front of the fireplace in their home (T. 99). Allegedly leaving the records on a metal chair near the fire, she said she left the home intending to run some errands and to deposit the completed record with the auditor in Spanish Fork (T. 35). About thirty minutes after she left the house she claimed she realized she had forgotten the records and returned to find them "engulfed" in flames leaping two or three feet high (T. 29, 51). She then purportedly picked up the hot metal chair, protecting her hands with towels, and transported the conflagration through the house to the outside patio (T. 35). She then doused the flames with water and extinguished the blaze. The appellant's husband arrived from Orem after she telephoned him with the news of the incident. In an effort to have an authority "visualize" the incident, the appellant called the succeeding recorder and asked her to come and witness the aftermath and offer advice (T. 95).

The state showed that the succeeding town recorder was persistently encouraged by the appellant's husband to sift through the debris and remove what was salvageable after the successor arrived at the scene (T. 109). Refusing to follow the Council member's directions because she felt someone in authority should examine the remains, the new Town Recorder suggested that the mayor be called. The appellant's

husband replied that he "didn't give a damn what anyone else thought and they could all go to hell as far as he was concerned" (T. 110). After repeated remonstration by the Town Recorder, the appellant's husband telephoned the town mayor (T. 110). The mayor notified the sheriff and county fire marshall.

The expert inspections that occurred 4 or 5 hours after the alleged fire indicated that there was no smoke odor or stain in the room or on its furnishings as would be expected after such a fire (T. 50, 66). There was no trail of debris or burns in the flooring along the path the appellant allegedly took from the fireplace to the patio outside (T. 42). No evidence of burning or singeing was observed on the person of the appellant although she claimed to have carried the metal chair with the fire on it through the house (T. 52, 63). Finally, there was substantial debris and evidence of burning outside on the patio where the fire was put out (T. 48, 69).

Steve Kennedy, the Utah State Fire Marshall with more than 25 years' arson investigation experience, examined the premises and remains on February 15, 1980 (T. 75). He testified that throughout his experience, no fire had been attributed to a spark going through a screen as appellant maintained (T. 81). Additionally, the Fire Marshall indicated that fires produced by sparks took hours to develop into

flame and cause a great deal of smoke before flames erupt (T. 83). He also said the metal chair was not sufficiently damaged to have supported the heat from the fire that destroyed the records (T. 82); further, that the limited damage to the exterior of the ledger books, that portion that is hard to ignite, indicated that the extensive damage to the contents or pages of the records was unreasonable without the aid of an accelerant or flammable (T. 80, 81).

The jury found the appellant guilty of violating Utah Code Ann., § 76-8-412 (1953), as amended--wilfully destroying public records held in custody.

ARGUMENT

POINT I

THE PROSECUTOR'S COMMENTS REGARDING THE STRENGTH OF THE DEFENSE EVIDENCE DID NOT VIOLATE THE DEFENDANT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

Following the presentation of evidence at the defendant's trial, the prosecutor commented on the basis and motive of the testimony of the defendant's husband:

> Now with regard to Mr. Hales' testimony. He has not been accused in this case, he's not on trial, but he wasn't even a witness to the burning or the aftermath of the burning, the immediate aftermath. But yet he's the one who tells the story. His comment, and I quote, "I don't give a damn," to Terri Tuttle is more than just mere words. And I think we need to analyze his motive in testifying.

(T. 128). After the defense made its closing argument, the prosecutor rebutted as follows:

> Now the 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 at 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 that he made no comment on the issue of motive. That's strange.

(T. 142, 143). The defendant maintains that these comments constitute an abridgement of her right to refuse to testify guaranteed by the Fifth Amendment of the United States Constitution.

The United States Supreme Court, in Griffin v. California, 380 U.S. 609 (1965), held that:

> . . . the Fifth Amendment, . . . 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.

Griffin at 615.

The Supreme Court further developed the Griffin doctrine in Chapman v. California, 386 U.S. 18 (1967):

> At the time of the trial, Art. I, § 13, of the State's constitution provided that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." Both petitioners in this case chose not to testify at their trial, and the State's attorney prosecuting them took full advantage of his right under the State Constitution to comment upon their failure to testify, filling his argument to the jury from beginning to end with numerous references to their silence and inference of guilt resulting therefrom. The trial court also charged the jury that it could draw adverse inferences from petitioners' failure to testify.

Chapman at 19. There is no question that the comments in Chapman violated that accused's Fifth Amendment rights as established in Griffin. Nevertheless, the Supreme Court held:

> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

Chapman at 22. The Supreme Court recognized the inherent danger of abuse of a harmless error rule; it therefore provided a high standard that must be met in order to invoke the rule. a "court must be able to declare a belief [that the error] was harmless beyond a reasonable doubt." Chapman at 24.

Following Griffin and Chapman, the Utah Supreme Court has drawn clear interpretive standards addressing the distinction between prosecutorial comments constituting error and comments deemed harmless. In State v. Kazda, Utah, 540 P.2d 949 (1975), this Court stated:

> It is not to be doubted that the right of a defendant not to testify in a criminal trial is a fundamental right protected by both the federal and the Utah Constitutions. Its exercise should in no way prejudice him in the eyes of the court or jury. He need give no reason; and there should be no concern as to his reason for not testifying. The simple and immutable fact is, that for what we accept as good and sufficient reasons, the privilege has been long established that comments concerning an accused's failure to testify, however adroitly disguised, may have the effect

> of impairing or destroying the privilege; and that this should not be done.
>
> The other side of this proposition is: that the prosecutor, and the public, whose interest he represents, should and does have a right to argue the case upon the basis of the total picture shown by the evidence or lack thereof. If either counsel cannot voice a challenge to the effect of the total evidence, then one is made to wonder, what may he talk about? It is our opinion that it is not only the prerogative, but the duty of either counsel, to analyze all aspects of the evidence; and this should include any pertinent statements or deductions reasonably to be drawn therefrom as to what the evidence is or is not, and what it does or does not show. The prosecutor's comment under scrutiny here falls within the principle just stated; and he made no direct reference to the fact that the defendant had not taken the stand.
>
> This problem has arisen in sister states who have ruled that statements of the nature here involved are legitimate comments on what the total evidence does or does not show, and are not violative of the constitutional right defendant asserts.

Kazda at 951 (emphasis added). According to Kazda, the statements "The defense has presented no evidence as to why the defendant was out there. What was he doing out there?" were held not to be a direct reference to the defendant's failure to testify. Rather, they were an exercise of the obligation to present all the evidence, even though the comments' ambiguity might have impacted on the jury.

In reaffirming the duty and privilege of counsel to argue the whole evidence, this Court in State v. Eaton, Utah, 569 P.2d 1114 (1977) added a new dimension to the Chapman decision as it applies in Utah. Not only must the Court be able to say that the comments were harmless beyond a reasonable doubt, but it must be "clear beyond a reasonable doubt in that the result would have been the same" (Eaton at 1116) in order to have harmless, non-prejudicial error.

A final standard was developed in State v. Nomeland, Utah, 581 P.2d 1010 (1978). This Court held that a jury instruction informing the jury that the defendant's failure to testify was not to be considered in the deliberations was advantageous, not prejudicial to the defendant. Quoting a Rhode Island case, this Court elaborated on the propriety of the prosecution's comments:

> In order that there be a violation of Griffin, it must appear that the language used by the prosecution . . . was manifestly intended or was of such character that a jury would naturally and necessarily consider it to amount to a comment on the failure of the accused to testify.

State v. Jefferson, 353 A.2d 190, 198 (R.I. 1976).

A careful reading of the closing arguments in this case will show that the prosecutor's comments did not violate the defendant's Fifth Amendment right and do not warrant reversal under the standards provided above (T. 127-129, 131-132, 142-143).

The prosecutor's first comment was designed to discredit and weaken the testimony of the defendant's husband by emphasizing inconsistent evidence, providing the inference of a possible motive for the testimony, and by noting a lack of basis for the testimony offered. Under Kazda, this argument is considered a public obligation or duty--a right or privilege which accompanies counsel in his responsibilities at trial. The same is true of the second contested comment. The defense's challenge "They haven't proved anything" (T. 132) which recurred repeatedly throughout the argument, was answered in the prosecution's final statement. The comments pointed out that the defense had only shown what was contained in the defendant's "Statement" and what was contained in the husband's testimony. The delicate balance of permissible and impermissible comment under Kazda was not breached by either of these comments.

The implication of the first comment must be greatly extended to provide an inference that the defendant failed to testify. The second comment more easily is construed to amount to a comment on the defendant's failure to testify. This is only because of the proximity in the argument to the reference of what the defendant did provide. Acknowledgment by the reaffirmation of the husband's absence from the scene about which he testified cannot be considered a direct reference to the defendant's failure to testify at trial under Kazda.

Contrary to the defendant's assertion, the verdict in this case did not hinge on the prosecution's comments; there was substantial evidence presented sufficient to sustain the conviction without the prosecutor's comments. The lack of evidence of fire in the home shortly after the burning was to have taken place, the great evidence of burning outside the home, the inadequate damage to the metal chair, lack of burns or singes on defendant's person, the high improbability of a spark igniting the records as the defense postulates, the theory of embezzlement providing a motive for the destruction, and the unreliability of the defendant's husband's testimony could have sustained the verdict without any argument by the prosecutor whatsoever. Eaton, supra. The defendant maintains that the testimony of the Utah State Fire Marshall, Mr. Steven Kennedy, is particularly representative of the weak evidence offered by the State; yet appellant noticeably fails in his brief to identify wherein the testimony is weak. Mr. Kennedy adequately qualified himself as an expert in arson investigation with experience in the Federal Bureau of Investigation, the National Board of Fire Underwriters, and the State of Utah, totaling more than 40 years of arson investigation. His testimony and opinion was corroborated and unrefuted. There is no weakness in the State's evidence as the defendant contends.

What effect, if any, the comments had on the jury is relevant. It is highly speculative that the jury associated the statements as a possible reference to the defendant's failure to testify since even the defense counsel apparently failed to notice it when the comment was made. Defendant's failure to object is a clear indication that the comments in their context, tone, and tenor did not naturally and necessarily alarm the jury as to the defendant's failure to testify. Nomeland, supra.

Moreover, any possible prejudice which might have been created by the comments was further minimized by the Court's instruction number 10:

> The defendant is not required to testify on her own behalf. The law expressly gives her the privilege of not testifying if she so desires. The fact that she has not taken the witness stand must not be taken as any indication of her guilt, nor should you indulge in any presumption or inference adverse to her by reason thereof. The burden remains with the state, regardless of whether the defendant testifies in her own behalf or not, to prove by the evidence her guilt beyond a reasonable doubt.

According to Nomeland, supra, this instruction enhances the defendant's position although she did not testify.

Finally, the prosecutor's comments were presented with no intention to make an issue of, or reference to, the fact that the defendant did not testify. In the first

instance the comment was intended to discredit the defense witness. In the second statement, the intention was clearly to rebut the defendant's argument as to who had proved what. It is clear from the transcript that the prosecutor had no intention of developing an assumption of guilt by an inference that the defendant did not testify. The prosecutor's intent or lack of motive in making the comments is a relevant factor which may be considered by this Court in determining whether error occurred. Nomeland, supra; Jefferson, supra.

In summary, since the prosecutor's comments were not direct references to the defendant's failure to testify, were not intended to naturally or necessarily prejudice the jury, and would not have changed the result of the case if left unsaid, there was no reversible error in their utterance. The prosecution fulfilled his obligation and duty to argue the whole evidence before the jury in making the comments.

POINT II

UTAH CODE ANN., §§ 76-6-504 AND 76-8-412 (1953), AS AMENDED, DO NOT PROSCRIBE THE SAME CONDUCT; APPELLANT WAS PROPERLY CONVICTED UNDER THE APPROPRIATE STATUTE AND THEREFORE THE CONVICTION SHOULD STAND.

Appellant contends that Utah Code Ann., § 76-6-504 (1953), as amended, proscribes the same conduct as Utah Code Ann., § 76-8-412 (1953), as amended. Section 76-6-504

provides:

> (1) Any person who, having no privilege to do so, knowingly falsifies, destroys, removes, or conceals any writing, other than the writings enumerated in section 76-6-503, 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.

Section 76-8-412 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.

If these statutes do proscribe the same conduct, or if there is doubt or uncertainty as to whether they proscribe the same or similar conduct, then the appellant is entitled to the benefit of the application of the statute proscribing the lesser penalty. State v. Shondell, 22 Utah 2d 343, 453 P.2d 146 (1969). However, contrary to appellant's contention, the statutes on their face and in their manifest purpose address different offenses and correspondingly different conduct.

A first general distinguishing feature is found in the titles of the statutes which describe the conduct they

prohibit. Section 76-6-504 is styled "Tampering with Records," while Section 76-8-412 is entitled "Stealing, destroying, or mutilating public records by custodian." Additionally, Section 76-6-504 is placed in the chapter of the Code describing fraudulent offenses against property. Section 76-8-412 appears in the chapter concerning offenses against the government. These first-glance distinguishing factors shed light on the divergent purpose of the statutes. Section 76-6-504 protects the people of the State of Utah from the fraudulent tampering with records and writings generally, to provide a remedy for third persons harmed by the destruction. In contrast, Section 76-8-412 is designed to protect the integrity of the government. These general distinctions are developed and accentuated with a more specific examination of the statutes.

Section 76-6-504 can be violated by any person, regardless of his capacity. Section 76-8-412 cannot be violated by anyone except a public official. In addition, the official must have a custodial obligation with respect to the records destroyed or mutilated. The importance of the person/officer and custodian/non-custodian distinctions are highlighted by the general purposes of the statutes mentioned above. Under Section 76-8-412, the inegrity of the government is the concern. This integrity cannot be violated except by a person who has become an agent for the government through an

official capacity. Further, the official must have custody of the record in order to focus the responsibility for the trust extended to the officer. No such concern for agency and responsibility is contemplated by Section 76-6-504. There the harm is to the public or third persons generally and therefore anyone may violate the statute.

The mental element required under each statute is different. Section 76-6-504 requires a "knowing" state of mind for the act while Section 76-8-412 demands a "willful" intent. This subtle but important distinction is indicated by the definitions of "knowing" and "willful." A person acts:

> (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.

Utah Code Ann., § 76-2-103. This significant distinction relates to the burden of proof required to convict under each statute. To show a "conscious objective or desire to engage in the conduct or cause the result" as required by Section 76-8-412 is harder to prove than is an awareness "that his

conduct is reasonably certain to cause the result" as demanded by Section 76-6-504. To protect a custodian who may have knowingly destroyed public records without having the desire to cause the result of the mutilated documents, the statute requires a showing of wilfulness. Such a high burden of proof is not needed in Section 76-6-504 since that statute requires a showing of fraud to convict.

The statutes pertain explicitly to differing subject matter. Section 76-6-504 proscribes the mutilation or destruction of "any writing or record, public or private." Section 76-8-412 deals with public records filed or deposited with a public official. The location of the record is significant. A driver's or business license is a public record or writing which is not deposited with an official. Since the government is not responsible for the housing of the document, the alteration of the license or destruction thereof does not reflect on the integrity of the government. In contrast, the government has an abiding interest in records kept in official custody, making this distinction substantial.

Finally, a violation of Section 76-6-504 requires proof of the traditional elements of fraud, including an intentional misrepresentation, reliance, and some sort of detriment. Section 76-8-412 does not require such a showing. The interest of maintenance of government integrity in Section 76-8-412 obviates the requirement of a showing of

some damage or harm. The destruction of a record by an official in custody of the record is sufficient in and of itself to warrant criminal action.

These specific distinguishing characteristics in the statutes are very important. They are rooted in the general purpose of the statute. Clearly the most important distinguishing feature is the official custodial capacity of the actor. Such character distinctions are sanctioned elsewhere in the law; for example, a restricted person can commit crimes by conduct that would not constitute crimes if the conduct was perpetrated by an unrestricted person. Utah Code Ann., § 76-10-503 (1953), as amended. These classifications are justified for two reasons. First, a person can manifest his unwillingness to comport to the norms of society and therefore be restricted from some activities to reduce his burden of voluntary compliance. Second, a person may voluntarily assume a higher standard of care and duty toward the public. Here, the public has a right to rely on the assumption of the trust and enforces the right by making the acts by someone in official capacity in some instances criminal where they would not be criminal if done by a non-official. The state interest outweighs the possibility that such character distinctions are discriminatory.

The distinguishing element of official custodial capacity was established in "the common law, fixed by the habits and customs of the people." Tuscan v. Smith, 153 A. 289, 294 (Me. 1931). An official custodian's scrupulous duty with respect to public funds and the record thereof was established in 1845 by the United States Supreme Court, where Justice McLean opined:

> Public policy requires that every depository of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that "he should keep safely" the moneys which come into his hands. Any relaxation of this would open a door to frauds, which might be practiced with impunity. . . . Let such a principle be applied to our postmasters, collectors of the customs, receivers of the public moneys, and others who receive more or less of the public funds, . . .

United States v. Prescott, 3 How (U.S.) 578, 588, 589 (1845). Strict accountability requires the keeping of a public record of funds.

> The evident purpose is to prevent fraud and insure honest administration. The evil of permitting willfull destruction of such a public record required by law to be kept is apparent.

People v. McAtee, 95 P.2d 471, 473 (Cal. 1939).

Because of the numerous substantive differences in these two statutes, it is clear that they do not proscribe the same conduct. Accordingly, under Rammell v. Smith, Utah, 560 P.2d 1108 (1977), the statute which most specifically applies to the facts will apply. Since the appellant was an official with custody of the record, and the jury found that she wilfully destroyed the record, the state applied the more appropriate statute and the conviction should stand.

The defendant says she fails to understand the rationale for the varying degrees of penalty proscribed by §§ 76-6-504, 76-8-412, and 76-8-413, Utah Code Ann. (1953), as amended. Section 76-6-413 states:

> Every person, not an officer such as is referred to in the preceding section, who is guilty of any of the acts specified in that section is guilty of a class A misdemeanor.

Sections 76-8-412 and 76-6-504, discussed earlier, provide penalties of felony of the third degree and class B misdemeanor, respectively. Although Section 76-8-413 is not at issue on appeal, it may be helpful to outline the reasoning for the various penalties in the three statutes.

A violation of Section 76-6-504 requires a showing of the elements of fraud, one of which is damage, and the evidence of some other wrongdoing. Presumably, a party guilty of violating Section 76-6-504 may be dealt with under the

penalty provisions provided by statutes governing the covered-up wrongdoing or harm commensurate with the nature of the harm. Thus, the penalty for the cover-up is negligible since the destruction of a record becomes a minor part of the criminal activity warranting class B misdemeanor treatment.

In contrast, the willful destruction of a public record held in trust by an officer can be prosecuted without the showing of any harm done to the government. No associated misconduct or deceit is necessary. The crime is the breach of the trust and possible loss of government integrity. The crime therefore warrants the penalty of a third-degree felony.

Finally, Section 76-8-413, which again protects the integrity of the government, is compared. This statute is identical by reference to Section 76-8-412 in all respects except the actor. So it is distinguishable in all respects from Section 76-6-504 as was Section 76-8-412 except for the capacity of the actor. The intense government interest in the records over which its officials have custody warrants the designation of class A misdemeanor for this statute. Additionally, violation of Section 76-8-413 necessitates some form of trespass, where a violation of Section 76-6-504 does not. These three statutes were carefully drafted to proscribe different conduct and should be applied accordingly.

CONCLUSION

The appellant was not prejudiced by the prosecutor's statements to the jury at trial and the appellant was charged with a crime under the appropriate statute. There being no error below, the decision should be affirmed.

Respectfully submitted this 19th day of March, 1982.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to W. Andrew McCullough, Attorney for Appellant, 930 South State, Suite 10, Orem, Utah, 84057, this 19th day of March, 1982.

Susan Patton