2012

Utah v. Epps : Brief of Appellant

Utah Court of Appeals

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J. Edward Jones; Attorney for Defendant/Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, **vs.** **JUSTIN EPPS,** Defendant/Appellant.	**APPELLANT'S OPENING BRIEF** Case No. 20120325 Dist. Ct. Case No. 121500012

On Appeal from the Fourth District Court,
Wasatch County, State of Utah
The Honorable Judge Derek P. Pullan

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT IS REQUESTED

APPELLANT IS OUT OF CUSTODY

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APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This is an appeal from a conviction and sentence in the Fourth Judicial District Court of the State of Utah. This appeal is authorized by Utah Code Annotated § 77-18a-1(1)(a). This Court has jurisdiction over this appeal under Utah Code Annotated § 78A-4-103(2)(e), as this appeal is from a conviction after jury trial of the charge Violation of a Protective Order, a violation of Utah Code Annotated section 76-5-108, a class A misdemeanor.

ISSUE PRESENTED FOR REVIEW

Was sufficient evidence presented at trial to sustain a conviction?

Determinative law: *State v. Holgate*, 2000 UT 74 (2001); *State v. Dunn*, 850 P.2d 1201

Standard of review: To determine whether there was sufficient evidence to convict a defendant, we do not examine whether we believe that the evidence at trial established guilt beyond a reasonable doubt. Rather, we will conclude that the evidence was insufficient when, after viewing the evidence and all inferences drawn therefrom in a light most favorable to the jury's verdict, the evidence "is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted." *State v. Dunn*, 850 P.2d 1201, 1212 (Utah 1993) .

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES WHICH ARE DETERMINATIVE AND OF CENTRAL IMPORTANCE TO THIS APPEAL

The following Rules and Statutes are included in their entirety in Addendum A:

STATUTES:

Utah Code Annotated, section 76-5-108. Violation of a Protective Order.

RULES:

Utah Rules of Criminal Procedure. Rule 17. The Trial.

Utah Rules of Criminal Procedure. Rule 23. Arrest of Judgment.

STATEMENT OF THE CASE

On January 25, 2012, the Wasatch County Attorney's Office filed an Information where Appellant, Justin Epps, was charged with one count of violating a restraining order (UCA[1] 76-5-108). (R. 1-4.)[2] On February 1, 2012, Mr. Epps was arraigned on these charges, and entered a plea of not guilty. (R. 5-6.) Mr. Epps waived preliminary hearing on February 22, 2012, and the matter was set for jury trial. (R. 10-11.)

On April 2, 2012, a jury trial commenced in this matter. (R. 67-69.) On that date, prior to jury selection, the prosecution and defense counsel met, and confirmed that all discovery had been provided, and who the prosecution intended to call as a witness. (R. 90:19.) During jury selection, the prosecution asked for a recess to address the court. (R. 90:10.) During the in chambers conference that followed, the prosecution revealed that it had provided the defense with the wrong copy of the restraining order, and that the alleged violation date pre-dated the restraining order in discovery. (R. 90:11.) The prosecution further revealed that the only witness on their witness list, who was to testify regarding service of the restraining order, did not serve the order allegedly violated in the charged offense. (R. 90:12, 14-15.)

The defense was provided a copy of the protective order relevant to the charged offense, and was given the identity of a new witness, the officer who served

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[1] UTAH CODE ANNOTATED, hereafter, UCA.

[2] Record Index page number, hereafter, R. Numbers after a colon following the Record Index number refer to transcript page numbers.

the relevant order, during jury selection, one minute prior to the in chambers hearing. (R. 90:12, 15.) The defense was then told of another witness the prosecution intended to call. (R. 90:15.) The defense objected to the admission of this late evidence. (R. 90:15-16.) The defense also requested that the new evidence be excluded, including the new witness and restraining order, and that if the prosecution could not proceed without it, that the case be dismissed with prejudice. (R. 90:19.)

The trial court denied the defense request to exclude this new evidence because no formal discovery request had been made, and because the court had not ordered discovery be provided pursuant to Rule 16 of the Utah Rules of Criminal Procedure. (R. 90:20-22.) The court then indicated that it would continue the trial if the defense needed additional time to prepare based on the late discovery of witnesses and evidence. (R. 90:22.) After consulting with counsel, Mr. Epps opted to proceed with the trial that day. (R. 90:23.) Jury selection was then completed. (R. 90:24-66.)

The prosecution called three witnesses in its case in chief, Deputy Sheriff John Rogers, Michelle Burnham, and Michelle Smith. (R. 90:80, 81-98, 98-107, 107-110.) The prosecution's first witness, Deputy Rogers, testified that as a deputy sheriff for Wasatch County, he had served thousands of subpoenas, and that on January 12, 2012, he was asked to serve a Justin Epps. (R. 90:82.) Deputy Rogers said that he remembered serving Mr. Epps at the door of his house, located at 286 East Second South, on that date. (R. 90:82, 87.) Upon cross examination, Deputy

Rogers was confronted with the fact that the served party was served at a different address, 115 South Main Street, and his response was "I don't remember serving him at that address." (R. 90:87-88.)

Deputy Rogers indicated that the restraining order that he served indicated that the restrained was to stay away from the protected party's place of work, but that the order only had a street address, 160 West 500 North, without indicating a city or state. (R. 61-65, 90:86.) He also testified then when he serves restraining orders that he explains that the no contact at work clause "means you don't bother them at work." (R. 90:90.)

At no time during Deputy Rogers testimony did he indicate that the defendant, Justin Epps, who was sitting in the courtroom, was the person that he served. He never identified the defendant for the record.

The prosecution's second witness, Michelle Burnham, testified that she knew Justin Epps, that she had been married to his brother, and that she knew Michelle Smith as a co-worker. (R. 90:99.) She further testified that on January 16, 2012, she worked at Rocky Mountain Care, located at 165 West 500 North, in Heber. (R. 90:100-101.) She was shown a copy of a restraining order listing the address 160 West 500 North and said that was the address where she worked with Ms. Smith, that she worked at that address on January 16, 2012, and that she (Michelle Burnham) met with Mr. Epps there on that date. (R. 90:101.) At no point during her testimony did Ms. Burnham identify the defendant in court for the record.

The prosecution's final witness, Michelle Smith, testified that Justin Epps was her ex-boyfriend, that she worked at the Rocky Mountain Care Center, and that she had obtained a restraining order against Mr. Epps. (R. 90:108.) Ms. Smith further testified that on January 16, 2012, she was not at work at the Rocky Mountain Care Center, and did not see Mr. Epps on that date. (R. 90:109.) At no time during her testimony did she identify the defendant in court for the record.

Mr. Epps exercised his constitutional right to not testify. (R. 90:114.) The defense rested without presenting evidence. (R. 90:116.)

At the conclusion of the trial, the defense moved the court for a directed verdict to dismiss the case for lack of jurisdiction and identification. (R. 90:156-157.) Specifically, the defense argued that there was no evidence presented that the crime occurred in Wasatch County, Utah, and that no witness identified the defendant for the record. (R. 90:156.) The trial court denied the motion to dismiss based on lack of proof of jurisdiction as the jury could have inferred that the crime occurred in Wasatch County, Utah. (R. 90:158.) The trial reserved ruling on the identification issue. (R. 90:158.)

During deliberations, the jury asked two questions. First, the jury asked: "Does the law require that a person read the instruction of the protective order or can the person be negligent and rely on what the deputy sheriff said to him?" (R. 90:158.) In the second question, the jury asked: "Can we infer that Justin Epps has full knowledge of the protection order because of prior servings." (R. 161.) Later

that afternoon, the jury found Mr. Epps guilty of violating a restraining order. (R. 90:164.)

After the verdict, the trial court denied the defense motion for directed verdict to dismiss based on lack of identificaiton. (R. 90:164.) The court found that there was "evidence in the record upon which a reasonable jury could find that the defendant, Justin Epps, is the same individual who is the client of the public defender in this case." (R. 90:164.) Specifically, the court pointed to the testimony of Deputy Rogers who said that he remembered serving process on Justin Epps. (R. 90:165.)

Mr. Epps was sentenced at a hearing held May 23, 2012. (R. 91.) The trial court sentenced Mr. Epps to serve one year in the county jail, and to pay a $2,500 fine. (R. 91:15.) Execution of that sentence was stayed, and Mr. Epps was placed on supervised probation for two years, was ordered to serve thirty days of home confinement on electronic monitoring, and was ordered to pay a $500 fine and a $33 courtroom security fee.

On April 23, 2012, Mr. Epps filed a Notice of Appeal, and on May 23, 2012 he filed a timely First Amended Notice of Appeal. (R. 71-72, 96-97.)

STATEMENT OF FACTS

On January 12, 2012, Deputy John Rogers was asked to serve a Justin Epps with a restraining order. (R. 90:82.) To the best of his memory, Deputy Rogers, who has served thousands of order, remembered serving the order at 286 East Second South, on that date. (R. 90:82, 87.) The paperwork filled out by Deputy Rogers reflects that the restraining order was served on Mr. Epps at 115 South Main Street, but Deputy Rogers did not remember serving Mr. Epps at that location. (R. 90:87-88.) The restraining order in question indicated that the restrained party was to stay away from the protected party's place of work, but that the order only had a street address, 160 West 500 North, without indicating a city or state. (R. 61-65, 90:86.) When Deputy Rogers serves restraining orders, he explains that the no contact at work clause "means you don't bother them at work." (R. 90:90.)

On January 16, 2012, Michelle Burnham, Justin Epps former sister-in-law, who had known Mr. Epps for 18 years, was visited by Mr. Epps at her work located at 165 West 500 North, in Heber. (R. 90:99-101.) Ms. Burnam was aware that her co-worker, Michelle Smith, had a restraining order against Mr. Epps, that listed the work address as 160 West 500 North, and Mr. Epps met Ms. Burnam at that location. On January 16, 2012, Michelle Smith was not at work at the Rocky Mountain Care Center, and did not see Mr. Epps on that date. (R. 90:109.)

SUMMARY OF ARGUMENT

The District Court abused its discretion when it denied Mr. Epps motions to arrest judgment and dismiss charges based on insufficient evidence. This brief will address this error, and Mr. Epps requests that the case be remanded, with an order that the trial court grant the motion to dismiss.

ARGUMENT

I

INSUFFICIENT EVIDENCE WAS PRESENTED TO SUSTAIN A CONVICTION AT TRIAL

A. The Trial Court Erred in Denying the Defense Motion to Dismiss

Utah Rules of Criminal Procedure, Rule 17, subdivision (p) explains that:

> At the conclusion of the evidence by the prosecution, or at the conclusion of all evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Pursuant to Rule 23 of the Utah Rules of Criminal Procedure, the defendant can move to have the trial court exercise this power to dismiss.:

> At any time prior to the imposition of sentence, the court upon its own initiative, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, . . . or may enter any other order as may be just and proper under the circumstances.

Once the defendant has made a request to arrest judgment and dismiss the case for insufficient evidence, the issue of whether the evidence was sufficient to merit a conviction is preserved for appeal. *State v. Holgate,* 2000 UT 74, P14 (Utah 2000.)

B. Insufficient Evidence was Presented at Trial to Support a Conviction

In the present case, Mr. Epps challenged the sufficiency of the evidence at trial, preserving this issue on appeal. *Id.* Specifically, Mr. Epps was charged with a knowing and intentional violation of a restraining order. UCA 76-5-108, subdivision (1) reads:

> Any person who is the respondent or defendant subject to a protective order, . . . ex parte protective order, . . . who intentionally or knowingly violates that order after having been properly served, is guilty of a class A misdemeanor.

The evidence presented in the jury trial failed to meet those elements in the following ways.

1. Insufficient evidence was presented to prove the order had been properly served beyond a reasonable doubt.

At trial, Deputy John Rogers, testified he had served thousands of subpoenas, and that on January 12, 2012, he was asked to serve a Justin Epps. (R. 90:82.) Deputy Rogers said that he remembered serving Mr. Epps at the door of his house, located at 286 East Second South, on that date. (R. 90:82, 87.) Upon cross examination, Deputy Rogers was confronted with the fact that the served party was served at a different address, 115 South Main Street, and his response was "I don't

remember serving him at that address." (R. 90:87-88.) Deputy Rogers further testified that he sometimes would review and sign a return of service form after serving a restraining order, and that he signed one in this case. (R. 90:83.) Nevertheless, Deputy Rogers admitted that he remembered serving Mr. Epps on a prior occasion, but did not recall this incident. (R. 90:88.) Deputy Rogers did not identify Mr. Epps in the courtroom for the record.

Deputy Rogers' testimony was insufficient to establish that the restraining order had been properly served. First, he didn't remember serving the order. Second, had he served the order, it was at an address different than the one listed on the return of service. Third, he never identified on the record that the person there in court was the person he served.

2. There was insufficient evidence to prove that Mr. Epps knowingly and intentionally violated a restraining order beyond a reasonable doubt

During the trial evidence was presented that a restraining order was in effect that prohibited Justin Epps from contacting Michelle Smith, from going to her residence at 286 East 200 North, Heber City, Utah, 84032, and from going to her work at 160 West 500 North. (R. 90:86.) The work address did not give the name of the protected business, or the city and state where the business was located. At trial Michelle Burman initially testified that the business where she and Michelle

Smith worked was located at 165 West 500 North. (R. 90:100.) She also failed to identify the defendant in court as the person she saw at her workplace on January 16, 2012. Additionally, Deputy John Rogers testified then when he serves restraining orders that he explains that the no contact at work clause "means you don't bother them at work." (R. 90:90.) Finally, Michelle Smith was not at work on January 16, 2012, the alleged date of offense, and did not see him that day. (R. 90:109.)

All of these independent facts created reasonable doubt as to whether Mr. Epps knowingly and intentionally violated the restraining order. First, without the full address listed in the order, he was not put on proper notice as to the protected location, and therefore could not knowingly violated the order's terms. Second, if Michelle Burman was correct in her initial testimony regarding the location of her workplace, then the wrong address was listed on the order, providing insufficient notice to Mr. Epps. Third, it was never established that the defendant in court was the person who went to Michelle Burman's workplace. Fourth, if Mr. Epps relied on Deputy Rogers' explanation for the meaning of the order, then he could not have knowingly and intentionally violated an order by going to a place, when the protected party was not there, to visit a long time friend of 18 years and former family member. Fifth, Mr. Epps purpose for going to Ms. Burman's work was solely to speak to her, and not to violate the order, and there was no evidence provided to prove his intent was otherwise.

3. Jury questions indicated that they had doubts

During deliberations, the jury asked two questions. First, the jury asked: "Does the law require that a person read the instruction of the protective order or can the person be negligent and rely on what the deputy sheriff said to him?" (R. 90:158.) In the second question, the jury asked: "Can we infer that Justin Epps has full knowledge of the protection order because of prior servings." (R. 161.) As is evidenced by these questions, the jury struggled with the issue of whether Mr. Epps intentionally violated a restraining order.

C. No Inferences Could Rectify the Lack of Evidence in this Case

To determine whether there was sufficient evidence to convict a defendant, the reviewing court views the evidence and all inferences drawn therefrom in a light most favorable to the jury's verdict, in order to decide whether the evidence "is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted." *State v. Dunn, supra*, 850 P.2d at 1212. In this case, no amount of verdict favorable inferences could overcome the lack of direct evidence regarding Mr. Epps intent. Although the "intent to commit [a crime] . . . may be found from proof of facts from which it reasonably could be believed that such was the defendant's intent," no facts were presented in this case that would lead to such an inference. *State v. Kazda*, 15 Utah.2d 313, 317 (1964).

D. A reasonable man could not have reached a guilty verdict

In *State v. Asay*, 631 P.2d 861 (Utah 1981) the court held that a jury's guilty verdict would be overturned if it could be shown that the evidence was "so lacking an insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt." Here, as explained above, the evidence was "so lacking." (*Id.*) A reasonable man could not have found Mr. Epps guilty when he was never identified as the individual involved. Further, if the court finds that there was sufficient evidence regarding identity, a reasonable man would not have found that he had the requisite intent to commit the crime charged.

CONCLUSION

For the reasons set forth above, appellant, Mr. Epps, respectfully requests this court find that the trial court erred in denying his motion to arrest the judgment and dismiss the charges, and reverse this matter with an order that the trial court grant the motion and dismiss the charge.

DATED: September 18, 2012

Respectfully submitted,

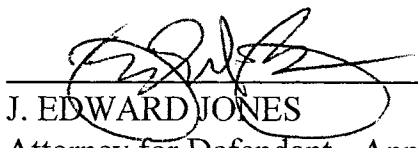
J. EDWARD JONES
Attorney for Defendant - Appellant

BRIEF FORMAT CERTIFICATION OF COMPLIANCE

Pursuant to Rules 24(f)(1)(C) , and 27(b), Utah Rules of Appellate Procedure, I certify that this brief is 13 point Times New Roman font, and contains 5,406 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B), based on the word-count feature of my word-processing program, Corel WordPerfect 12.

DATED: September 18, 2012

Respectfully submitted,



J. EDWARD JONES
Attorney for Defendant - Appellant

CERTIFICATE OF SERVICE

I hereby I certify that on September 18, 2012, a true and correct copy of the foregoing Appellant's Opening Brief and the attached Addendums was mailed by first class mail to the following:

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805 West 100 South
Heber City, UT 84032

J. EDWARD JONES
Attorney for Defendant - Appellant

ADDENDUM A

Utah Code Annotated, section 76-5-108. Violation of a Protective Order.

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

(1) Any person who is the respondent or defendant subject to a protective order, child protective order, ex parte protective order, or ex parte child protective order issued under Title 78B, Chapter 7, Part 1, Cohabitant Abuse Act, or Title 78A, Chapter 6, Juvenile Court Act of 1996, Title 77, Chapter 36, Cohabitant Abuse Procedures Act, or a foreign protection order enforceable under Title 78B, Chapter 7, Part 3, Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, who intentionally or knowingly violates that order after having been properly served, is guilty of a class A misdemeanor, except as a greater penalty may be provided in Title 77, Chapter 36, Cohabitant Abuse Procedures Act.

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

UTAH RULES OF CRIMINAL PROCEDURE. RULE 17. THE TRIAL.

Rule 17. The trial.

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

(1) misdemeanor cases when defendant is in custody;

(2) felony cases when defendant is in custody;

(3) felony cases when defendant is on bail or recognizance; and

(4) misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

(g) After the jury has been impaneled and sworn, the trial shall proceed in the following order:

(1) The charge shall be read and the plea of the defendant stated;

(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;

(3) The prosecution shall offer evidence in support of the charge;

(4) When the prosecution has rested, the defense may present its case;

(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;

(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and

(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into

proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(j) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

(k) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(l) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(m) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(n) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(o) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(p) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Rule 23. Arrest of judgment.

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.