

1990

Utah v. Wayne Wardle : Petition for Writ of Certiorari

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

900460

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

)

Plaintiff and Appellee,

)

Case No. 900460

vs.

)

WAYNE WARDLE,

)

Category ____

Defendant and Appellant.)

PETITION FOR WRIT OF CERTIORARI

REVIEW OF THE DECISION OF THE UTAH COURT OF APPEALS,
THE HONORABLE NORMAN H. JACKSON (PRESIDING),
REGINAL W. GARFF AND J. ROBERT BULLOCK, APPELLATE JUDGES.

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FILED

OCT 9 1990

Clerk, Supreme Court, Utah

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

There are no statutory or constitutional provisions which are dispositive or controlling. The text of all relevant authorities is quoted in the body of this brief.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)

Plaintiff and Appellee,)

vs.)

WAYNE WARDLE,)

Defendant and Appellant.)

Case No. _____

PETITION FOR WRIT OF CERTIORARI

Defendant-Appellant hereby petitions this Court pursuant to Utah Code Ann. §78-2a-4 and Rule 45, Utah Rules of Appellate Procedure, to issue a writ directing the Court of Appeals to certify the decision and record in the above-entitled case to this Court for review.

QUESTIONS PRESENTED

1. Was there prejudicial error in allowing the prosecutor to cross-examine the Defendant regarding business dealings without buttressing his remarks with admissible extrinsic evidence?

2. Did the district court err in refusing to give the Defendant's proposed "reasonable alternative hypothesis" instruction in light of the language of the "reasonable doubt" instruction?

OPINION OF COURT OF APPEALS

The opinion of the Court of Appeals in this matter is unpublished. A copy of the slip opinion is attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was filed on June 15, 1990. Appellant timely filed a Petition for Rehearing which was denied on September 11, 1990. This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-4, and the petition was timely filed pursuant to Rule 48, Utah Rules of Appellate Procedure.

STATEMENT OF THE CASE

a. Nature of the Case. Defendant was convicted of aggravated arson and insurance fraud in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Frank G. Noel presiding.

b. Course of Proceedings and Disposition in Lower Courts. Defendant was tried and convicted of aggravated arson and insurance fraud. The district court entered judgment on the charge of aggravated arson as a second degree felony and the Defendant was sentenced to an indeterminate term of not less than one year nor more than 15 years in the Utah State Prison. He was sentenced to an indeterminate term of not less than one year nor more than 15 years in the charge of insurance fraud, the sentences to run concurrently. The Defendant was then granted a stay of the execution of the prison sentences and placed on probation in the custody of the court and under supervision of the Department of Adult Parole and Probation for a period of 18 months.

c. Statement of Facts. In October 1986, the Defendant was the proprietor of a small business engaged in the repair and maintenance of lawn sprinkler systems. The business was housed in an old home located at 395 West 5900 South in Murray, Utah. (T. 41, 73)

On Monday, October 20, 1986, the Defendant went to his place of business at approximately 6:45 a.m. He later told investigators he was there for the purpose of doing some miscellaneous bookkeeping. The Defendant left the premises at approximately 7:15 or 7:20 a.m. locking the door behind him. (T.74-75) The Defendant and his wife were the only persons in the possession of keys to the building. (T. 76)

At 7:44 a.m. the local fire department was advised that the Defendant's building was burning. Fire fighters were at the location by 7:48 a.m. and the fire was under control by 7:59 a.m. (T. 22-25)

After the fire had been extinguished, investigators from various public agencies and from the Defendant's insurance carrier, Ohio Casualty Insurance, examined the premises and attempted to determine the point of origin and the cause of the fire.

Dean Larsen, assistant chief and fire marshall, Murray City Fire Department, was the first investigator on the scene. He testified that he located what he believed to be the point of origin of the fire near a desk in the northeast quadrant of the building. (T. 42-48) He eventually located a soldering iron, the tip of which was lying on the floor and had burned through the carpet and the pad "into the subflooring with an indentation of approximately half an inch deep char into the floor." (T. 52)

Because it was obvious that the soldering iron was located near the point

where the fire had originated and had been in contact with the floor for a substantial period of time the State's experts theorized that the instrument had been used as a timing device or had been intentionally planted as a "decoy." (T 98-99) Consequently, a substantial part of their investigation would revolve around an experimentation to determine whether or not the soldering iron could have started the fire and under what circumstances.

Larsen opined that there may have been some type of flammable liquid used because he observed what he characterized as irregular burn patterns in the carpet indicating that for some reason the heat of the fire had remained low and to the floor in various locations. (T. 53-54) He also stated that it appeared that the soldering iron had been placed on the floor "and that something had been set on top of it so that the tip would stay in the position touching some combustible material, and some flammable materials put around it to accelerate it." (T. 64) Based upon these observations he concluded that the fire was intentionally set.

Larsen acquired a soldering iron similar to the one recovered at the scene of the fire. He dropped the soldering iron on the floor 15 to 20 times in order to determine whether or not the tip would come to rest in contact with the carpeting. He testified: "I wasn't able to do that. Every time it landed on the handle and not on the tip." (T. 66; See also T. 92, 127)

He then performed a test wherein he heated the soldering iron and placed paper on top of it to see if the paper would ignite. He testified that it would not ignite unless he first moistened the paper with lighter fluid. (T. 66-67)

Finally, he left the soldering iron on for approximately four days to see if the handle would burn away or the instrument would fail for some other reason. It did not. (T. 67)

John Blundell testified that he examined the scene of the fire at Larsen's request. (T. 157) He independently located the same point of origin. (T. 159-160) He also felt that burn patterns in the carpet "had the appearance of the possibility of a flammable liquid being present." (T. 170)

Blundell then spent some time ruling out an electrical malfunction as the cause of the fire. (T. 160-164)

He testified that after concluding his examination of the scene of the fire: ". . . at least in my mind I wasn't certain that this was an intentionally set fire or an accidentally caused fire. So that's why the other two individuals spent a lot of time looking at soldering irons and conducting experiments associated with them." (T. 172) Blundell did not personally conduct any experiments involving the soldering irons nor was he present when any tests were conducted. (T. 167-168)

Blundell conceded that in his opinion the soldering iron could have started the fire if a paper sack or some other combustible material had fallen onto the iron and encapsulated the heat. (T. 181)

James A. Ashby was retained by Ohio Casualty Insurance for the purpose of investigating the fire. (T. 207) His investigation lead him to conclude that the burn patterns in the carpet may have been attributable to radiant heat and not an indication of the use of any flammable liquid. (T. 210, 280) He opined that the irregular burn

patterns in the carpet were likely caused by the presence of paper or the disintegration of the wall paneling. (T. 257, 283-284) As Ashby explained it: "Or in particular, I was worried about the paneling material, because it very quickly delaminates and peels off the wall and drops these burning embers in that area. And those burning embers can cause heavy carpet destruction as well." (T. 283)

Ashby also conducted tests using a pencil type soldering iron. Ashby discovered that when dropped from a table the soldering iron usually came to rest with the tip down and in contact with the carpet. (T. 216-217, 219)

In addition to the testimony of these three witnesses, the State produced evidence of the presence of a light range hydrocarbon in two of the five carpet samples taken from the scene of the fire. (T. 130) The State chemist testified that he detected the hydrocarbon by initially noting a "sweet odor" in two of the samples. (T. 131) Tests were then run on the gastromatography which indicated the presence of some kind of hydrocarbon although the chemist was unable to identify the substance or indicate in what quantity it was present. (T. 134)

The Defendant testified and admitted that he had used a soldering iron three or four days before the fire. (T. 316-317, 329, 338) He denied having intentionally left the iron on and denied having intentionally set the fire. (T.324, 327-328)

Sometime after the fire, the Defendant contacted a public adjuster who examined the premises and prepared a proof-of-loss statement for the Defendant's approval and signature. In December 1986 Defendant submitted a claim to Ohio Casualty in the amount of \$24,984.75 and was ultimately paid \$15,900.00 in settlement

of his claim. (T. 143-145)

In December 1987, almost 14 months after the fire, criminal charges were initiated against the Defendant. Following his conviction, Defendant appealed to the Utah Court of Appeals which affirmed his convictions.

ARGUMENT

POINT I

DEFENDANT WAS UNFAIRLY PREJUDICED BY UNWARRANTED ATTACKS RELATED TO HIS FINANCIAL CIRCUMSTANCES.

Over objection by Defendant's counsel, the prosecutor was allowed to question the Defendant regarding a host of issues related to his financial circumstances. (T. 342-345, 354-355) Defendant concedes that in a case involving arson with intent to defraud an insurer the prosecution may be allowed certain latitude in developing the defendant's motive through questions regarding his financial status, provided that the inquiry appears to have been made in good faith. See People v. Folsom, 34 Cal.Rptr. 148 (1963).

The prosecutor's cross-examination regarding "financial interest" follows:

Q. [BY MR. JONES] Do you have any judgments against you?

A. [BY MR. WARDLE] I don't believe --

MR. METOS: I'll object. I don't see the relevance of this.

MR. JONES: Goes to financial interest, your honor.

THE COURT: Overruled.

THE WITNESS: I'm not aware I do.

Q. [BY MR. JONES] Did you have one involving Western General Dairies?

A. I do or did.

Q. Did you have a garnishment against your accounts?

A. I don't know.

Q. Did you have a judgment involving a man named Gary Gavin?

A. No.
Q. A lawsuit with him?
A. No.
Q. Did you owe him money?
A. I don't know who Gary Gavin is.
Q. Did you ever have any employees that sued you during that time
A. I'm sure we have.
Q. Did you change the name of your business about the time of the fire?
A. We still have not completed the name change. It's in the -- that process will take a few more years.
Q. Did you start to change the name about the time of the fire?
A. I think the year before.
Q. Why were you changing the name?
A. We were incorporating.
Q. Why did you change the name?
A. Because we were incorporating.
Q. Did it have anything to do with lawsuits pending against you?
A. Not at all.
Q. Did you change the owner of the business?
A. I'm still the primary owner.
Q. Did you change the owner and put your wife as the owner?
A. She's the president of the corporation. I'm a major stockholder.
Q. She wasn't before the fire, was she?
A. She still was. I'm still dba.
Q. Did you change your checking account about the time of the fire?
A. I changed it--which, on the Brighton?
Q. Did you change it to Valley Bank?
A. It still is.
Q. At the time of the fire how much money did you have in your accounts at Valley Bank?
A. I have no idea.
Q. You didn't have anything, did you?
A. I have to have something, otherwise they close it.
Q. Had you transferred all of the money out of the Valley Bank account?
A. I don't think we transferred any money.
Q. Just used everything up that was in that account?
A. Yeah, there was no point in leaving money in there.
Q. And again that didn't have anything to do with lawsuits or any possible litigation?
A. No.

* * *

Q. [BY MR. JONES] Mr. Wardle, I'm a little confused. Are you telling the jury you didn't know you had a judgment?

A. [BY MR. WARDLE] The way you asked the question, I don't know what you're asking.

Q. I'm asking you, sir, did you ever have any judgments against you in a court of law?

A. I think I've had probably five or six judgments against me through my history.

Q. Starting when?

A. I don't recall.

Q. And ending when?

A. I don't have any current.

Q. Did you have any in '86?

A. I don't recall. I believe that I had a couple.

Q. Well, which judgments do you recall having?

A. The one that you mentioned, Western General Dairies for \$762.00. They got a judgment by default and we did pay that. That was paid and satisfied at that time, I'm sure, because we paid it the day after we found out about it. And there was one for Conlee Company for Five or \$6,000, for a supply bill we had paid, but Cindy down there got a little overzealous. And Frank did apologize, but I believe that's still on my record, because we simply haven't bothered to take it off.

Q. So at the time of the fire did you have that judgment pending?

A. No, it was never a judgment. It was already paid and satisfied, but it was never entered.

Q. How many times have you been sued for civil judgments?

MR. METOS: I'll object. We need to be more specific. If he had civil judgments pending and outstanding at the time, that may establish a motive. But if he had civil judgments in the past and satisfied them so what?

THE COURT: Sustained.

Q. [BY MR. JONES] Did you have any civil judgments pending or in effect at the time of this fire?

A. I don't recall.

MR. JONES: That's all.

(T. 342-345; 354-355)

When the court invited rebuttal the prosecutor declined. (T. 356) The State had succeeded in suggesting to the jury that (1) the Defendant had been sued civilly on numerous occasions; (2) that his bank accounts had been garnished; (3) that he had

changed his business name for the purpose of defrauding creditors; (4) that he had changed his bank account for similar purposes; and (5) that he had incorporated his business and designated his wife as president of the newly-formed corporation for the purpose of avoiding his creditors.

Neither the Defendant's answers nor any rebuttal offered by the prosecutor suggests a good faith basis for these inquiries.

The State's case was based entirely upon circumstance. The prejudicial effect of these attacks is amplified by the fact that the Defendant's credibility was not only the cornerstone of his defense, it was its sum and substance.

In State v. Peterson, 722 P.2d 768 (Utah 1986), the defendant in a burglary prosecution was questioned about prior felony convictions. He admitted three convictions, but questioning about a 1978 felony conviction in Spokane drew three denials. In reversing the conviction, the Utah Supreme Court observed:

On appeal, defendant argues that the prosecution's reference to other unproven felonies prejudiced his case since his defense was based solely on his credibility. He claims that the prosecutor's suggestions (by inference) that he was not telling the truth about his felony convictions would cause the jury to doubt his denial of the present charge. The concern is well-founded. Other courts have held that where a witness denies prior convictions, questioning on that subject is disallowed unless the questioner is prepared to present extrinsic proof of the convictions. The rule was explained in Kizer v. State, 67 Okl.Cr. 16, 93 P.2d 58 (1939), as follows:

[I]mpeaching questions should not be propounded to a witness unless they are based upon facts that the interrogator intends to present in refutation of adverse answering of questions propounded; such line of questioning should be done in good faith, and not for the purpose of prejudicing and arousing suspicion of the jury against the defendant.

93 P.2d at 88.

In the instant case, the trial court denied the motion for mistrial in finding that the prosecutor had acted in good faith. This finding was in error, however, in view of the prosecutor's failure to buttress his references to defendant's convictions with admissible extrinsic evidence (such as a certified copy of the conviction). [citation omitted].

722 P.2d at 769-770.

State v. Singleton, 66 Ariz. 49, 182 P.2d 920 (1947), was an appeal from a murder conviction. The "very heart" of the defendant's theory of self-defense lie in establishing his reputation for being a peaceable man. On cross-examination, the prosecutor asked the defendant three times whether or not he had threatened a third party by the name of Menacey. Three times the defendant denied it. The State contended that "this line of questioning was not put to lay the foundation for impeachment, but was designed to rebut defendant's claims of self defense and on that basis was both admissible and proper." 182 P.2d at 929. In reversing the conviction, the Arizona Supreme Court stated:

[W]hen, as here, such questioning is raised and then dropped with no further attempt on the part of the State to prove its point, the aforementioned "fishing expedition" having failed, we believe it to be wholly improper and highly prejudicial. To allow this sort of examination would be to allow the imaginative and overzealous prosecutor to concoct a damaging line of examination which could leave with the jury the impression that defendant was anything that the questions, by innuendo, seemed to suggest. If the questions were persistent enough and cleverly enough framed, no amount of denial on the part of a defendant would be able to erase the impression in the mind of the jury that the prosecutor actually had such facts at hand and that probably there was some truth to the insinuations.

182 P.2d at 930.

In the instant case the Defendant was asked if he owed money to a gentlemen by the name of Gary Gavin. He denied it. He was asked whether or not he had engaged in litigation with Gavin. He denied it. He was asked whether or not his business name was changed as a result of pending lawsuits. He denied it. He was asked if he had redistributed the ownership of his business with similar motives. He denied it. He was asked if he had changed banks and checking accounts. He denied any impropriety. He was asked whether or not any such changes had "anything to do with lawsuits or any possible litigation." He denied it.

A relevant inquiry would have directly approached the Defendant's financial condition at the time of the fire. Instead, the prosecutor chose to paint the Defendant as dishonest in his business dealings and in his denial of the prosecutor's specific questions for which the jury would surely assume there existed a good-faith basis.¹

In the Court of Appeals the State suggested that the authorities cited by the Defendant should be distinguished because the impeachment in the instant case does not arise out of questioning involving prior felony conviction. Resp. Br. at 14-15. The Court of Appeals agreed. Slip opinion at 4.

The condemnation of innuendo has never been limited to situations where the tactic is used to imply the existence of a prior criminal record. See ABA, Code of Professional Responsibility DR 7-106(C)(1); ABA, Standards for Criminal Justice 3-5.7(d);²

¹The prosecuting attorney may well be assumed to be a man of fair standing before the jury; and they may well have thought that he would not have asked the question unless he could have proved what it intimated if he had been allowed to do so." People v. Wells, 100 Cal. 459, 462, 34 Pac. 1078, 1079 (1893).

²"It is an improper tactic for the prosecutor to attempt to communicate impressions by innuendo through questions that would be to the defendant's advantage to answer in the negative, for example, 'Have you ever been convicted of the crime of robbery?' or 'Weren't you a member of the Communist party?' or 'Did you tell Mr. X that ...?' when the questioner has no evidence

6 Wigmore, Evidence, Section 1808(2)(Chadbourn rev. 1976).

The prosecutor had succeeded in painting the Defendant as dishonest in his business dealings and in his denial of the prosecutor's specific questions for which the jury would surely assume there existed a good faith basis. The lack of good faith is demonstrated by the prosecutor's failure to buttress his remarks with admissible extrinsic evidence. See State v. Peterson, supra; see also, Tomarchio v. State, 99 Nev. 572, 665 P.2d 804 (1983).

The Court of Appeals disposed of this issue by noting that the Defendant "admitted having had five or six civil judgments against him." Slip opinion at 4. The opinion fails to consider the fact that the only obligation which was identified as a judgment at any time relevant to any financial motive for arson was a \$762 judgment in favor of Western General Dairies.

It has been said that cross-examination is the most effective machine devised for getting to the truth. Cross-examination by innuendo is the most effective machine devised for creating the illusion of truth and the illusion of effective impeachment. The power of innuendo lies in deception. It breeds suspicion and spawns skepticism. It cuts to the very core of a defense based primarily upon the accused's credibility.

POINT II

THE DISTRICT COURT ERRED IN REFUSING TO GIVE
DEFENDANT'S PROPOSED "REASONABLE HYPOTHESIS"
INSTRUCTION.

At trial, counsel proposed a jury instruction which would have advised the

to support the innuendo." Comment, ABA, Standards of Criminal Justice 3-5.7.

jury that in a circumstantial evidence case the evidence must exclude "every reasonable hypothesis other than that of the guilt of the defendant". (R. 66) When the trial court failed to give this instruction exception was taken. (T. 407)

Counsel is aware of the long line of Utah decisions holding that the trial court need not give a "reasonable alternative hypothesis" instruction so long as the jury is properly instructed regarding "reasonable doubt". See State v. Clayton, 646 P.2d 723 (Utah 1982) (citing numerous cases).

The Defendant does not claim personal knowledge of all of the circumstances which led to the fire. He was left to answer the charges by declaring his innocence and proposing possible explanations which incorporated the circumstances as he understood them to be. (T. 346-347)

Instruction No. 3 advised the jury: "A reasonable doubt must be a real, substantial doubt and not one that is merely possible or imaginary." [Emphasis Added] (R. 93)

It was error to refuse to give the proposed "reasonable alternative hypothesis" instruction where the "reasonable doubt" instruction suggested the inadequacy of a defense based upon "possible" explanations for the origin of the fire.

In the Court of Appeals the State argued that the Defendant has waived his right to a review of the adequacy of the instructions given because trial counsel did not take exception to the "reasonable doubt" instruction. What the State fails to recognize is that the inadequacy of the "reasonable doubt" instruction would have been substantially cured had the proposed "reasonable alternative hypothesis" instruction been given.

The precise deficiency of which Defendant complains was recognized by Justice Stewart in his dissenting opinion in State v. Ireland, 773 P.2d 1375, 1382 (Utah 1989):

Finally, I submit that it is inappropriate to instruct that a reasonable doubt is not merely a possibility, as the instruction in this case does. Possibilities may or may not create doubt. Depending on the circumstances, a possibility may constitute a reasonable doubt. Whether a possibility is sufficient to create a reasonable doubt depends upon the likelihood of the possibility. Certainly a fanciful or wholly speculative possibility ought not to defeat proof beyond reasonable doubt. But the instruction does not make the point clear.

An instruction that a reasonable doubt must be a "real, substantial doubt, and not one that is merely possible or imaginary" has been held to be erroneous because, in practical effect, it tends to diminish the prosecutor's burden of proof by implying that the prosecution need not obviate a real or substantial doubt. [Citation omitted]

In my view, the trial court's instruction was clearly erroneous and ought to be so declared.

In Ireland the majority affirmed the defendant's conviction but noted:

We do acknowledge however, that the dissent's criticisms of the "more weighty affairs of life" language is justified and share Justice Stewart's concern that the "possible or imaginary" language might, by implication, be understood to diminish the prosecutor's standard of proof. Therefore, in our supervisory capacity, we direct the trial courts to discontinue use of that language in their instructions on the definition of reasonable doubt.

773 P.2d at 1380.

The problems discussed in Ireland are presented foursquare by the exception that was taken in the trial court. In the instant case, the Defendant does not claim personal knowledge of all of the circumstances which led to the fire. He was left to answer the charges by declaring his innocence and proposing possible explanations

which incorporated the circumstances as he understood them to be. Clearly the refusal to give the "reasonable alternative hypothesis" instruction was error where the "reasonable doubt" instruction suggested the inadequacy of a defense based upon "possible" explanations for the origin of the fire.

CONCLUSION

It is respectfully submitted that the Defendant was unfairly prejudiced in cross-examination regarding financial matters which was calculated to destroy his credibility. A good faith basis for that line of questioning was never demonstrated. The decision of the Court of Appeals is at variance with State v. Peterson, 722 P.2d 768 (Utah 1986).

Finally, the inadequacy of the "reasonable doubt" instruction would have been substantially cured had the proposed "reasonable alternative hypothesis" instruction been given and the Defendant has preserved his right to appellate review of this issue by exceptions taken in the trial court. The decision of the Court of Appeals is at variance with State v. Ireland, 773 P.2d 1375 (Utah 1989).

It is respectfully submitted that the Defendant's convictions should be reversed and the case remanded to the district court for a new trial.

DATED this 5 day of October, 1990.

151

Gary W. Pendleton
Attorney for Defendant and Appellant

MAILING CERTIFICATE

I do hereby certify that on this 18 day of November, 1989, I did personally mail four copies of the above and foregoing Brief to R. Paul Van Dam, Attorney General, and Sandra L. Sjogren, Assistant Attorney General at 236 State Capitol Building, Salt Lake City, Utah 84114.

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Secretary

FILED

JUN 15 1990

Gary Pendleton
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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State of Utah,)	
)	
Plaintiff and Appellee,)	
)	OPINION
v.)	(Not For Publication)
)	
Wayne Wardle,)	Case No. 890372-CA
)	
Defendant and Appellant.)	

Third District, Salt Lake County
The Honorable Frank G. Noel

Attorneys: Gary Pendleton, St. George, for Appellant
R. Paul Van Dam and Sandra L. Sjogren, Salt Lake
City, for Appellee

Before Judges Garff, Jackson, and Bullock.¹

JACKSON, Judge:

Wayne Wardle appeals his jury convictions of aggravated arson, a first-degree felony in violation of Utah Code Ann. § 76-6-103 (1990), and insurance fraud, a second-degree felony in violation of Utah Code Ann. § 76-6-521 (1990). We affirm.

Wardle raises five issues on appeal: (1) insufficiency of the evidence; (2) denial of due process; (3) improper expert testimony; (4) ineffective assistance of counsel; and (5) refusal of jury instruction.

Wardle owned and operated A-1 Maintenance in an old home in Murray, Utah. He was at the business for one-half hour the morning of October 20, 1986. About thirty minutes after he departed, the Murray City fire department was dispatched to the

1. J. Robert Bullock, Senior District Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10) (Supp. 1989).

business. The firefighters arrived four minutes later and found the building ablaze.

Investigators agreed that the point of origin of the fire was adjacent to Wardle's desk in his office area. They discovered a soldering iron next to his desk that had been burning for several days and had penetrated the carpet, pad and one-half inch into the underlying particle board. The burn pattern around the iron was consistent with the use of an accelerant, such as flammable liquid. Tests revealed the presence of a light range hydrocarbon, an accelerant, in the carpet. Investigators concluded that the fire was intentionally set. They concluded that the iron would not ignite flames without the aid of an accelerant or manipulation of a garbage bag to create a bellows effect. All investigators agreed that, on that morning, Wardle could not have avoided seeing or smelling the burning produced by the iron.

Wardle's building was insured for \$30,000. His one-year policy became effective three months prior to the fire. The insurance claims investigator described the building as a "shack" that could have been replaced for about \$13,000. After the fire, Wardle says he was not too concerned about the building because he was planning to demolish it anyway, which he did for \$450. He said he had received bids for demolition at \$1,700-\$1,800 and had a loan for a new building. He also stated that the fire did not affect his ability to continue in business because it was his off-season and there was little equipment or furnishings in the building.

Wardle retained a public adjustor to prepare an insurance claim and filed his claim for \$24,984.75. Wardle signed the proof of loss statement. The claim was settled for \$15,900.

We will examine the sufficiency of the evidence to support the guilty verdicts on both charges. When reviewing a claim that the evidence was insufficient, we must view the evidence and all inferences that may be drawn from it in the light most favorable to the verdict. State v. Verde, 770 P.2d 116, 117 (Utah 1989). If there is evidence from which the jury could have found all the elements of the crime, our inquiry must stop and the conviction must be affirmed. State v. Booker, 709 P.2d 342, 345 (Utah 1985).

First, we will examine the evidence supporting the verdict of aggravated arson. Section 76-6-103(1) provides in relevant part:

a person is guilty of aggravated arson if
by means of fire or explosives he
intentionally and unlawfully damages:
(a) a habitable structure[.]

. . . .

Three arson investigators examined the cause of the fire: Dean Larsen, Murray City fire marshall and assistant chief; John Blundell, at Larsen's request; and James Ashley, at the request of Wardle's insurer. Each testified that the fire was intentionally set. Further, the State chemist's discovery of hydrocarbon, a fire accelerant, in carpet samples was consistent with the investigators' determinations that the carpet burn patterns revealed the use of an accelerant. Wardle was on the premises shortly before the fire was discovered, and he was there at his desk when the smoldering soldering iron could not have been overlooked. The door was locked and Wardle had the keys. Wardle's only explanation for the fire was that he must have kicked or moved a paper sack full of garbage onto the smoldering iron that morning without noticing what he had done. The jury could reasonably conclude from the evidence before it that Wardle had intentionally started the fire. We find sufficient evidence in the record to support Wardle's conviction of aggravated arson.

Next, we will examine the evidence supporting the verdict of insurance fraud. Section 76-6-521 provides:

Every person who presents, or causes to be presented, any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes or subscribes any account, certificate of survey, affidavit or proof of loss, or other book, paper or writing, with intent to present or use the same, or to allow it to be presented or used, in support of any such claim is punishable as in the manner prescribed for theft of property of like value.

Wardle submitted to Ohio Casualty Insurance Company a "Sworn Statement In Proof of Loss." The statement contains the following affirmation: "The said loss did not originate by any act, design or procurement on the part of the insured or this affiant." The document was duly subscribed and sworn to by Wardle. The jury, having found Wardle guilty of aggravated arson, could only conclude that the above affirmation was false. This evidence alone is sufficient to support Wardle's conviction of insurance fraud. Thus, we do not need to

consider the State's claim that evidence of the inflated values listed in the proof of loss statement was sufficient to support the insurance fraud conviction.

Wardle framed his due process argument as follows: "Defendant was denied due process as a result of unwarranted and prejudicial attacks upon his character and credibility." His first complaint is that the State inappropriately used the insurance fraud count as a "vehicle for prejudicing the defendant." Wardle fails to cite a single authority in support of this point or to demonstrate that it constitutes a denial of due process. Wardle's second due process complaint alleges unfair prejudice from "unwarranted attacks related to his financial circumstances." Again, Wardle has not cited any authorities which mention due process. The only Utah case cited is State v. Peterson, 722 P.2d 768 (Utah 1986), which is not on point. That case involved impeachment of a defendant based on prior criminal convictions. Here, Wardle was not asked about any prior criminal activity or convictions. He was asked about some civil judgments bearing on his financial condition prior to the fire, and he admitted having had five or six civil judgments against him. Wardle has failed to properly articulate his due process claim or cite supporting authority for this argument. We think that it was proper to inquire about Wardle's financial status as revealing a motive for arson and insurance fraud. See People v. Folsom, 220 Cal. App. 2d 809, 34 Cal. Rptr. 148, 150 (1963).

We turn next to Wardle's claim that his conviction was based on "improper 'expert' testimony." He complains about the following testimony: (1) Larsen was asked, "What is your theory of the case, how did this fire start?" He replied, "My opinion is that the soldering iron was put there prior to the actual fire itself; that it smoldered for quite some time without getting in complete combustion or the fire stage; that it was discovered by Mr. Wardle and that he accelerated it, put some type of flammable liquid on it to get it started and then left." (2) Ashby was asked whether he was "able to form some kind of theory as to what happened here?" He stated that the soldering iron was placed on the floor with a bag of garbage on Thursday, that Wardle went back to investigate, found the bag slow burning and used something to create an open flame and left. He believed the smoldering iron "would have been very noticeable, the smoke, the odor, something, something should have told Mr. Wardle that things were amiss." (3) Blundell summarized, "[B]asically what we're saying is that the

defendant lied about what he found when he walked into the building that morning because smoke would have been present."

Wardle directs us to Utah Rules of Evidence 704 and 403 as the basis for his argument that admission of the above testimony was "manifest error." Those rules provide:

Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 403. Exclusion of relevant evidence on ground of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Wardle argues that this testimony from the experts should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. His argument simply regurgitates the language of the rule. Then he cites State v. Rimmasch, 775 P.2d 388 (Utah 1989), as requiring reversal of his convictions "based upon the erroneous and prejudicial admission of expert testimony."²

Wardle undertook no analysis of Rimmasch as it relates to his case, but simply shared a quote from page 399:

We remain wary of the potential of such evidence to distort the fact-finding process by reason of its superficial plausibility and its potential for inducing fact finders to accept expert judgment on critical issues rather than making their own.

2. Besides Rimmasch, Wardle cites only State v. Cobo, 90 Utah 89, 60 P.2d 952, 958 (1936), in support of his claim of "manifest error" based on improper expert testimony.

We note that Rimmasch treats Rules 608(a) and 702, which Wardle has not mentioned. Wardle argues further that the following rhetorical question by the prosecutor during closing argument suggested to the jury "that it may forego independent analysis of the facts" and decide the case on a single issue:

Do you believe these three arson investigators when they reached the conclusion that this was an intentionally set fire, or do you believe the defendant when he says it was an accident?

To us, this question sets the issue correctly as one of credibility. The parties each had a theory concerning the cause of the fire, i.e., intentional or accidental. The jury believed the experts and not Wardle. Credibility of witnesses is a matter for the jury to determine. State v. Bagley, 681 P.2d 1242, 1244 (Utah 1984).

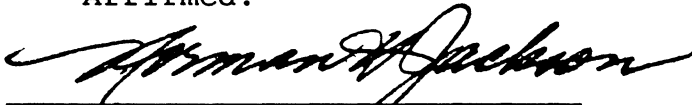
Next, Wardle contends his trial counsel was ineffective, resulting in a denial of his sixth amendment rights. In evaluating an ineffective assistance of counsel claim, we must determine that counsel's performance fell below an objective standard of reasonable professional judgment and that defendant was prejudiced. State v. Carter, 776 P.2d 886, 893 (Utah 1989).

First, Wardle contends that counsel should have objected to the prosecutor's insurance fraud theory and argument that Wardle's proof of loss statement was inflated because that theory was unsupported by the evidence. However, Wardle ignores testimony that his building was valued at \$13,000 and that he accepted \$15,900 after submitting a claim for \$25,000. Further, Wardle testified that he would have been happy to receive \$5,000-\$6,000 because he was not sure he had insurance and that was what he felt his loss was at the time. His proof of loss statement listed \$544 for sheetrock when there was no sheetrock in the walls that burned. From this evidence, the prosecutor could properly argue that Wardle believed the value of his building to be about \$6,000 and that his \$25,000 claim was inflated and padded. Thus, an objection to the prosecutor's argument would not have been well taken. We find no deficiency in counsel's performance in this regard.

Next, Wardle contends that counsel "was remiss in allowing the State to introduce, without objection, improper opinion evidence which was clearly prejudicial to defendant." Prejudice is established where this Court's confidence in the verdict is undermined because there is a reasonable likelihood of a different result if counsel had not performed deficiently. State v. Morehouse, 748 P.2d 217, 219 (Utah Ct. App. 1988). Assuming arguendo that counsel was deficient in not objecting to the experts' insertion of Wardle's name in their hypotheses as to how the fire started, we find no prejudice. Wardle was the last known person in the building prior to the fire. He was there shortly before the fire. An accelerant was applied to the fire. Wardle's failure to see or smell the smoldering iron next to his desk where the fire originated is inexplicable. We find it highly improbable that the jury found Wardle guilty because his name was mentioned by the experts. Wardle's "accident" explanation placed his credibility squarely at odds with that of the experts, even without Blundell's commentary on the divergent testimony. Because Wardle has not demonstrated prejudice, his conviction must stand. See State v. Frame, 723 P.2d 401, 405 (Utah 1986).

We have carefully considered Wardle's remaining claim regarding the trial court's failure to give a jury instruction,³ and we conclude it is meritless.

Affirmed.

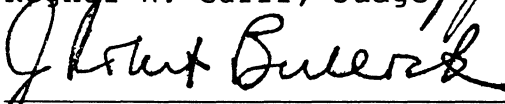


Norman H. Jackson, Judge

WE CONCUR:



Reginal W. Garff, Judge



Robert Bullock, Judge

3. The brief contains a single page of argument and cites a single case as follows: "See State v. Clayton, 646 P.2d 723 (Utah 1982) (citing numerous cases)."

FILE

SEP 11 1990

IN THE UTAH COURT OF APPEALS

State of Utah,)
)
 Plaintiff and Appellee,)
)
 v.)
)
 Wayne Wardle,)
)
 Defendant and Appellant.)

ORDER

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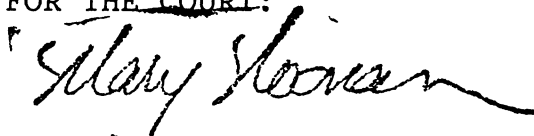
Case No. 890372-CA

This matter is before the Court upon a Petition for Rehearing filed by the appellant. Appellant argues in part that rehearing should be granted based on his belief that the reply brief was not considered by the Court. Although the reply brief was not docketed in the Court's computerized docketing system, the reply briefs were available and were considered by the panel.

IT IS HEREBY ORDERED that the appellant's Petition for Rehearing is denied.

Dated this 11th day of September, 1990.

FOR THE COURT:



Mary T. Noonan
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of September, 1990, a true and correct copy of the foregoing REMITTUR was deposited in the United States mail or personally delivered to each of the parties below.

Gary Pendleton
Attorney for Appellant
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R. Paul Van Dam
State Attorney General
Sandra L. Sjogren
Assistant Attorney General
B U I L D I N G M A I L

DATED this 17th day of September, 1990.

By Shari Knighton
Deputy Clerk