

2001

Utah v. Scott Holland : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	Case No. 20010359-CA
	:	
v.	:	
	:	
SCOTT HOLLAND,	:	Priority No. 2
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

**APPEAL FROM A CONVICTION FOR ATTEMPTED MURDER, A
SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE
ANN. § 76-5-203 (Supp. 2000), IN THE FIFTH JUDICIAL DISTRICT
COURT, IRON COUNTY, UTAH, THE HONORABLE J. PHILLIP
EVES, PRESIDING**

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**SCOTT BURNS
Iron County Attorney**

Attorneys for Appellee

NO ORAL ARGUMENT OR PUBLISHED OPINION REQUESTED

FILED

Utah Court of Appeals

AUG 06 2001

**Paulette Stagg
Clerk of the Court**

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	Case No. 20000359-CA
	:	
v.	:	
	:	
SCOTT HOLLAND,	:	Priority No. 2
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a jury conviction for attempted murder, a second degree felony, in violation of UTAH CODE ANN. § 76-5-203 (Supp. 2000). This Court has jurisdiction of the appeal under UTAH CODE ANN. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Should this Court reach defendant's claim of error where he fails to provide an adequate record for review, fails to support his claim with any legal analysis and pertinent authority, and where he invited the alleged error?

No standard of review applies. In the absence of an adequate record, this Court presumes the trial court ruled correctly. *State v. Snyder*, 932 P.2d 120, 131 (Utah App. 1997). Further, this Court declines to review claims unsupported by legal authority and analysis. *State v. Bryant*, 965 P.2d 539, 549 (Utah App. 1998). Finally, invited error is not subject to review. *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993) ("A party cannot

take advantage of an error committed at trial when that party led the trial court into committing error.”).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah R. App. P. 11(e)(2):

Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant’s deficiencies in providing the relevant portions of the transcript.

Utah R. App. P. 24(a)(9):

An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

STATEMENT OF THE CASE

Defendant was charged with attempted murder, a second degree felony, in violation of UTAH CODE ANN. § 76-5-203 (Supp. 2000); financial credit card fraud, a third degree felony, in violation of UTAH CODE ANN. § 76-6-506.3 (Supp. 2000); possession of paraphernalia, a class B misdemeanor, in violation of UTAH CODE ANN. § 58-37a-5 (1998); and illegal use of a communication device, a class B misdemeanor, in violation of UTAH CODE ANN. § 76-6-409 (1999) (R2-1).

The parties subsequently stipulated that the attempted murder charge would be tried separately from the other charges (R70). Thereafter, during jury deliberations on the attempted murder charge, the trial court responded in writing to several questions from the jury by directing them to again review the instructions defining attempted murder, “such as Instructions 10, 13, 14 and 15” (*see* Court’s Exh. ##14-15, contained in small manilla envelope) (Copies of the pertinent exhibits are contained in **addendum A**; copies of the pertinent jury instructions are contained in **addendum A(1)**). Defense counsel approved the trial court’s written response both as to form and content (Court’s Exh. #15), **add. A**. Thereafter, the jury convicted defendant of attempted murder (R145).

On 5 March 2001, prior to his April 2001 sentencing, defendant filed a motion for arrest of judgment and/or new trial, challenging the adequacy of the trial court’s written response to the deliberating jury (R157-155) (a copy is contained in **addendum B**). The State filed a response on 9 March 2001 (R185-182) (a copy is contained in **addendum C**). Following the parties’ oral argument on 30 March 2001, the trial court orally denied the motion, adopting the State’s memorandum and entering specific findings of fact (R213-212, 226).¹ The trial court’s written ruling denying the new trial motion was filed

¹Defendant did not request that the argument and oral ruling handed down on 30 March 2001 be transcribed and designated in the record on appeal. *See* Utah R. App. P. 11(e).

on 22 May 2001 and specifically incorporates the prior oral ruling, but does not reiterate the trial court's oral findings (R227-226) (a copy is contained in **addendum D**).

Also at the 30 March 2001 hearing, defendant pled guilty to two counts of possession of drug paraphernalia, both class B misdemeanors (R206-197, 215-214). Pursuant to the parties' plea agreement, the original credit card and communication device offenses were dismissed (R203).

On 9 April 2001, the trial court imposed the statutory term of one-to-fifteen-years for the attempted murder conviction, and two concurrent statutory six-month terms for the misdemeanor crimes (R220-217).

Defendant filed a timely notice of appeal (R222). *See State v. Vessey*, 957 P.2d 1239, 1240 (Utah App. 1998) (defendant's motion for new trial, filed before sentencing, was untimely and had no effect on the time for filing a notice of appeal, and defendant's notice of appeal filed within 30 days after the final judgment was timely).

STATEMENT OF THE FACTS

Defendant has not requested the preparation and/or designation of any transcripts pertinent to this appeal. *See* Utah R. App. P. 11(e). The State therefore recites the facts as set forth in the "No Warrant Arrest Fact Sheet"(R5). On 27 July 2000, Officer McIntyre apprehended and interviewed defendant (*id.*). After waiving his *Miranda*² rights, defendant admitted to having a confrontation with Travis Ford 15 days earlier and

²*See Miranda v. Arizona*, 384 U.S. 436 (1966).

attempting to shoot him by firing one shot which missed Ford (*id.*). Defendant turned over the .38 caliber revolver he used to shoot at Ford (*id.*). A search of defendant's person yielded two illegal credit cards (*id.*). A search of defendant's vehicle further yielded another handgun, a black nylon bag containing several syringes and a spoon with a white residue, and three "cloned" cellular phones (*id.*).³ When asked what his intentions were in shooting at Ford, defendant replied, "I don't know what they were" (*id.*).

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's denial of defendant's motion to arrest judgment and/or to grant a new trial for three reasons. First, defendant fails to provide a transcript of the parties' arguments and the trial court's oral findings in support of its ruling. Therefore, this Court should assume the trial court correctly decided the motion.

Second, defendant fails to support his claim of instructional error with pertinent authority and meaningful legal analysis in contravention of the briefing rule. The Court may reject his claim of error on this ground alone.

Finally, the available record undisputedly establishes defense counsel approved the trial court's written response to the deliberating jury as to both form and content. Therefore, any error was invited and the trial court properly denied the new trial motion

³Cloning is a process which allows a cellular phone to be used without incurring air-time or service charges (*id.*).

on this ground. Having led the trial court to believe that its written response was error-free, defendant may not now take advantage of any alleged error.

ARGUMENT

DEFENDANT FAILS TO SUPPORT HIS CLAIM OF ERROR ON APPEAL WITH AN ADEQUATE RECORD AND/OR BRIEF; MOREOVER, ANY ALLEGED ERROR HERE WAS INVITED

Defendant challenges the trial court's denial of his motion to arrest judgment and/or to grant a new trial. Aplt. Br. 4-5. Defendant claims he was entitled to an arrest of judgment or new trial because the trial court erroneously responded to written questions from the deliberating jury. *Id.* In denying the motion, the trial court adopted the reasoning set forth in the prosecutor's memorandum - - that the trial court's written response was both proper *and* approved by defense counsel (R135-132), **add. D.**

This Court should reject defendant's appellate challenge to the trial court's ruling for any one or all of the following three reasons: First, defendant fails to provide an adequate record for review; second, he fails to support his claim of error with pertinent authority and meaningful legal analysis; and third, the available record undisputedly establishes that any error was invited.

A. Failure to Provide an Adequate Record.

Rule 11(e)(2), Utah Rules of Appellate Procedure, requires an appellant to "include in the record a transcript of all evidence relevant" to the challenged finding or ruling. Here, defendant did not have the 30 March 2001 hearing - - where the parties

argued and the trial court ruled on the new trial motion, designated in the record on appeal (R224). While the trial court filed a subsequent written ruling, that ruling merely incorporates the trial court's earlier oral decision without reiterating those specific oral findings (R226), **add. D.**

Consequently, the Court should deem the record inadequate for meaningful appellate review and "presume that the trial court made the appropriate findings on the record" to support its ruling denying the motion for new trial. *State v. Snyder*, 932 P.2d 120, 131 (Utah App. 1997). *See also State v. Wetzel*, 868 P.2d 64, 67 (Utah 1993); *Jolivet v. Cook*, 784 P.2d 1148, 1150 (Utah 1989), *cert. denied*, 493 U.S. 1033, 110 S.Ct. 751 (1990); *State v. Theison*, 709 P.2d 307, 309 (Utah 1985); *State v. Wulffenstein*, 657 P.2d 289, 293 (Utah 1982) ("When a defendant predicates error to this Court, he has the duty and responsibility of supporting such allegation by an adequate record").

B. Failure to Comply With the Briefing Rule.

Rule 24(a)(9), Utah Rules of Appellate Procedure, provides that the argument portion of an appellant's brief "shall contain the contentions and reasons of the appellant with respect to the issues presented, . . . with citations to the authorities, statutes and parts of the record relied on." Under this rule, Utah appellate courts have consistently declined to address inadequately briefed issues because "a reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." *State v.*

Bishop, 753 P.2d 439, 450 (Utah 1988); *see also State v. Wareham*, 772 P.2d 960, 966 (Utah 1989) (declining to address argument on the ground that defendant's brief "wholly lacks legal analysis and authority to support his argument"); *State v. Bryant*, 965 P.2d 539, 549 (Utah App. 1998) (same).

This Court should decline to consider defendant's argument on appeal because he has failed to comply with rule 24(a)(9). In his one-page argument, defendant provides no meaningful analysis of, let alone pertinent authority for, his contention that the trial court's written response was erroneous. *See* Apl't. Br. at 4-5. Nowhere in defendant's brief does he attempt to fit this case into any meaningful analytical framework. *Id.* He does not cite to a single case. *Id.* He thus fails to give the Court any guidance as to any test, standard, or analytical formula that may arguably apply.

Because defendant has failed to support his claim with pertinent authority or legal analysis, this Court should refuse to consider it.⁴

⁴The only arguable support defendant's cites for his claim of error is an affidavit from one of the jurors claiming to have misunderstood the trial court's written response and therefore to have misapplied the law. A copy of the affidavit was attached to defendant's new trial motion and is thus numbered in the record (*see* R160-158). Based on the available record, however, it is not clear that the trial court even considered the affidavit because its written ruling indicates only that its "decision was based upon the points and authorities submitted by the State of Utah as well as specific findings of fact made by the Court, from the bench and on the record" (*see* R226), **add. D.**

The trial court's apparent non-consideration of the affidavit was appropriate. Indeed, "[a]ll inquiries into the thought processes of the jurors are improper because they undermine the integrity of the verdict." *State v. Lucero*, 866 P.2d 1, 3 (Utah App. 1993). While Rule 606(b), Utah Rules of Evidence allows testimony on the question of "whether any outside influence was improperly brought to bear upon any juror, the rule

C. Invited Error.

Finally, although defendant has not provided the Court with the parties' oral arguments and the trial court's oral ruling, the available record undisputedly establishes that any alleged error here was invited. Indeed, the trial court's written response to the deliberating jury reflects that *defense counsel reviewed the response and approved it as to both form and content* (Court's Exh. #15), **add. A.** Defendant thus led the trial court to believe that the response was error-free. *Id.*

The policy undergirding the invited error doctrine is that the trial court "should have the first opportunity to address the claim of error," and that parties should be discouraged from intentionally misleading the trial court "so as to preserve a hidden ground for reversal on appeal." *State v. Anderson*, 929 P.2d 1107, 1108 (Utah 1996). Having led the trial court to believe that, not only did he not object to the response, but also expressly approved it, defendant may not now claim error. *State v. Dunn*, 850 P.2d

further "provides that evidence by affidavit will not be admitted as to 'any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror.'" *Lucero*, 866 P.2d at 3 (quoting Utah R. Evid. 606(b)). Because the juror's affidavit here outlines the alleged influence of the trial court's written response on the juror's reasoning, it necessarily contains inadmissible information under rule 606(b).


1201, 1220 (Utah 1993) (“A party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.”).⁵

CONCLUSION

The trial court’s ruling denying defendant’s motion to arrest judgment and/or to grant a new trial should be rejected and defendant’s conviction for attempted murder, a second degree felony, affirmed.

RESPECTFULLY SUBMITTED on 6 August 2001.

MARK L. SHURTLEFF
Utah Attorney General


MARIAN DECKER
Assistant Attorney General

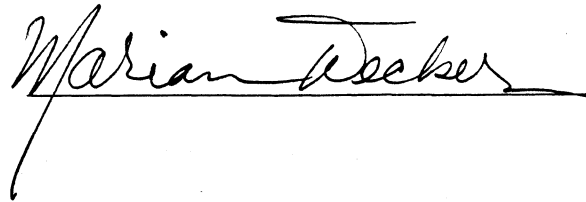
⁵In any event, the trial court’s response was correct. The trial court merely directed the jurors to review the attempted murder instructions, “such as Instructions 10, 13, 14 and 15” (Court’s Exh. # 15), **add. A**. While defendant complains about an arguable ambiguity in instruction #14, read as a whole, the instructions make plain that the requisite mental state for attempted murder is knowing and intentional, *not* reckless. ***Id.*** See ***Lucero***, 866 P.2d at 2 (“Jury instructions must be read and evaluated as a whole. . . [I]f taken as a whole they fairly instruct the jury on the law applicable to the case, the fact that one of the instructions, standing alone, is not as accurate as it might have been is not reversible error.”).

CERTIFICATE OF MAILING

I hereby certify that on 6 August 2001, I mailed a copy of the foregoing *Brief of Appellee*, to the following:

JAMES K. SLAVENS
PO Box 752
Fillmore, UT 84631

Attorney for Appellant

A handwritten signature in cursive script, reading "Marian Decker", written in dark ink. The signature is fluid and stylized, with a long horizontal line extending from the end of the name.

ADDENDA

ADDENDUM “A”

Could an individual
be tried for attempted
murder if they pointed
a gun at someone
without actually
shooting it?

Michelle

Dad P. Henrich



Dear Jurors,

The court cannot comment on the effect, value or weight of the evidence in this case. In addition, the question posed appears to be hypothetical since it does not reflect the events in evidence in this case.

It is the exclusive province of the jury, after having heard the evidence and been instructed on the law, to determine whether the acts of the defendant violated the law.

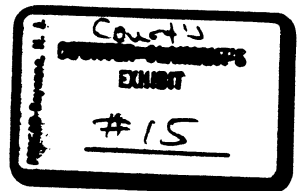
You have the duty to make that determination in this case. Your attention is redirected to the Instructions defining Attempted Murder, such as Instructions 10, 13, 14 and 15.

J. Philip Eves
5th District Judge

Approved as to
form and content:

Jan K. Sh

[Signature]



ADDENDUM “A(1)”

Instruction No. 10

Before you can convict the Defendant Robert Scott Holland of Attempted Murder. as charged in the Information filed by the State in this case, the State must prove, and you must find, unanimously and beyond a reasonable doubt, each and every one of the following elements:

- ✓1. That the defendant
2. attempted
3. knowingly and intentionally
4. to cause the death of another, and
- ✓5. that those acts occurred on or about July 12, 2000 in Iron County, State of Utah.

If you are not convinced beyond a reasonable doubt of any one or more of these elements, you must find the defendant not guilty of Attempted Murder as charged in the Information. If on the other hand, you are convinced beyond a reasonable doubt of all of the above stated elements, you must enter a verdict of guilty unless you find that the defendant was justified in exercising self defense according to the following instructions.

00105

INSTRUCTION NO. 13

In these instructions certain words and phrases are used which require definitions in order that you may properly understand the nature of the crime charged and in order that you may properly apply the law as contained in these instructions to the facts as you may find them from the evidence. These definitions are as follows:

"Intent": means intention, design, resolve, a determination of the mind.

"Intentionally": a person acts intentionally 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.

"Knowingly": a person acts 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 and that his conduct is reasonably certain to cause the result.

"Unlawful": means that which is contrary to law or unauthorized by law.

"Actor": means a person whose criminal responsibility is in issue in a criminal action.

00102

INSTRUCTION NO. 14

In every crime or public offense there must be a union or joint operation of the act and intent. The intent or intention is manifest by the circumstances connected with the offense and the sound mind and discretion of the accused, as shown by the evidence.

A person is only guilty of a criminal offense when his conduct is prohibited by law and he acts with some kind of criminal intent, that is, he acts intentionally, knowingly, or recklessly as the definition of the offense requires.

Instruction No. 15

One who is convicted of murder must be shown to have acted knowingly and intentionally in causing the death of another. A person is guilty of an attempted murder if, acting with that same mental state, he engages in conduct constituting a substantial step toward the commission of the offense but does not complete the offense.

The mental state for the completed crime and the attempt is the same whether the murder is completed or only attempted.

INSTRUCTION NO. 22

If, in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none should be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

ADDENDUM “B”

On 11/13/2019, at 11:00 AM, the following information was received from the attorney:

SERVED:

JUDGE


00157

upon the rights of a party.

Michele D. Furnival in her affidavit makes it clear that she did not feel that the Defendant acted knowingly or with intent to murder another person. During the deliberation, the jury asked the question of whether or not a person could be guilty of attempted murder if they pointed a gun towards another person. The Court responded to this question by instructing the jury to refer to Jury Instruction 14, which did have reckless in the instruction. Ms. Furnival then acquiesced to the guilty plea by reading Jury Instruction 14 to mean that if the Defendant acted recklessly, he would be guilty of attempted murder. This clearly is not the law.

Even though the jury instructions regarding the elements of the offense identify intentionally or knowingly as the *mens rea*, the jury clearly did not follow that particular instruction because of the ambiguity of Instruction No. 14. Jury Instruction No. 14 erroneously included "reckless" as an adequate *mens rea* to find the Defendant guilty. Ms. Furnival clearly demonstrates that she did not feel the Defendant was guilty of intentionally or knowingly attempting to murder anyone. This fact establishes that the Defendant was prejudiced by the jury not following the instruction or because of the ambiguity of the jury instruction regarding recklessness. Because of this, Mr. Holland is entitled to an arrest of the judgment or in the alternative, a new trial "in the interest of justice" because there exists an "error or impropriety which had a substantial adverse effect upon the rights of a party."

Dated this March 1, 2001.


James K. Slavens
Attorney for Defendant

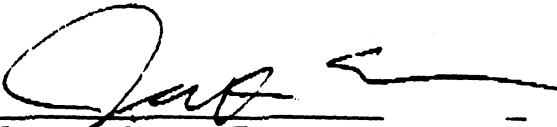
CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Utah, resident of and with my office in Fillmore, UT; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on March 29, 2001.

DISTRICT OF
STATE OF
DOCUMENT SERVED: RESPONSE

ATTORNEYS SERVED: (MAIL)

Scott Burns
Iron County Attorney
97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720


James K. Slavens, Esq.
Attorney for Defendant

JAMES K. SLAVENS (6138)
Attorney for Defendant
P. O. Box 752
Fillmore, Utah 84631
435-743-4225



IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH

Plaintiff

vs.

ROBERT SCOTT HOLLAND

Defendant

AFFIDAVIT OF MICHELE D. FURNIVAL

Case No.

0015-733

JUDGE

STATE OF UTAH

)

)ss.

County of _____

)

Michele D. Furnival, being first duly sworn, deposes and states as follows:

1. I was a juror in the above titled action and make this affidavit based upon my own personal knowledge and experience.
2. Initially, during the jury deliberations, it was my opinion that Mr. Holland did not knowingly or intentionally attempt to murder any person.
3. After much deliberation, we, the jury, asked the judge the question of whether or not a person could be guilty of attempted murder by pointing a gun towards another person. The answer back referred us to the jury instructions.
4. We reviewed the instructions, and the other jurors pointed out to me that Instruction No. 14 stated that if Mr. Holland acted recklessly, he would be guilty of attempted murder.

0015

5. For this reason, I agreed with the guilty verdict.
6. I do not feel and did not feel that Mr. Hollard had the intent or knowingly wanted to murder any other person. I felt and feel that it was reckless for him to point a gun toward another person.

DATED this 28 day of Feb MS 2001.

Michelle Farnival
Michele D. Farnival

SUBSCRIBED AND SWORN to before me this 28 day of March, 2001.

(SEAL)

Witnessed by :

Notary Public for Utah

Residing at: _____

My Commission Expires: _____

Courtney Farnival

Melanie Stewart

2/28/01

2/28/01

INSTRUCTION NO. 14

CRIMINAL

and had the intent to do

In every crime or public offense there must be a union or joint operation of the act and the recklessness or intent. The intent or intention is manifest by the circumstances connected with the offense and the sound mind and discretion of the accused, as shown by the evidence.

A person is only guilty of a criminal offense when his conduct is prohibited by law and he acts with some kind of criminal intent, that is, he acts intentionally, knowingly, or recklessly as the definition of the offense requires.

00153

JAMES K. SLAVENS (G138)
Attorney for Defendant
P. O. Box 752
Fillmore, Utah 84631
435-743-4225

responsibility of
Jury Instruction No. 14 at

the defendant in the case

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH

Plaintiff

vs.

ROBERT SCOTT HOLLAND

Defendant

RESPONSE TO STATE'S OBJECTION
TO DEFENDANT'S MOTION FOR
ARREST OF JUDGMENT AND/OR A
MOTION FOR A NEW TRIAL AND
SUPPORT THEREOF

Case No. 001500733

JUDGE EVES

COMES NOW, the Defendant by and through his attorney, James K. Slavens, and
responds to the States Objection to Defendant's Motion for an Arrest of Judgment and New Trial
as follows:

FACTS

1. The second paragraph of Jury Instruction no. 14 states as follows: "A person is only
guilty of a criminal offense when his conduct is prohibited by law and he acts with some
kind of criminal intent, that is, he acts intentionally, knowingly, or *recklessly* as the
definition of the offense requires." Emphasis added.
2. The jury asked the court whether or not a person could be guilty of "attempted murder"
by simply pointing a gun a person and never firing the gun. The Court instructed the jury
to refer to Jury Instruction no. 14.

A. Jury Instruction No. 14 is a misstatement of the law and does not otherwise clearly and unambiguously state the law and is clear error.

The Defendant is not disputing the first paragraph of Instruction No. 14 as being accurate. However, a close reading of the second paragraph clearly adds recklessly to the mens rea requirement.

Jury Instruction No. 14 states that if a person conduct is prohibited by law, and he acts "intentionally, knowingly, or recklessly" he is guilty of the offense. This is clearly not the law. In order for the Defendant to be guilty of attempted murder, he must of acted knowingly or intentionally. To state that recklessly meets the mens rea requirement is an inaccurate statement of the law, which entitles Mr. Holland to a new trial.

The State's response to this is that the clause "as the definition of the offense requires" somehow clarifies or cures the defect because the clause instructed the jury to disregard the reference to recklessly because the previous element instruction only listed intentionally and knowingly as the appropriate mens rea. This argument has no merit and must be summarily dismissed. First, the Jury Instruction does not refer back to any other jury instruction. Second, the language "as the definition of the offense requires" provides no direction to the jury. What does "definition of the offense requires" mean? The language could be interpreted to be a restatement of the conduct requirement, but it certainly cannot be interpreted as the State argues—that the jury, because of this language, would refer back to the jury instruction listing the essential elements and see that reckless intent cannot satisfy the mens rea element.

Based upon the above, Jury Instruction No. 14 is a misstatement of the law or at best is ambiguous and does not clearly state the law. Consequently, the Defendant's request for an arrest of judgment and/or a new trial must be granted.

- B. The Court, the prosecutor, and the defense attorney all share the responsibility of insuring accurate jury instructions are presented to the jury.

The State argues that since the Defendant did not object to the Jury Instruction No. 14 at the trial, the Court cannot entertain the objection at this point. First, the defendant in the case quoted by the State of Utah, *State v. Lucero*, 886 P.2d 1 (App. 1993), never objected to the jury instruction that was in dispute by the parties. This fact did not prohibit the appellate court from addressing the merits of the appeal. Second, all the parties, the Court, the State and the Defendant all have the duty to ensure that the Jury Instructions accurately state the law.

If the Court denies the Defendant's Motion, then his remedy is a post-conviction relief pursuant to Utah Code Section 78-35a-101 et. seq. A person pursuant to this act may be entitled to relief from a conviction for ineffective assistance of counsel, 78-35a-104 (d). However, Section 78-35a-106 provides that a person is not entitled to the relief if the issue can still be raised in a post trial motion or on appeal. Consequently, for this preclusion to have effect, the standard of review should be the same, allowing the Defendant to request a new trial regardless of whether or not Defendant's counsel failed to object, because in a post-conviction relief action he could argue that he had ineffective assistance of counsel.

Based upon the above, the Court should reject the State's position that because the Defendant failed to object he cannot now request a new trial or arrest of judgment.

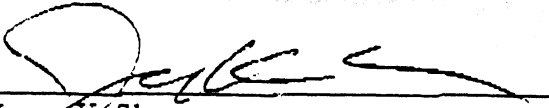
- C. The juror's affidavit is appropriate to show that the Defendant was prejudiced by the faulty instruction.

The State argues that Utah Rules of Evidence 606 (b) restricts the use of a juror's affidavit to only determining "whether any outside influence was improperly brought to bear upon any juror." The State's argument cannot be accepted by the court for the following reasons.

First, the first clause of the rule states that "upon an inquiry into the validity of a verdict"

a juror cannot testify. This is not the purpose of the juror's affidavit. Before the Court can find that the Defendant is entitled to a new trial or an arrest of judgment, the Court must find that the error was not harmful or not prejudiced by the error. The affidavit establishes this requirement and is not being used to inquire into the validity of the guilty verdict. Based upon the affidavit, there can be no dispute that the Defendant was prejudiced by the error.

Dated this March 29, 2001.


James R. Slavens
Attorney for Defendant

ADDENDUM “C”

SCOTT BURNS (#4283)
Iron County Attorney
97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720
Telephone: (435) 586-6694

ed by the Defendant. The Court

Evidence allows testimony from the

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IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY
STATE OF UTAH

State v. Thomas

STATE OF UTAH,

Plaintiff,

vs.

ROBERT SCOTT HOLLAND,

Defendant.

) **STATE'S OBJECTION TO DEFENDANT'S
MOTION FOR ARREST OF JUDGMENT
AND/OR MOTION FOR A NEW TRIAL**

) Criminal No. 001500733

) Judge J. Philip Eves

COMES NOW the State of Utah, by and through Iron County Attorney Scott Burns, and respectfully objects to Defendant's Motion for Arrest of Judgment and/or Motion for a New Trial, and further objects to the Court's possible consideration of a juror affidavit submitted by the Defendant in support of his motion.

The State's objection is based upon the fact that (a) the Court properly instructed the jury with respect to the elements of the underlying offense;(b) Defendant's counsel did not object to Instruction No. 14 at the appropriate time;(c) Instruction No. 14 correctly states the law: a person is only guilty of a criminal offense when his conduct is prohibited by law and he acts with some kind of criminal intent, that is, he acts intentionally, knowingly, or recklessly as the definition of the offense requires (emphasis added); and (d) the Court should refuse to consider a juror affidavit as it relates to matters that occurred during the course of the jury's deliberations.

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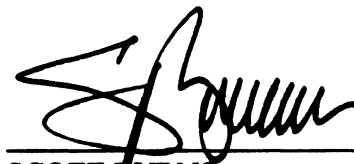
In State v. Lucero, 886 P.2d 1 (Ct. App. 1993), the Utah Court of Appeals considered issues set forth in Defendant's motions (a copy of State v. Lucero is attached hereto and incorporated herein by this reference). In Lucero, the jury returned a guilty verdict and the Defendant filed a motion for a new trial on the grounds that a supplemental jury instruction was an incorrect statement of the law and that the judge improperly communicated with the jury during their deliberations. In support of his motion for a new trial, the Defendant submitted an affidavit from one of the jurors. The trial court denied the motion, refused to consider the juror affidavit, and the Court's decision was affirmed on appeal.

Citing several Utah Court of Appeals and Supreme Court decisions, Lucero stands for the proposition that jury instructions, if taken as a whole, fairly instruct the jury on the law applicable to the case, the fact that one of the instructions standing alone is not as accurate as it might have been, is not reversible error. State v. Brooks, 638 P2d 537 (Utah, 1981); State v. Tennyson, 850 P2d 461 (Utah App. 1993). Moreover, the Court states that "jury instructions must be read and evaluated as a whole," State v. Johnson, 774 P2d 1141 (Utah 1989), and "jury instructions must accurately and adequately inform a criminal jury as to the basic elements of the crime charged." State v. Roberts, 711 P2d 235 (Utah 1985). The trial court properly and correctly instructed the jury with respect to the elements of the crime. Instruction No. 14 properly instructs the jury with respect to "act and intent" and states that "a person is only guilty of a criminal offense when his conduct is prohibited by law and he acts with some kind of criminal intent, that is, he acts intentionally, knowingly, or recklessly as the definition of the offense requires." The definition of the offense in the case at bar requires intentionally or knowingly, and the jury was properly instructed.

As relating to the affidavit of a juror, as submitted by the Defendant, the Court should not consider said affidavit. Rule 606(b) of the Utah Rules of Evidence allows testimony on the question of "whether any outside influence was improperly brought to bear upon any juror." However, Rule 606(b) provides that evidence by affidavit will not be admitted as to "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror." All inquiries into the thought processes of the jurors are improper because they undermine the integrity of the verdict. State v. Thomas, 830 P2d 243 (Utah 1992); State v. Gee, 498 P2d 662 (Utah 1972). An affidavit of a juror will not be received to show the juror's opinions, surmises, and processes of reasoning in arriving at a verdict. Thomas, 830 P2d at 248 n.4. "Rule 606(b) limits testimony to the objective existence of extraneous prejudicial information or an outside influence; jurors may not testify as to how they or the other jurors were subjectively affected by the extraneous information." Id.

Based upon the foregoing, the State respectfully requests the Court to deny the Defendant's Motion for Arrest of Judgment and/or Motion for a New Trial, and the State further requests the Court to refuse to consider the juror affidavit tendered by the Defendant in support of his motions.

DATED this 7th day of March, 2001.



SCOTT BURNS
Iron County Attorney

San Diego the City of

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a full, true, and correct copy of the within and foregoing
OBJECTION TO DEFENDANT'S MOTION FOR ARREST OF JUDGMENT AND/OR MOTION
FOR A NEW TRIAL, by first-class mail, postage fully prepaid, on this 7th day of March,
2001, to the following, to wit:

Submitted an affidavit from Mr. James K. Slavens
Attorney for Defendant
P.O. Box 752
Fillmore, UT 84631



Secretary

ADDENDUM “D”

FILED

FILED

SCOTT BURNS (#4283)

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Telephone: (435) 586-6694

MAY 29 2001

COURT OF APPEALS

IN THE FIFTH JUDICIAL DISTRICT COURT,
IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

ROBERT SCOTT HOLLAND,

Defendant.

) **ORDER DENYING DEFENDANT'S**
) **MOTION FOR ARREST OF JUDGMENT**
) **AND/OR MOTION FOR NEW TRIAL**

) *20010359-4*
) Criminal No. 001500733

) Judge J. Philip Eves


The above-entitled matter having come before the Court on March 30, 2001, in Parowan, Utah, pursuant to a motion by the Defendant to arrest judgment in the above-entitled matter or, in the alternative, for a new trial, and the Defendant, ROBERT SCOTT HOLLAND, having appeared in person together with his attorney of record James K. Slavens, and the State of Utah having appeared by and through Iron County Attorney Scott Burns, and the Court having receiving and reviewed the motion and memorandum submitted by the Defendant, and the Court having further received and reviewed the State of Utah's objection to Defendant's motion, supported by a memorandum of points and authorities, and the Court having further heard oral argument from all parties and being fully advised in the premises, now makes and enters the following order:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant's Motion for Arrest of Judgment and/or Motion for a New Trial should be, and hereby are, overruled and denied.

The Court's decision is based upon the points and authorities submitted by the State of Utah as well as specific findings of fact made by the Court, from the bench and on the record.

DATED this 22nd day of May, 2001.

BY THE COURT:



J. PHILIP EVES
District Court Judge