

1961

# State of Utah v. John Edwards : Brief of Appellant

Utah Supreme Court

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Wendell P. Ables; Attorney for Defendant and Appellant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs

Case  
No. 9525

JOHN EDWARDS,

Defendant and Appellant.

FILED  
SEP 18 1961

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Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

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Wendell P. Ables

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**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

**STATE OF UTAH,**  
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**JOHN EDWARDS,**  
**Defendant and Appellant.**

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**BRIEF OF APPELLANT**

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**PRELIMINARY STATEMENT**

Defendant was convicted in the District Court of Weber County for the crime of profiting by the earnings of fallen women. 76-53-10 UCA (1953)

**RELIEF SOUGHT**

Defendant requests that the Court award him a new trial.

**STATEMENT OF FACTS**

On February 17, 1961, at about 9:00 P.M. an Ogden City plain clothes police officer was sitting in an unmarked police car parked on the South side of lower 25th Street headed East (R-14). An acquaintance was sitting in the car with him who happened to know the de-

defendant and his wife, the three having been "drinking pals" (R-9,10). The defendant and his wife walked up to the friend who was sitting in the right front seat next to the officer and defendant asked the friend if he had a drink (R-15). The friend said no, and the defendant walked around to the driver's side, in the street, and asked the police officer for a cigarette (R-15). Defendant's wife remained on the sidewalk during the conversation between defendant and the officer. After the officer gave defendant a cigarette, the jury apparently found that the defendant asked the officer if he was looking for a girl. The officer said, "Sure," and the passenger in the police vehicle got out of the car and left the scene (R-16). Defendant then walked back to the sidewalk where his wife was standing and the two got into the car, defendant's wife being in the middle of the front seat, and defendant sitting on the right side of the front seat (R-16). The defendant then suggested that they drive some place where it was dark, and the officer drove the defendant and his wife to the vicinity of 28th Street and Adams where he parked the vehicle (R-17). Defendant then said, "It will be Five

Dollars". The officer pulled out his wallet and gave the defendant what he thought was a five dollar bill and defendant took the bill (R-18). The officer then wanted to know what he was going to get for his Five Dollars, and the defendant said he could have sexual relations with his wife. The officer asked the wife if this was right and she agreed to have sexual relations with him (R-18).

The bargain having been struck, defendant offered to leave the car while the agreed services were performed. The officer suggested they drive to a place that was a little darker and thereupon drove defendant and his wife to the Ogden City and County Building where he arrested defendant for profiting by the earnings of fallen women (R-18,19).

Defendant testified at the trial and steadfastly maintains that the reason he and his wife got into the car was merely for transportation to the liquor store; that the defendant did not ask the officer if he wanted a girl; that he did not solicit his wife to act as a prostitute for the officer; and that he accepted the bill from the officer to help buy some liquor (R-39-43).

## STATEMENT OF POINTS

### POINT I

THE CROSS EXAMINATION OF DEFENDANT ABOUT HIS WIFE'S PLEA OF GUILTY TO THE CHARGE OF PROSTITUTION WAS IR-RELEVANT, IMMATERIAL, INCOMPETENT, COLLATERAL, HEARSAY, AND CONSTITUTES PREJUDICIAL ERROR.

### POINT II

THE CROSS EXAMINATION OF DEFENDANT ABOUT CONVICTIONS OR BEING INCARCERATED ON MISDEMEANOR VIOLATIONS CONSTITUTES PREJUDICIAL ERROR.

### POINT III

THE CROSS EXAMINATION OF DEFENDANT VIEWED AS A WHOLE CONSTITUTES PREJUDICIAL ERROR.

### POINT IV

THE TRIAL COURT HAD THE IMPERATIVE DUTY TO ADMONISH OR INSTRUCT THE JURY ON THE EVIDENCE OF THE DEFENDANT'S WIFE'S PLEA OF GUILTY TO PROSTITUTION AND EVIDENCE OF THE DEFENDANT'S CONVICTION OR INCARCERATION FOR MISDEMEANOR VIOLATIONS.

## ARGUMENT

### POINT I

THE CROSS EXAMINATION OF DEFENDANT ABOUT HIS WIFE'S PLEA OF GUILTY TO THE CHARGE OF PROSTITUTION WAS IR-RELEVANT, IMMATERIAL, INCOMPETENT, COLLATERAL, HEARSAY, AND CONSTITUTES PREJUDICIAL ERROR.

During the cross examination of defendant he was asked the following questions:

Mr. Newey: Now, you were with your wife when she was



booked in this police station the night of February 17, booked for prostitution?

Mr. Frorer: Objection.

The Court: Objection is overruled. You may ask.

Mr. Newey: You were right there when she was booked for prostitution and gave her name, Shirley Jean Edwards and stated she was your wife?

Defendant: Yes, sir.

Mr. Newey: You are aware of the fact that she plead guilty to that charge are you not? (R-45-46)

The essence of the defendant's answer to this question was yes.

It is obvious that there is but one factual situation in this case and the defendant was charged with the crime of profiting by the earnings of fallen women based on these facts. The defendant's wife, however, was charged with the crime of prostitution based on these same facts and sometime prior to defendant's trial plead guilty to this offense. These are two separate and distinct offenses arising out of the same set of facts and the district attorney was allowed to bring in the plea of guilty to the crime of prostitution during the trial of the defendant of the charge of profiting by the earnings of fallen women.

An identical situation was presented to this Court in the case of State vs Justesen, 35 Utah 106, 99 P 456 (1909). In this case, the defendant suborned or procured one Larson to testify falsely at a civil trial which apparently was done. Subsequent to this, the crime was discovered and Larson pleaded guilty to the crime of perjury. At the trial of the defendant on the charge of subornation of perjury the district attorney offered into evidence the information on which Larson was charged concerning the same perjury. After objection by defense counsel the district attorney remarked in the presence and hearing of the jury, "We simply want to show that he [referring to Larson] was arraigned on the information, that he appeared in court, and that he pleaded guilty to it". The objection was overruled and the information and minute entries showing the arraignment and plea of guilty were read into the record.

In reversing the conviction of the defendant and ordering a new trial this Court stated at 35 Utah 109;

"He [Justesen] is charged with having committed the crime of subornation of perjury, which is a separate and distinct offense from that of perjury. Therefore, no part of the record of Larson's conviction was competent

for any purpose, and should have been excluded. The record of Larson's plea of guilty to the information charging him with perjury, and the statement by the district attorney with reference thereto, were especially prejudicial, and the objections made to them should have been sustained." (Emphasis Mine)

To the same effect see People vs Farrell, 11 Utah 414, 40 P 703 (1895).

The defendant's wife was not present and did not testify at the trial (R-43) and the jury could not help but wonder, "Was defendant's wife charged with a crime, and if so, what was the disposition of the case?" The district attorney realized the importance of this question in the minds of the jury and the following discussion took place out of the hearing of the jury:

Mr. Newey: Your Honor, I would request an instruction that the question as to whether or not, or an instruction that the woman in such a solicitation case would not be tried at the same place and time with the man under the law, that she may or may not be tried at a different place and that such a question is not the question of this jury to decide.

Mr. Frorer: I object to any such instruction here. He is raising an inference which I don't believe the prosecution is entitled to. I don't believe that is part of this case, whether or not this woman has been charged with any crime.

The Court: You will prepare a proper request which states that they are not concerned with that, that they are concerned only with whether this man is guilty or not.....(Emphasis Mine) (R-36)

The trial court noted that the only question involved was the guilt or innocence of the defendant but incredibly allowed the prejudicial evidence in, over the objection of defense counsel.

Even if the defendant and his wife could be considered co-conspirators or accomplices under 76-12-1 or 76-1-44, UCA (1953), her plea of guilty to the crime of prostitution was highly prejudicial and inadmissible as against defendant. This Court stated further at 35 Utah 109,

"The rule is elementary that where two or more persons have joined or conspired together to commit a crime, and have either accomplished or abandoned their common desire, no one of them can by the subsequent act or declaration of his own affect his co-conspirator. His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence as such against any but himself."

The rule is laid down in Wharton's Criminal Evidence, Vol. 2, Section 459, 12th Ed. (1955):

".....as a general rule, the fact that a confederate or co-conspirator of the defendant pleaded guilty or has been found guilty, is inadmissible on the issue of the guilt of the defendant who is separately tried."

In the case of State vs Gargano, 99 Conn 103, 121 A 657 (1923), the Connecticut Supreme Court stated at 121 A 659:

"The pleas of guilty of certain of those persons jointly charged in an information with the commission of a crime are, in effect, merely confessions or statements by these parties that they committed such crimes. The fact that they pleaded guilty, or the record of such pleas, is not admissible upon the trial of another person jointly charged with the commission of the same crimes."

"The plea of guilty by, or the conviction of one person of the commission of a crime, or a record of such plea, does not establish the fact that such crime was committed as against any other person, and is not admissible as tending to prove such fact....."

"The confession involved in a plea of guilty in court by one charged with a crime is as much hearsay as if the confession were made out of court."

While it is true that defendant testified that he did not think his wife was a "fallen woman" on direct examination this opened the door, if at all, to evidence of prior misconduct but not misconduct arising out of the same set of facts defendant was being tried on.

In view of the disputed facts in this case, the admission of this evidence could have no other effect than to convince the jury of defendant's guilt.

It is submitted that admission of this evidence, over the timely objection by defense counsel, was highly prejudicial and defendant is entitled to a new trial.

## POINT II

### THE CROSS EXAMINATION OF DEFENDANT ABOUT CONVICTIONS



OR BEING INCARCERATED ON MISDEMEANOR VIOLATIONS CONSTITUTES PREJUDICIAL ERROR.

During the cross examination of defendant he was asked the following questions:

Mr. Newey: Did you spend some time in jail down in Las Vegas, Nevada for being drunk?

Mr. Frorer: I object.

The Court: The objection is overruled, you may ask him.

\*\*\*

Mr. Newey: How long were you in jail down there for being drunk during the month of June?

The Defendant: Well, I think it was 10 or 15 days, something like that. It may have been one day. I don't exactly know the month. I know I was in there for being drunk, that is what I did time for, is being drunk. (R-53)

\*\*\*\*\*

Mr. Newey: You spent some time in jail in San Bernadino, California in November of 1960?

\*\*\*

The Defendant: Yes, for vag.....(R-54)

The duty of a witness or an accused to answer questions is spelled out in 78-24-9, UCA (1953). This statute reads as follows:

"A witness must answer questions legal and pertinent to the matter in issue,.....nor need he give an answer which will have a direct tendency to degrade his character, unless it is to the very fact in issue or to a fact from which the fact in issue would be presumed. But a witness

must answer as to the fact of his previous conviction of a felony."

The question of whether an accused may be impeached for conviction of a misdemeanor came before this Court in the case of State vs Johnson, 76 Utah 287, 287 P 909 (1930). This Court reviewed the authorities and the statute relating to the duty of a witness or an accused to answer questions and concluded at 76 Utah 99:

".....since our statute restricts the inquiry to a conviction of a felony. We therefore are of the opinion that error was committed in permitting the state to read in evidence the records of the city court to show convictions of pleas of guilty of the misdemeanor referred to."

In State vs Hougensen, 91 Utah 351, 64 P2d 229 (1936) this Court set forth 11 rules to guide Bench and Bar in the conduct and scope of impeachments of witnesses. A careful study of these rules fails to disclose any mention of misdemeanor convictions and it is submitted that a conviction of this grade of crime is inferentially excluded from being a basis of impeachment of a witness. The Hougensen case, supra, does not overrule the Johnson case, supra, but it is on the contrary, supplemental to it.

It is obvious from the cross examination of the defendant that the purpose was not to impeach him for the

purpose of affecting his credibility but to degrade him in the eyes of the jury. The defendant was not asked if he had been convicted or plead guilty to a crime, but was asked how many days in jail he had spent after each misdemeanor violation (which of course implies a conviction or a plea). It does not appear that impeachment on the basis of the misdemeanors of drunk and vagrancy would have any bearing on the defendant's credibility upon being tried for profiting by the earnings of fallen women.

The failure of the trial court to sustain the timely objection of defense counsel constituted prejudicial error.

### POINT III

THE CROSS EXAMINATION OF DEFENDANT VIEWED AS A WHOLE CONSTITUTING PREJUDICIAL ERROR.

The cross examination complained of under Points I and II is incorporated herein by reference. In addition to the previously discussed improper prejudicial cross examination I would like to point out the following:

(All of the questions are by Mr. Newey and answers by the defendant)

Q. You were in Las Vegas, Nevada with your wife on January 16, 1960?

A. Yes, sir.



Q. She spent two days in jail there for being drunk?

A. In Salt Lake.

Q. No, in Las Vegas, Nevada.

A. Well, not as I know she didn't. I didn't know about it. (R-51)

No attempt was made to prove the offense.

Q. All right, February 21, 1960 in Las Vegas, Nevada you were married to her then?

\*\*\*

Q. She spent 12 and a half days in jail there for being drunk. She was sentenced to that, 12 and a half days or twenty five dollars. You remember that don't you?

A. No, sir, I don't remember that. (R-51)

Again no attempt was made to prove the offense.

Q. You were in Salt Lake City on July 3, 1960, you and your wife weren't you?

\*\*\*

Q. She was arrested there for being drunk on July 3, 1960, was she not? (R-51,52)

\*\*\*\*\*

Q. Let's go back in the month before that, May 24, 1960....

\*\*\*

Q. You were in jail in Los Angeles part of the time, for being drunk in a public place?

\*\*\*

A. I don't know if I was in jail in May for getting drunk... (R-53,54)

There was no attempt made to prove this offense.

Q. Were you and your wife up in Pocatello, Idaho last September, 1960?

\*\*\*

Q. And she was in jail up there for being drunk, wasn't she?

A. Yes, she got in jail.....(R-55)

Q. You didn't know Mr. Anderson was a police officer when you helped your wife get in the car and got in the car with him, did you?

\*\*\*

Q. In fact you thought it was the man you and your wife had the night before? (R-60)

This Court has extended protection on cross examination to a witness for the accused in the case of State vs Herrera, 8 Utah 2d 188, 330 P2d 1086 (1958). It should be abundantly clear that the same protection should extend to the accused when he takes the stand in his own defense. The fair and impartial trial constitutionally guaranteed the accused requires that he be protected on cross examination from the degrading, prejudicial type questioning appearing in the Herrera case, supra, and in the case at bar. A careful reading of the cross examination of the defendant compels the conclusion that it deprived him of a fair trial.

I, II and III are harmless, then this Court should consider them cumulatively and award defendant a new trial.

State vs St. Clair, 3 Utah 2d 230, 262 p2d 323 (1955).

#### POINT IV

THE TRIAL COURT HAD THE IMPERATIVE DUTY TO ADMONISH OR INSTRUCT THE JURY OF THE EVIDENCE OF THE DEFENDANT'S WIFE'S PLEA OF GUILTY TO PROSTITUTION AND EVIDENCE OF THE DEFENDANT'S CONVICTION OR INCARCERATION FOR MISDEMEANOR VIOLATIONS.

It was the duty of the trial court to admonish or instruct the jury as to the limited effect of the evidence adduced under Points I and II. Although no request for admonishment or limiting instructions were made, the facts here clearly indicate the application of the rule regarding palpable error stated in State vs Cobo, 90 Utah 89, 60 P2d 962 (1936).

It is difficult to see how the introduction of the evidence complained of under Points I and II could not help but strongly indicate the defendant's guilt; although the only legal reason for its introduction would be to affect defendant's credibility. No doubt great confidence in the jury system is justified, but they should not be exposed to evidence where the danger of prejudice is great without proper admonishment or limiting instructions.

P 481 (1918) this Court stated:

".....it is by far a better and safer practice in any case where evidence is admissible only for a certain purpose or as against a particular defendant that the court, at the time the evidence is received, instruct and admonish the jury of the purpose for which the evidence is received and tell them that they should not consider it for any other purpose."

The case of Stansbury vs United States, 219 F2d 165 (1955 5th Cir.) is in point. The defendant was convicted of violating the Marihuana Tax Act. Defendant was cross examined concerning the "extraneous offenses of gambling and a policy wheel" and the Government tried to show that he was the father of the illegitimate child of one of his witnesses. The witness, Gloria White, was also cross examined concerning her illegitimate child and the insinuation was made but not proved that defendant was the father. The United States Circuit Court of Appeals for the 5th Circuit unanimously reversed the conviction and granted a new trial. The Court stated at 219 F2d 167;

"Most of the questions were not objected to but belated objections were made and we think those collateral matters were of such a nature on the whole that the trial court, of his own motion, should have admonished the jury not to consider them; or should have limited the purpose for which some of the evidence was admitted. This conclusion is based in part of the fact that, as pointed out, the case in chief was not at all strong and the prejudicial matters hereafter set out may well have tilted the scales against appellant on the question of his guilt or innocence of the offense charged." (Emphasis Mine)

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To the same effect Matters vs Commonwealth, \_\_\_Ky. \_\_\_,  
245 SW2d 913 (1952).

The trial court had a duty either to admonish the jury at the time of the introduction of the questionable evidence or to instruct the jury properly at the close of the case. Failure to do so, under the facts in this case, constituted palpable and prejudicial error and defendant is entitled to a new trial.

#### CONCLUSION

Defendant did not have a fair trial.

Respectfully Submitted,

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Attorney for Defendant and  
Appellant