

1961

State of Utah v. John Edwards : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Walter L. Budge; Ronald N. Boyce; Attorney for Respondent;

Recommended Citation

Brief of Respondent, *State v. Edwards*, No. 9525 (Utah Supreme Court, 1961).
https://digitalcommons.law.byu.edu/uofu_sc1/3893

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED
OCT 24 1961

STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

JOHN EDWARDS,
Defendant and Appellant.

Clerk, Supreme Court, Utah

Case
No. 9525

BRIEF OF RESPONDENT

WALTER L. BUDGE
Attorney General

RONALD N. BOYCE
Assistant Attorney General
Attorneys for Respondent

TABLE OF CONTENTS

	Page
NATURE OF CASE.....	1
RELIEF SOUGHT	1
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	2
ARGUMENT	3
POINT I —	
THE CROSS-EXAMINATION OF DEFENDANT CONCERNING HIS WIFE'S PLEA OF GUILTY TO THE CHARGE OF PROSTITUTION WAS RELEVANT TO IMPEACH THE DEFENDANT CONCERNING HIS ASSERTIONS AS TO HER GOOD CHARACTER AND ON OTHER ISSUES	3
POINT II —	
THE CROSS-EXAMINATION OF DEFENDANT CONCERNING HIS PREVIOUS STAYS IN JAIL AND CONVICTIONS WAS RELEVANT TO IMPEACH THE DEFENDANT SINCE HE PLACED HIS CHARACTER INTO ISSUE AND MADE STATEMENTS CONCERNING ACTIVITIES WHICH WERE INCONSISTENT WITH THE FACTS OF SUCH JAIL STAYS AND CONVICTIONS	10
POINT III —	
THE CROSS-EXAMINATION OF THE DEFENDANT WAS WITHIN THE BOUNDS OF PROPER CROSS-EXAMINATION	16
POINT IV —	
THE COURT'S FAILURE TO INSTRUCT THE JURY THAT THE DEFENDANT'S CONVICTIONS AND HIS WIFE'S PLEA OF GUILTY SHOULD BE LIMITED TO CREDIBILITY WAS NOT ERROR.....	19
CONCLUSION	21

Authorities

McCormick, Evidence, p. 330.....	15
Tracy, Handbook of the Law of Evidence (1960), pp. 177, 331.....	14, 15
Wharton's Criminal Law and Procedure, Vol. 5, p. 196.....	20
Wigmore, Evidence, 3rd Ed., Secs. 58, 68, 391, 981, 100 et seq.....	8, 14, 15
Wigmore, Evidence, 3rd Ed., Vol. I, pp. 491, 509.....	9
Wigmore, Evidence, Vol. III, p. 613.....	13

TABLE OF CONTENTS — (Continued)

	Page
Cases	
Bowman v. Commonwealth, 261 Ky. 215, 87 S.W. 2d 355.....	19
Cobb v. Follansbee, 79 N. H. 205, 107 A. 630.....	19
Michelson v. United States, 335 U. S. 469 (1948).....	7
Naverrete v. State, 40 S.W. 791 (Tex. Crim.).....	19
People v. Bransfield, 289 Ill. 72, 124 N.E. 365.....	19
People v. Darr, 262 Ill. 203, 104 N.E. 389.....	19
People v. Farrell, 11 Utah 414, 40 Pac. 703 (1895).....	6
People v. Gray, 66 Cal. 271, 5 Pac. 240.....	19
People v. Rubalcado, 56 Cal. App. 440, 205 Pac. 709.....	19
Schonfeld v. United States, 277 F. 934.....	19
State v. Francis, 58 Mont. 659, 194 Pac. 304.....	19
State v. Greene, 33 Utah 497, 94 Pac. 987 (1908).....	19, 20
State v. Herrera, 8 U. 2d 188, 330 P. 2d 1086 (1958).....	17
State v. Hougenesen, 91 Utah 351, 64 P. 2d 229 (1936)....	6, 7, 13, 15, 16
State v. Justesen, 35 Utah 105, 99 Pac. 456 (1909).....	5, 6
State v. Mares, 113 Utah 225, 192 P. 2d 861 (1948).....	13
State v. McCurtain, 52 Utah 53, 172 Pac. 481 (1918).....	20
State v. Simpson, 78 N. D. 360, 49 N.W. 2d 777 (1951).....	9
State v. Stokes, 288 Mo. 539, 232 S.W. 106.....	19
State v. Tacconi, 110 Utah 212, 171 P. 2d 388 (1946).....	9, 10, 15
State v. Thompson, 58 Utah 291, 199 Pac. 161 (1921).....	13
State v. Turner, 95 Utah 129, 79 P. 2d 46 (1938).....	18
State v. Williams, 94 Vt. 426, 111 A. 701.....	19
State v. Woodall, 6 U. 2d 8, 305 P. 2d 473 (1956).....	21
Sutton v. State, 124 Ga. 815, 53 S.E. 381 (1906).....	8
Statutes	
42-0207 NDRC 1943	10
76-53-10, U.C.A. 1953	1

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

— vs. —

JOHN EDWARDS,

Defendant and Appellant.

}
Case
No. 9525

BRIEF OF RESPONDENT

NATURE OF CASE

The defendant was convicted of profiting by the earnings of fallen women in violation of 76-53-10, U.C.A. 1953, upon trial in the Second Judicial District, and claims errors of evidence require reversal and a new trial.

RELIEF SOUGHT

The State seeks the affirmance of the jury's decision.

STATEMENT OF FACTS

The State will adopt the preliminary statement of facts set out in the defendant's brief as being essentially

correct, but will add facts contained in the record where relevant to the issues raised on appeal.

STATEMENT OF POINTS

POINT I.

THE CROSS-EXAMINATION OF DEFENDANT CONCERNING HIS WIFE'S PLEA OF GUILTY TO THE CHARGE OF PROSTITUTION WAS RELEVANT TO IMPEACH THE DEFENDANT CONCERNING HIS ASSERTIONS AS TO HER GOOD CHARACTER AND ON OTHER ISSUES.

POINT II.

THE CROSS-EXAMINATION OF DEFENDANT CONCERNING HIS PREVIOUS STAYS IN JAIL AND CONVICTIONS WAS RELEVANT TO IMPEACH THE DEFENDANT SINCE HE PLACED HIS CHARACTER INTO ISSUE AND MADE STATEMENTS CONCERNING HIS ACTIVITIES WHICH WERE INCONSISTENT WITH THE FACTS OF SUCH JAIL STAYS AND CONVICTIONS.

POINT III.

THE CROSS-EXAMINATION OF THE DEFENDANT WAS WITHIN THE BOUNDS OF PROPER CROSS-EXAMINATION.

POINT IV.

THE COURT'S FAILURE TO INSTRUCT THE JURY THAT THE DEFENDANT'S CONVICTIONS AND HIS WIFE'S PLEA OF GUILTY SHOULD BE LIMITED TO CREDIBILITY WAS NOT ERROR.

ARGUMENT

POINT I.

THE CROSS-EXAMINATION OF DEFENDANT CONCERNING HIS WIFE'S PLEA OF GUILTY TO THE CHARGE OF PROSTITUTION WAS RELEVANT TO IMPEACH THE DEFENDANT CONCERNING HIS ASSERTIONS AS TO HER GOOD CHARACTER AND ON OTHER ISSUES.

The defendant has contended that because he was cross-examined as to his wife's plea of guilty to the crime of prostitution, that the trial court thus committed prejudicial error. The record discloses the following relevant facts relating to that issue. After the prosecution had presented its case, defense counsel made his opening statement in which he said with reference to the defendant's wife. (R. 39):

“His wife is not a fallen woman which I think will come out later, which is one of the elements that the prosecution is required to prove.”

Thereafter, the defendant took the stand and testified (R. 42):

“Q. To your knowledge, what type of woman is your wife?

“A. My wife is a working woman and kind of a business woman. She don't believe in doing wrong. She doesn't curse.

“Q. Would you call your wife a fallen woman?

“A. I believe she is true to her husband and I believe she is a woman that don't do prostitute because I have never known her to do it.”

On cross-examination the following occurred: (R. 45)

“Q. You testified that she didn’t practice prostitution?

“A. No, sir, she doesn’t I know that.

“Q. You testified that you have known this and you know that she would never do such a thing?

“A. Yes, sir, I never knowed her to do that, sir. That is the truth that Jesus could tell you.

“Q. 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: Ojection is overruled. You may ask.”

“Q. You were right there when she was booked for prostitution and gave her name Shirley Jean Edwards and stated she was your wife?

“A. Yes, sir.

“Q. You are aware of the fact that she plead guilty to that charge are you not?

“A. Well, she didn’t know what prostitution means because she had never heard of prostitution in her life. In fact she can’t hardly speak English. She don’t know what the word prostitution means. I have never spoke that word to her.

“Q. You have never spoke such a word to her?

“A. That is right.”

Further at pages 49-50:

“Q. And your wife wouldn’t know what the word prostitution meant?

“A. No, she doesn’t know.

“Q. That is why she plead guilty to the charge?

“A. Yes, sir.

* * *

“Q. You say your wife is a good woman and has worked regularly?

“A. Yes, sir.

“Q. And hasn’t been around jails or anything of that sort to even know what this thing means?

“A. No, sir.”

It should be further noted that the Trial Judge, in instructing the jury, required finding that the woman in question would act as a prostitute (R. 11), and further noted that defendant had denied that his wife ever indicated a willingness to so act (R. 41).

It is submitted that based upon the above record, the prosecutor acted well within the bounds of proper demeanor in questioning the defendant. The defendant contends that *State v. Justesen*, 35 Utah 105, 99 Pac. 456 (1909), stands for the proposition that the action of the prosecutor in questioning the defendant with reference to his wife’s conviction was error. It does not. The Justessen case involved the attempt of the prosecutor to offer the record of a plea of guilty of a co-conspirator who committed perjury where the defendant was charged with subordination. The offer was a direct attempt to use the plea of guilty as independent proof in support of the crime charged when not relevant.

The instant situation is not so concerned. In the instant case the matter was brought out on cross-exami-

nation to rebut and attack the veracity of the defendant with reference to his assertions as to his wife's character. This is an entirely different situation than that raised in *Justesen*. *People v. Farrell*, 11 Utah 414, 40 Pac. 703 (1895) is no authority for defendant's contentions either, since it merely stands for the proposition that the admission of a co-conspirator is not admissible after the conspiracy has ceased. The conclusion results that none of the authorities cited by defendant support the contention of error.

It will be conceded that a plea of guilty by one of two persons charged with a crime arising from the same incident is not usually admissible as against the other to prove guilt, but must otherwise become relevant. In this instance, the fact that the defendant's wife plead guilty was directly relevant to impeach the defendant's veracity with respect to his wife's character. In *State v. Hougensen*, 91 Utah 351, 64 P.2d 229 (1936), it was noted:

“There are two methods of discrediting evidence. First, to show that the evidence itself is untrue and unreliable; and second, to show that the transmitter of the testimony is unreliable, either because of bad memory, failure to accurately record impressions, or because of lack of veracity.”

In the instant case, where the defendant saw fit to put his wife's character in issue, the fact that she had plead guilty to the crime of prostitution tended to impeach the defendant's assertion that she was a woman of excellent character, and thus impeached the transmitter's veracity. Therefore, the cross-examination was directly

relevant to the second form of discrediting evidence noted in the *Hougensen* case.

In *Michelson v. United States*, 335 U. S. 469 (1948), the United States Supreme Court recognized that it was permissible to inquire of a witness who testifies as to the good character or reputation of a defendant, whether they were aware of the defendant's arrest some 26 years before. The Court noted that:

“It was proper cross-examination because reports of his arrest for receiving stolen goods, if admitted, would tend to weaken the assertion that he was known as an honest and law abiding citizen. The cross-examination may take in as much ground as the testimony it is designed to verify. To hold otherwise would give defendant the benefit of testimony that he was honest and law-abiding in reputation when such might not be the fact; * * *.”

By the same token, to allow the defendant in the instant case to falsely assert that his wife was a woman of chaste and proper character, where he knew of the fact that she plead guilty to prostitution, would allow him to assert as a fact, something which, in view of her plea, may definitely not be true, and which, if he knew of her plea, would tend to diminish the veracity of his testimony. Thus the cross-examination was perfectly proper to attack the defendant's veracity. Indeed, even the defendant recognizes that it was so admissible for credibility purposes. (Defendant's Brief, p. 14.)

It is submitted that a second reason exists why the evidence was properly admitted. The defendant at-

tempted to defend against the crime charged by asserting that his wife was of good character, and since his wife was of good character and would not engage in prostitution, that he could not, as a result, be guilty of procuring her for the purposes of prostitution. Thus, the character of the defendant's wife, a third person, was placed in issue by the defendant. In such a case the evidence of the wife's plea tended to directly refute the claim of her good character, and was for that reason admissible. *Sutton v. State*, 124 Ga. 815, 53 S.E. 381 (1906). The rule is noted in Wigmore, Evidence, 3rd Ed., Sec. 68, where it is said:

“Where the character offered is that of a third person, not a party to the cause, the reasons of policy for exclusion seem to disappear or become inconsiderable; *hence if there is any relevancy in the fact of character, i. e. if some act is involved upon the probability of which a moral trait can throw light, the character may well be received.*”
(Emphasis supplied)

In this instance the defendant placed the character of his wife in issue to dissipate the claim of his guilt, and cannot protest at having her character attacked to refute his claim.

Finally, a third basis exists whereby the cross-examination of defendant on such an issue is relevant and admissible. It is based upon the fact that the defendant's wife's character was a matter of evidence. Thus, the defense counsel noted that it must be proven that the defendant's wife was a “fallen woman,” and the trial

court instructed on the elements such as to make the prosecution bear the burden of proving the woman, defendant's wife, to be a prostitute. Under these circumstances, the wife's character was an evidentiary issue. Wigmore, Evidence, 3rd Ed., Vol. I, p. 491, 509. Thus, as to the particular class of crime with which the defendant was here charged, an exception for the purposes of proving character arises. Thus, it is noted in Wigmore, op. cit., Sec. 204:

“It has already been seen that, apart from statutes constituting the repute of the house as the sole element of the crime of professional pandering, the character or use of the house and the character or occupation of the inmates may come into issue. Two questions having a bearing here are thus presented. (1) May particular instances of prostitution in the house be offered, as showing its habitual character? (2) *May particular acts of prostitution by the inmates be offered, as showing their occupation or character as prostitutes?* Both these questions should be answered in the affirmative * * *.” (Emphasis supplied)

Thus, as Wigmore notes, where character is itself an element or matter of proof, specific instances of prostitution or actions of such a nature are relevant. See *State v. Tacconi*, 110 Utah 212, 171 P. 2d 388 (1946) for a similar conclusion. In proving such character, the Supreme Court of North Dakota, in *State v. Simpson*, 78 N.D. 360, 49 N.W. 2d 777 (1951), noted, where the charge was keeping a bawdy house:

“One of the essential matters that the state had to prove was that the defendant maintained a house where illicit sexual intercourse was indulged in

contrary to the temporary injunction issued. The evidence that Judy Cox had been proceeded against and had plead guilty to prostitution in that house was very material to the issue raised. It bore directly on the character of the house maintained by the defendant.”

The Court held the plea of guilty was properly admitted under 42-0207 NDRC 1943. The plea of guilty thus went to the issue of the character of a third person that was itself relevant. In the instant case, the woman’s character was relevant and her plea tended to prove that element and thus be admissible. In *State v. Tacconi*, supra, the fact that the woman forfeited bail in answer to the offense was admitted.

Thus, for three reasons, the defendant’s position is not well taken. First, the evidence tended to impeach the defendant’s veracity. Second, it rebutted the direct assertions as to defendant’s wife’s character with its relation to his. Finally, it was directly relevant to an element of character in issue.

POINT II.

THE CROSS-EXAMINATION OF DEFENDANT CONCERNING HIS PREVIOUS STAYS IN JAIL AND CONVICTIONS WAS RELEVANT TO IMPEACH THE DEFENDANT SINCE HE PLACED HIS CHARACTER INTO ISSUE AND MADE STATEMENTS CONCERNING HIS ACTIVITIES WHICH WERE INCONSISTENT WITH THE FACTS OF SUCH JAIL STAYS AND CONVICTIONS.

The defendant contends that the prosecutor's cross-examination on his previous convictions for drunkenness and other misdemeanors was error. It is submitted, however, that an analysis of the record will show the examination to have been proper.

On direct examination the accused testified (R. 41):

“ * * * I have been working for her honestly. I have never sold her to no man in my life. Honest to God I haven't. I have never sold my wife and I wouldn't do that and I believe in the Bible. I believe in God Almighty too. My dad is a twenty-second degree Masonic.”

The defendant testified, in addition, that he had been drinking with one of the prosecution's witnesses for two or three days prior to the day of the incident, and that he had been drinking on that day also (R. 40, 41). He further testified that he had had about two fifths to drink so far that day, and maybe three (R. 42). He further noted that he thought the detective he had approached was going to take he and his wife to a liquor store (R. 41).

On cross-examination the following occurred (R. 52):

“Q. You state you have worked regularly and supported your wife?

“A. Yes, sir. I have been working ever since I have been with her. I worked in Idaho until the spuds were over, this past summer up here in Rupert. I worked all over Idaho and Blackfoot, I worked in Toole Lake, California, loading spuds. I worked on the harvest all the time. I worked hard.

“Q. You state that you wouldn’t do such a thing as to pander or something like that?

“A. No, sir. I raise my hand to Jesus and expect to go to hell if I did. It is the truth. I expect to go to hell when I die if I say that because I always believe in God and I continue to believe in Him.

“Q. You were not working on June 9, 1960, in Las Vegas, Nevada, were you? You were not working on that day?

“A. No, sir, I guess, I worked for a Jew down there for awhile.

“Q. Did you spend some time in jail down in Las Vegas, Nevada, for being drunk?”

“MR. FROBER: I object.

“THE COURT: The objection is overruled, you may ask him.”

“Q. That is June 9, 1960, in Las Vegas, Nevada. You were not working then, were you?

“A. I was working there when I was there, yes sir, for a Jew there.

“Q. How long were you in jail down there for being drunk during the month of June?

“A. 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.

“Q. Let’s go back in the month before that, May 24, 1960, just less than a month before. The month of May, you were not working during that month, were you full time?

“A. I have been working off and on. I never missed a month of work in my life.

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

“A. I guess I was not, I was working for a Jew.

“Q. You working in the month of May of 1960?

“A. You can’t work when you are in jail.”

A reading of the record from pages 52-55 demonstrates that the prosecution’s cross-examination was proper for at least three reasons. First, it appears clear that on both direct and cross-examination the accused attempted to show that he was an honest, hard-working person, who kept employed all the time in an effort to support his wife, and thus would not resort to such activities as pandering. The defendant injected his own character into the proceedings, and thus opened the door for the prosecution to rebut. The defendant notes that some Utah cases have said that impeachment is limited to felonies,¹ but such is not the case where a defendant puts his or another’s character in issue. In such instances, rebuttal of the character trait by any means relevant thereto is permissible. *State v. Thompson*, 58 Utah 291, 199 Pac. 161 (1921); *State v. Mares*, 113 Utah 225, 192 P. 2d 861 (1948). Wigmore has noted the rule in the following terms:

“After a defendant has attempted to show his good character in his own aid, prosecution may in rebuttal offer as evidence his bad character. The true reason for this seems to be, not any relaxation of the principle just mentioned, i.e. not a

¹ The defendant cites *State v. Hougensen*, 91 Utah 351, 64 P. 2d 229 (1936) as the last case supporting a line of Utah cases requiring impeachment by felony. However, p. 370 of the Court’s opinion would appear to leave the matter to the trial court’s discretion so as to allow proof of misconduct not amounting to a felony. Wigmore has so interpreted this case. Wigmore, op. cit., Vol. III, p. 613.

permission to show the defendant's bad character, but a liberty to refute his claim that he was a good one. Otherwise a defendant, secure from refutation, would have too clear a license unscrupulously to impose a false character upon the tribunal."

Wigmore, Evidence, 3rd Ed., Sec. 58.

The defendant, having placed his good character in issue, so far as steady employment, work habits, and honesty, the prosecution was entitled to refute the implications of such traits of good character. Although it may be argued that this should not include reference to specific misconduct, it is the general rule that specific acts of misconduct may be shown on cross-examination of the witness himself. Wigmore, *op. cit.*, Sec. 981, notes:

"The reasons already examined appear plainly to have no effect in forbidding the extraction of the *facts* of misconduct from the witness himself on cross-examination."

See also Tracy, Handbook of the Law of Evidence (1960), p. 177.

In the instant case the defendant's character trait for steady employment was in issue, and the prosecution properly examined as to matters which demonstrated that his work habits were not such as he claimed, and factors which were directly relevant to his honesty. It therefore appears that the actions of the prosecution were proper.

Second, and closely associated with the first contention, is the fact that the accused, by his testimony,

attempted to show a steady pattern of employment. (R. 39, 43, 44, 45, 52) Thus, evidence that a substantial part of his time was spent in jail because of drunkenness or vagrancy is directly relevant to disprove the employment assertions. *State v. Hougensen*, 91 Utah 351, 64 P. 2d 229 (1936). The evidence was directly contradictory to the defendant's previous assertion, and was, therefore, directly relevant.² Wigmore, Evidence, 3rd Ed., Secs. 1000 et seq.

Third, it is submitted that cross-examination as to these matters, when coupled with the other evidence of record demonstrating scanty employment, plus excessive drinking habits, forms a motive for the crime. The evidence of the other criminal misconduct demonstrating a habitual and uncontrolled use of liquor, and also demonstrating vagrancy and limited employment, when added to the evidence showing extensive drinking on the day of the incident, tends to show a motive for the commission of the crime, that being to obtain money with which to buy more booze, and thus an exception to the rule as to when other crimes may be shown. McCormick, Evidence, p. 330; Wigmore, supra, Sec. 391; *State v. Tacconi*, 110 Utah 212, 171 P. 388 (1946). Thus, as is noted in Tracy, supra, p. 331:

“To show a motive for the perpetration of a crime, the prosecution may offer evidence of the commission of a similar or different crime, if a logical

² The inconsistencies between the defendant's statement that he and his wife worked full time, and that his wife was a good woman, appear of record on pages 50-56.

inference as to motive can be drawn from such evidence.”

The defendant's motive for commission of the crime was to obtain money to continue drinking. The evidence of habitual or frequent drunkenness to the point of public offense and vagrancy, would tend to supply the obvious motive for the crime. Thus the examination, tending, as it did, to reveal the motive behind the act, was proper.

In addition, it is noted that in *State v. Hougensen*, supra p. 370, that the court, in one of eleven principles of cross-examination, said:

“Questions whose only object could be to call for answers to affect the credibility of the witness and which answers could tend to degrade his or her character, but not tend to subject such witness to punishment for a felony, are permissible over a general objection as to their relevancy or competency, in the sound discretion of the court.”

Thus, the admissibility of such matter is properly left to the discretion of the Trial Judge, and certainly the Trial Judge acted properly here in exercising his discretion.

POINT III.

THE CROSS-EXAMINATION OF THE DEFENDANT WAS WITHIN THE BOUNDS OF PROPER CROSS-EXAMINATION.

The contention that the cross-examination of the defendant should be deemed cumulative error, and thus be held prejudicial, is without merit in view of the fact that the examination was legally proper on many

bases. The examination appended to the defendant's brief concerns the arrests and jail terms of the defendant's wife and himself. It should be remembered that the defendant testified on direct examination as to the good character of his wife. On cross-examination, in addition to the matter appended to the defendant's brief, the record discloses (R. 50):

"Q. You say your wife is a good woman and has worked regularly?

"A. Yes, sir.

"Q. And hasn't been around jails or anything of that sort to even know what this thing means?

"A. No, sir."

Thus the evidence of the defendant's wife's stay in jail and convictions for drunkenness directly tended to refute the defendant's statement and impeach him. There was nothing improper in such examination. *State v. Herrera*, 8 U. 2d 188, 330 P. 2d 1086 (1958) is no authority for defendant's claim of error. There the defendant was cross-examined as to extraneous offenses that he was supposed to have committed, and which were not directly related to character or other issues before the court. In the instant case the defendant and a third person's character were before the Court, direct in issue, and used by defendant to support his claim of innocence. Examination in relation to this subject was wholly proper.

Defendant points out that no attempt was made to prove some of the offenses. It should be noted that the abstract of evidence reflects not that the defendant denied

the incidents, but that he did not remember or know the specific incidents. Under such circumstances, the testimony is neutral and there is nothing to contradict. In addition, such proof was rendered unnecessary because the defendant admitted being in jail all the time, but could not remember exactly when. The record shows on p. 54:

“Q. Do you want to deny that you were in jail of May of 1960? I want to remind you that you have taken an oath.

“A. I don’t know if I was in jail in May for getting drunk. I know I get in for being drunk all the time, but I work all the time.”

Thus, the defendant admitted the veracity of the cross-examination and no need for additional proof was required, since it would merely have been cumulative.

Cross-examination is one of the essential weapons of the prosecution, as well as defense, and in cases where the State may have to reply on only one or two witnesses to affirmatively prove its case, it may be the major weapon, especially where the defendant’s story is directly inopposite. If the examination is within recognized rules of evidence, courts should be reluctant to say examination exceeds the bounds of propriety. It is submitted that the examination in the instant case was well within the limits approved by the court in *State v. Turner*, 95 Utah 129, 79 P. 2d 46 (1938), and hence there is no merit to the contention that it was prejudicial.

POINT IV.

THE COURT'S FAILURE TO INSTRUCT THE JURY THAT THE DEFENDANT'S CONVICTIONS AND HIS WIFE'S PLEA OF GUILTY SHOULD BE LIMITED TO CREDIBILITY WAS NOT ERROR.

The defendant finally contends that the Trial Judge should have instructed that the evidence of the defendant's convictions, and his wife's plea of guilty, should be considered by the jury only with relation to the defendant's credibility.

The record reflects that the defendant was given full opportunity to request special instructions and to take exceptions (R. 68, 69), and although defense counsel was concerned with the instructions and took an exception, no exception or special request was made for the instruction the defendant now contends should have been given. A substantial number of cases have said that under these circumstances there is a waiver, and no basis for reversal exists on appeal. *People v. Gray*, 66 Cal. 271, 5 Pac. 240; *Naverrete v. State*, 40 S.W. 791 (Tex. Crim.); *People v. Bransfield*, 289 Ill. 72, 124 N.E. 365; *People v. Darr*, 262 Ill. 203, 104 N.E. 389; *State v. Williams*, 94 Vt. 426, 111 A. 701; *Cobb v. Follansbee*, 79 N. H. 205, 107 A. 630; *State v. Francis*, 58 Mont. 659, 194 Pac. 304; *State v. Stokes*, 288 Mo. 539, 232 S.W. 106; *People v. Rubalcado*, 56 Cal. App. 440, 205 Pac. 709; *Schonfeld v. United States*, 277 F. 934; *Bowman v. Commonwealth*, 261 Ky. 215, 87 S.W. 2d 355. The Utah Supreme Court stated in *State v. Greene*, 33 Utah 497, 94 Pac. 987 (1908):

“* * * the rule as declared by the great weight of authority seems to be that evidence which is competent for certain purposes, and is incompetent for other purposes, but is admitted generally, it is incumbent upon the party objecting to its reception, if he desires to have the effect of such evidence limited to the specific purpose for which it is admissible, to ask the Court to inform the jury by appropriate instructions as to the purpose for which they may consider the evidence, and, if he fails to make the request, he cannot afterwards be heard to complain.”

The defendant relies upon *State v. McCurtain*, 52 Utah 53, 172 Pac. 481 (1918) as supporting a requirement that the instruction should be given anyway. The decision does not so hold. There a request was made, which the trial judge later ignored. In addition, the court was adamant in not being understood as abandoning the rule noted above in the *Greene* case. It said:

“Let it be distinctly understood, however, that by anything we have said herein it is not intended to, and we do not, modify the general rule laid down by this Court in *State v. Green*, 33 Utah 479, 49 Pac. 987, and in *Groot v. Railroad*, 34 Utah 164, 96 Pac. 1019. Upon the contrary, we reaffirm the general doctrine there stated.”

Thus, in the absence of a requested instruction, the defendant may not now complain. Wharton's Criminal Law and Procedure, Vol. 5, p. 196.

It appears additionally, that the defendant's contention is not substantially well taken. As noted above, the evidence was admissible for other reasons besides credibility, since it disclosed motive, and rebutted character which was offered to prove guilt or innocence. Fur-

ther, the wife's plea was relevant to the issue of whether she was a prostitute. The Trial Court might well have given some clarifying or additional instructions, if a request had been made, but even so, it does not appear that prejudice resulted, especially since the jury was otherwise properly instructed with respect to their duties and prerogatives. The language of *State v. Woodall*, 6 U. 2d 8, 305 P. 2d 473 (1956), involving a similar crime, is noteworthy here, where much the same objection was raised. The court said:

“It might very well be that if defendant had requested a specific instruction on former prostitution, he would have been entitled to it, but without such request we cannot say that defendant was, by the failure to give a special instruction on this point, precluded from having a fair and proper determination of the issues.”

The same is apparent in the instant case, and the defendant's last point is, therefore, unmeritorious.

CONCLUSION

The defendant was given a full and fair trial within the bounds of due process. The record makes manifest that the defendant's conduct, both in and out of the courtroom, was the reason for his conviction, and not any misconduct by the prosecution. The Court should affirm.

Respectfully submitted

WALTER L. BUDGE

Attorney General

RONALD N. BOYCE

Assistant Attorney General

Attorneys for Respondent