

2002

West Valley City v. Gordon R. Christensen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY, :

PLAINTIFF/APPELLEE, : Case No. 20020623-CA

v :

GORDON R. CHRISTENSEN, :

DEFENDANT/APPELLANT :

OPENING BRIEF OF APPELLANT

This is an appeal from judgments, sentences and convictions for D.U.I, a class B misdemeanor, and for speeding and failure to yield to an emergency vehicle, class C misdemeanors, entered in the third District Court, West Valley Department, State of Utah, the Honorable Terry L. Christiansen, presiding.

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ATTORNEY FOR MR. CHRISTENSEN

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JURISDICTION

Utah Code Ann. § 78-2a-3(2)(e) provides this Court's jurisdiction over appeals from misdemeanor convictions entered in a court of record.

ISSUE, STANDARDS OF REVIEW AND PRESERVATION

Did the trial court act with actual bias in cross-examining Mr. Christensen?

The issue of bias is reviewed for correctness. State v. Alonzo, 973 P.2d 1111 (Utah 1999).

Rulings on the admissibility of evidence are reviewed for correctness. Subsidiary factual findings are reviewed for clear error. Spears v. West, 2002 UT 24 at ¶ 18, 44 P.3d 742.

Counsel objected to some of the trial court's evidentiary rulings (e.g., the trial court did not intercede when the trial court assumed the role of prosecutor).

Because Utah trial courts have the duty to recuse themselves when the

“impartiality might reasonably be questioned,” Alonzo at 979 (internal quotations and citations omitted), the failure of trial counsel to move for recusal should not constitute a waiver of the issue. Cf. id. But see, State v. Tueller, 2001 UT App 317 ¶¶ 8 and 9, 37 P.3d 1180 (rejecting this argument and finding that if parties fail to file for recusal under rule 29, the appellant must establish plain error or exceptional circumstances to obtain relief on appeal).

Christensen will meet the requirements of the plain error and/or ineffective assistance of counsel doctrines to obtain relief under this issue.

The plain error doctrine requires a showing that an obvious and harmful error occurred which prejudiced the defendant’s substantial rights, although the obviousness prong may be relaxed when a highly prejudicial error occurred which is more obvious in hindsight than it likely was before the trial court. See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989).

To demonstrate ineffective assistance of counsel, Christensen must demonstrate that trial counsel’s performance fell below objectively reasonable standards of representation, and that this objectively deficient performance was prejudicial. See e.g. Parsons v. Barnes, 871 P.2d 516, 521 (Utah), cert. denied 513 U.S. 966 (1994). The prejudice prong of the ineffective assistance of counsel doctrine requires proof of a reasonable probability of a different result in the absence of the objectively deficient performance. See e.g. State v. Lovell, 758 P.2d 909, 913 (Utah 1988).

CONSTITUTIONAL PROVISIONS AND RULES

The following constitutional provisions, statutes, and rules pertain, and are set forth in full in the addendum to this brief: Constitution of Utah, Article I §§ 7 and 12; United States Constitution, Amendment XIV, § 1; Utah Code of Judicial Conduct Cannon 3; Utah Rules of Criminal Procedure 19 and 29.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

West Valley City charged Christensen with one count of D.U.I., one count of speeding, and failure to yield to an emergency vehicle (R. 7-8).

Christensen moved to suppress his prior D.U.I. convictions and his comments regarding his prior convictions (R. 30-31, 56-57). The trial court granted the motion, informing the prosecutor he did not want to go anywhere near the evidence (R. 174 at 12). The prosecutor agreed to instruct his officers not to testify about the prior D.U.I.s or about the possibility of him going to jail, and to stay within the confines of the court's ruling permitting them to say that during the course of the DUI investigation and arrest, Christensen repeatedly asked them to let him go (T. 13-14).

Following a trial, the jury convicted Christensen of all offenses charged (R. 143).

In a commitment signed August 5, 2002, Judge Christiansen sentenced Christensen to concurrent terms of one hundred and eighty, ninety and ninety days in jail, and then suspended all but sixty days and indicated a willingness to suspend an

additional fifty upon Christensen's initiation of an alcohol treatment program (R. 153-158).

Christensen timely filed his notice of appeal August 5, 2002 (R. 162-63).

STATEMENT OF FACTS

On the night of November 15, 2000, West Valley City Police Officer Paul Gill saw Mr. Christiansen's car speeding at the rate of forty-six miles an hour in a thirty-five mile-an-hour zone (T. 46). The officer initially activated his lights, and after following Christensen some four or five blocks, activated his siren (T. 48-49). Christensen drove for some ten blocks after the officer activated his lights, at times accelerating to seventy miles an hour, until he stopped at a dead end (T. 48-49, 51).

It was dark, snowing heavily, and was twenty-eight degrees outside (T. 50-56).

Because he felt Christensen had been evading him, Officer Gill waited for backup officer Evans, who beckoned Christensen out of his truck while Gill held a gun on the door of Christensen's truck (T. 52).

After Evans commanded him to step out of his truck, remove the keys from the ignition, and walk backwards toward the policemen's voices so they could take him into custody, Christensen got out of his truck with his hands in the air (T. 53). After he got out, his hands went back down, and Gill did not know if he was confused or non-compliant (T. 54). The police gave him a few commands and threatened to release their dog on Christensen if he did not comply (T. 55).

Christensen started to stumble and Gill believed that Christensen could not comply with their orders or did not fully understand them (T. 55). He kept turning toward the police, putting his hands down, and refusing to walk backwards (T. 55). He appeared disoriented and unsure of what to do (T. 55).

As Gill spoke with Christensen, Gill detected an odor of alcohol and assumed that this was coming from Christensen's breath (T. 55).

Gill cuffed Christensen to return to the station for field sobriety tests in fairer conditions (T. 56-57). He placed Christensen under arrest for failing to stop at the scene of the stop and issued a citation, despite Christensen's asking him to "give him a break" and not issue the citation (T. 83-85). Gill was not sure when he told Christensen he was under arrest (T. 98).

After Gill cuffed Christensen and informed Christensen he had been chasing him and asked him something perhaps pertaining to alcohol, Christensen stated, "You haven't been chasing me and I don't drink alcohol." (T. 56, 86).

Gill said that Christensen was having a hard time talking, and that Gill had to support Christensen's weight for him (T. 56). When he sat Christensen in the back of Gill's patrol car, Christensen could not put his feet in, and stared at Gill and asked him for another break (T. 56).

After some coercion to get Christensen into the patrol car, Officer Evans informed Gill that he had found a bottle of whiskey in the bed of Christensen's truck during an

impound search (T. 57, 96). Gill's DUI report form indicated that there was no evidence found during the search of Christensen's truck (T. 97). Officer Evans testified that he found a shot glass inside Christensen's truck, and an empty open bottle of whiskey in a drawer in the rear of the pickup (T. 136-37). This did not constitute an open container violation under Utah law (T. 96).

At the station, Gill noticed Christensen's eyes, but was not sure if they were droopy, glossy, pink and reddish, and he felt that Christensen had difficulty focusing directly (T. 58). Christensen spoke slowly with a thick tongue and slurred his words (T. 58). Christensen staggered down the stairs to the intoxilyzer room where the field sobriety tests were to occur, and Gill helped him by holding his arm and supporting his weight (T. 59).

Christensen stuttered from side to side and swayed from front to back, and because of injuries he claimed to have had, Gill was uncomfortable having him perform a one-leg stand or nine step walk and turn (T. 59, 63).

Christensen said he was 77 years old, when in fact he was 67 (T. 60). Christensen seemed unhappy with Gill and also told Gill, "I am not very thorough with you." (T. 60-61).

Christensen complained of physical maladies, but did not tell Gill that he was a diabetic or was suffering from low blood sugar (T. 61-62). Had he complained of such an illness, Gill would have called Christensen's physician (T. 63).

Gill performed the Horizontal Gaze Nystagmus test, which he explained as follows:

The horizontal gaze nystagmus is a test which we use to determine – initially when we're taught alcohol, someone's blood alcohol, a guy is going to react a certain way once you are affected by alcohol. There's a total (inaudible) screen which I'm looking for. The eyes pursue (inaudible). I mean as an example, if someone is not under the influence of alcohol, following an object it will be very smooth, kind of like a marble rolling (inaudible). Once alcohol is involved that pursuit begins to – it becomes rough, scratchy, they have a hard time focusing and your marble smoothness goes away. You also have nystagmus which is the uncontrollable balancing of the eye which occurs at a certain area and continues through maximum, what we call maximum deviation (inaudible) followed up to here as far as you can go, that's maximum.

(T. 63-64).¹

¹An contrasting and excellent discussion of the theory behind and proper application of the Horizontal Gaze Nystagmus test is found in State v. Witte, 836 P.2d 1110 (Kan. 1992), where the court stated,

The National Highway Traffic Safety Administration (NHTSA) has researched and recommended a battery of field sobriety tests to assist in this determination. The NHTSA claims the HGN test is an accurate and effective field sobriety test to determine whether a driver's alcohol concentration is above .10.

Nystagmus is "an involuntary rapid movement of the eyeball, which may be horizontal, vertical, rotatory, or mixed." HGN is "a jerking of the eyes as they gaze to the side. Many people will exhibit some nystagmus, or jerking, as their eyes track to the extreme side. However, as people become intoxicated, the onset of the nystagmus, or jerking, occurs after fewer degrees of lateral deviation, and the jerking at the more extreme angles becomes more distinct." 1983 NHTSA Study at 2.

"The theory behind the gaze nystagmus test is that there is a strong correlation between the amount of alcohol a person consumes and the angle of onset of the nystagmus."

No special equipment is needed to administer the HGN test. The driver is instructed to keep his head stationary and follow an object, such as

Gill asked Christensen to touch the tip of his pen at the outset, but Christensen touched the pen in the middle, rather than the tip (T. 64-65).

The officer's next description of the test was as follows:

The next part is I asked Mr. Christensen to follow my pen as I moved it slowly, keeping his head still and focusing on the pen with his

a pen, a penlight, or the officer's finger, with his eyes. The object is held at the driver's eye level and positioned about 12 to 15 inches away from the driver's eyes. The NHTSA then instructs officers:

"Check the suspect's right eye by moving the object to the suspect's right. Have the suspect follow the object until the eyes cannot move further to the side. Make this movement in about two seconds, and observe: 1) whether the suspect was about to follow the object smoothly or whether the motion was jerky; and 2) how distinct the nystagmus is at the maximum deviation.

"Move the object a second time to the 45-degree angle of gaze, taking about four seconds. As the eye follows the object, watch for it to start jerking back and forth. If you think you see nystagmus, stop the movement to see if the jerking continues. If it does, this point is the angle of onset. If it does not, keep moving the object until the jerking does occur or until you reach the imaginary 45-degree line. Note whether or not the onset occurs before the 45-degree angle of gaze. (The onset point at a BAC of 0.10 percent is about 40 degrees.)"

This procedure is repeated for the left eye.

There are three possible signs of intoxication for each eye:

"Angle of Onset -- the more intoxicated a person becomes, the sooner the jerking will occur as the eyes move to the side.

"Maximum Deviation -- the greater the alcohol impairment the more distinct the nystagmus is when the eyes are as far to the side as possible.

"Smooth Pursuit -- an intoxicated person often cannot follow a slowly moving object smoothly with his eyes."

A score of six points is possible, three for each eye. According to the NHTSA, if a driver scores four or more points, the driver's BAC is above .10.

Id. at 1112-1113 (citations omitted).

eyes moving and eyes only. When I did that, Mr. Christensen began to follow the pen and right off, initially as soon as he started this, you could start to see the pursuit in the eyes. He slowly and gradually kicked out further.

(T. 65).

After the officer testified that he initially “observed the smooth pursuit in both eyes,” he continued,

When I moved the pen, his eyes would not – I guess you’d have to see someone – the eyes tend to – or jerk, they jerk, they can’t follow it like a (inaudible) a marble rolling across, it’s very smooth, just smoothly follow the pen and (inaudible). In a non-smooth pursuit his eyes, as I’m moving it slowing like this, cannot follow it at the same speed, cannot track it at that same speed –

....

– in that it tends to be scratchy, lose focus, stop focusing (inaudible).

(T. 66).

Gill saw scratchiness and jerkiness in Christensen’s eyes (T. 66).

Because Christensen would not follow the pen out to a point where Gill wanted him to, and seemed understanding of the instructions but uncooperative, Gill did not complete the HGN test (T. 67-68).

His testimony on this point was,

Okay. Mr. Christensen either was not able to track the pen or would not track the pen to my maximum so I could either observe onset or nystagmus at maximum (inaudible). He wouldn’t follow my pen. So when they won’t follow it all the way out, I can’t observe the maximum, the nystagmus maximum (inaudible). If they are unwilling to follow it further (inaudible) I can’t observe the onset prior (inaudible).

(T. 67).

On cross-examination, he conceded that he did not see nystagmus in Christensen's eyes, and got no result from that test indicating the involvement of alcohol (T. 102).

On the finger count test, Christensen began the test during the instructions when he was not supposed to, performed the test twice when he was supposed to do it three times, and improperly counted some fingers twice and missed a finger once (T. 69-71).

He said that Christensen did not take the ABC test, but said "he could not control himself (inaudible)." (T. 71-72). When the prosecutor asked if Christensen did not know how to say the alphabet, Gill answered, "He said he did not want to take it and (inaudible)." (T. 72). On cross-examination, Gill testified that Christensen said he did not know the alphabet (T. 103).

Based on his inability to take the alphabet test, Gill concluded that Christensen had been driving under the influence (T. 72).

He normally performed five field sobriety tests, but performed only two in this case (T. 105).

Gill and his supervisor decided not to book Christensen on felony fleeing, because they believed he was too intoxicated to have the requisite state of mind (T. 73).

After placing Christensen under arrest for DUI, Gill read him the admonitions on his DUI report form, twice informing Christensen that he was under arrest for DUI (T. 74).

Gill's testimony regarding Christensen's first response to the admonition was

inaudible, and after the second admonition, Christensen told Gill, “I do not drink.” (T. 74-75).

After Gill read the admonition that he might lose his driving privilege, Christensen responded, “I will not submit to this test.” (T. 76). When Gill informed Christensen that he could have his own physician administer the test, and that he could lose his license for refusing, Christensen answered, “I understand.” (T. 77).

When the prosecutor asked Gill what other statements Christensen made, Gill testified,

Yes, and I wrote those comments down. As far as comments go, he (inaudible), “You’re a pain in the ass to me, I’m getting a citation,” (inaudible) initiated as I was putting him in – he asked me (inaudible). The reason I logged his lack of cooperation was due to the fact that he was not completely listening to me (inaudible). I was saying things several times because right in the middle of the conversation he would ask, he would ask (inaudible).

(T. 78-79).

Gill testified that Christensen was angry during portions of the investigation, and became more upset as the investigation continued (T. 79, 100).

Officer Evans testified that he had a good rapport with Christensen, because Christensen was so upset with Officer Gill (T. 137). At some point during the investigation, Mr. Christensen had urinated on himself (T. 138). Evans visited with Christensen after his arrest, and Christensen made no mention of being diabetic (T. 139). He vacillated between wanting to go to jail and not wanting to go to jail, occasionally

seemed angry, and seemed to want to be Evans' friend (T. 140-41).

Evans turned off his video recorder early in the stop, and did not record finding a whiskey bottle (T. 148). He did not prepare a written report, or record Christensen's statements to him (T. 142, 146).

Mr. Christensen maintained at trial that prior to and during the course of his arrest, he was suffering from low blood sugar as a result of his diabetes, and consequently became disoriented, confused, impaired in his judgment, and shaky (T. 155, 160). Prior to his arrest, he stopped at a convenience store and bought some orange juice and a candy bar to raise his blood sugar (T. 155). He was only able to eat about a bite of the candy bar, and get the juice before the stop (T. 161).

The weather conditions caused him very poor visibility, and his side mirrors were fogged and frosted, and he stopped his truck to clear his rear windshield of his camper, when he realized the police were there, with a gun pointed at him (T. 162, 178). He did not know they had been following him, and did not know if he had been speeding, but may have been, given his diabetic condition (T. 162-63). He may not have followed the commands they yelled at him, but he did try to follow them (T. 163).

He had a handicap placard hanging in his truck because of his bad knees, and told the officers that he could not do a heel-to-toe test (T. 163).

He maintained that he did tell the officers that it was impossible that they smelled alcohol on him, because he does not drink because he has diabetes (T. 164).

He asked the officers for his candy bar and orange juice, and did not know if they did not hear him, or misinterpreted his request, but the officers did not give him the juice and candy (T. 164).

Before the HGN test, he told the officer that he could not see well without his glasses (T. 166). He tried to follow the officer's instructions, but could not see the pen well, and may have touched the pen in the middle, when the officer may have asked him to touch it on the top (T. 166). If his eyes were quivery and jerky and not following, this may have been a result of his low blood sugar (T. 167).

He was very angry with Gill and thought he told him he did not know the ABCs when Gill asked him to do the ABC test, and reiterated his refusal to do more tests when Gill discussed the intoxilyzer (T. 167).

The Driver License Division did not take his license, because they did not find that he had refused to take the intoxilyzer (T. 169-170).

He told the officers they could take him to the local hoosegow, but they called his wife to come and get him (T. 171). He denied having urinated in his pants (T. 171).

He did not recall any long conversation with Officer Evans, or the mood swings Evans described, but conceded that those things may have happened, as a result of his low blood sugar (T. 172).

In his truck, there were four shot glasses which he had bought as souvenirs on a trip, but he did not use them (T. 173). He did not know how the empty whiskey bottle

got in the drawer in his camper (T. 180). He had been fishing with a bunch of his friends before the stop, but he did not recall their having been drinking that brand of whiskey (T. 181).

He conceded that he may have been incapable to drive safely because of his diabetes, but maintained that this was not because of alcohol consumption (T. 173).

On cross-examination, the prosecutor asked Christensen about his comments to the officers about his not drinking, and Christensen maintained that he no longer drank, as he did in his younger days (T. 180). He could not remember how long it had been since he had last drunk alcohol, but thought it had been more than five years, and maybe was about ten years ago (T. 180).²

At the prosecutor's request, the court excused the jury (T. 181). The prosecutor asked the court's permission to impeach Christensen with his November 28, 1999 arrest, which resulted in his guilty plea to one count of alcohol related reckless driving (T. 182).

Defense counsel argued that the prior conviction should be excluded under Utah Rule of Evidence 404(b), because a conviction for alcohol related reckless can enter without consumption of alcohol (T. 183).

The prosecutor argued that the entry of an alcohol-related plea was prima facie evidence of perjury, and the trial court stated that he was sure alcohol had to be involved in an alcohol related offense (T. 183).

²The trial was on June 11, 2002.

The court indicated his belief that the alcohol related reckless conviction could come in for impeachment of Christensen's testimony that he had not drunk alcohol for ten years (T. 184-85).

With regard to Christensen's refusal to take a chemical test, the court forbade the prosecutor to discuss his two prior conviction because it was too prejudicial (T. 187).

After the jury returned, on cross-examination, Mr. Christensen agreed that he was charged with an alcohol-related offense on November 28, 1999, but when the prosecutor if he pled guilty to an alcohol-related offense, he asked, "And what would that be?" (T. 188).

The court responded,

Mr. Christensen, that would be – what that means is that you were – you were convicted of an offense where it is alleged that you consumed alcohol.

(T. 188). He answered that he was charged, but not convicted, and then testified that they offered him a deal and he took it, but was not drunk (T. 189).

He then conceded that he pled guilty to an offense that included as a requirement that he consumed alcohol (T. 189). Defense counsel made an objection during an unrecorded bench conference (T. 189). When the prosecutor asked Christensen if the offense to which he pled guilty required him to drink alcohol, Christensen said he did not know the legal ramification (T. 189-190).

The court asked him if he was charged with and pled guilty to an offense which

would have indicated that he had consumed alcohol, and he answered that he thought the offense was an open container of alcohol in the back of his truck, and he maintained that he did not admit to having consumed alcohol (T. 190).

The court excused the jury (T. 190). During the argument, defense counsel informed Mr. Christensen that with his prior plea, he did admit to having consumed some alcohol (T. 193). When the prosecutor asked Christensen if he had lied when he told the jury he had not consumed alcohol for ten years, Christensen answered, outside the jury's presence, "I guess so. I don't know." (T. 194).

When the jury returned, Christensen admitted that his guilty plea in 2000 involved an admission to having consumed alcohol, and admitted that he had consumed alcohol within the last couple of years (T. 195). When asked if he had lied to the jury when he testified that he had not consumed alcohol in the last ten years, he said it was an error in judgment (T. 195).

He testified that he had only consumed alcohol on that one occasion, but then testified that he had probably done so more than once (T. 198).

He testified that alcohol does not exacerbate his symptoms of his diabetic condition because alcohol converts to sugar (T. 198).

He did not know why the officers could smell alcohol on him, or why officer Evans could smell urine on him (T. 199).

Christensen testified that he did not take the Breathalyzer after he and Officer Gill

became hostile with one another, and the prosecutor repeatedly asked him whether a breathalyzer would give an accurate reading of exactly how much he had to drink (T. 204-05). When Mr. Christensen testified that he did not know that a breathalyzer would show his breath alcohol level, the court again excused the jury (T. 206).

The court asked Mr. Christensen if he'd had an intoxilyzer test before, and he said he had (T. 208). He knew that the test would give a readout of how much alcohol was on his breath (T. 209). The court asked Christensen why he did not give that answer when the prosecutor asked him, Christensen said he did not understand that at that time, and that he was confused (T. 209).

The court said that he was very close to admitting Christensen's prior DUI convictions for impeachment purposes, and that if he heard one more answer that was trying to confuse and mislead the jury, he would permit the prosecutor to introduce the prior convictions for DUI and alcohol related reckless (T. 209-210).

After the jury returned, Christensen testified that he did not think that Officer Gill could change the readout on the intoxilyzer, which would probably be fair and impartial (T. 212-213).

The prosecutor asked Christensen a series of questions about how he supposedly said he "they could bring the local news" but he would not take the breathalyzer, despite the fact that Christensen had never testified to anything of the kind (T. 213-214).

After further cross-examination and redirect by counsel, the court asked the jurors

if they had any questions (T. 215). He then asked Mr. Christensen,

All right. Mr. Christensen, the first question: Why did you refuse the test, that's referring to the breathalyzer test, if you were not intoxicated?

(T. 215). Christensen explained that he did not understand why they ignored his requests and kept asking him to take unnecessary tests, and then the court asked him what his current blood sugar was (T. 215). Christensen said he did not know, but that it was unusually low (T. 215). The court asked what a normal blood sugar level was, and then asked what caused his low blood sugar level, and Christensen explained that normal blood sugar was between 100 and 150 on his tester, and that his not eating all day caused it to drop (T. 216).

The court informed Christensen and the jurors that diabetes normally means high blood sugar and then asked Christensen if eating sweets would not increase his blood sugar (T. 216). Christensen answered that eating sweets would raise blood sugar to a normal level (T. 216).

Then the court asked Christensen if he knew why his wife did not testify to his condition, and he explained that it was his wife's temple day (T. 216).

The trial court's comments and questions implied that Christensen's defense was preposterous because diabetics suffer from high and not low blood sugar, and will thus exacerbate their diabetes by eating sugar (T. 216). In fact, diabetics often suffer from hypoglycemia, which may be caused by lack of food, and drinking juice and eating high-sugar foods is in fact the recommended course of treatment to alleviate the symptoms of

diabetic hypoglycemia, such as weakness and confusion. See, e.g., American Diabetes Association Homepage,
<http://www.diabetes.org/for-parents-and-kids/diabetes-care/hypoglycemia.jsp>.

SUMMARY OF ARGUMENT

Mr. Christensen, like all criminal defendants, was entitled by due process of law to an impartial judge to preside over his case. Under Utah law, trial courts are obligated to recuse themselves when their impartiality might reasonably be questioned.

In the instant matter, the trial court's partiality against Christensen became quite patent when the judge assumed the role of prosecutor and asked Christensen a series of highly damaging questions, which were not addressed by the prosecution, and which clearly implied that the trial judge did not believe Christensen's testimony or the defense case.

The trial judge's line of questioning violated the law forbidding judges to comment on the evidence, and the judge never instructed the jury that they were the sole arbiters of fact or to disregard any indications of the court's views on the evidence.

Because of the poor example of impartiality the judge set for the jurors, because of the judge's invasion of the roles of the prosecutor and jurors, and because of the prejudice caused by the judge's performance, this Court should order a new trial.

ARGUMENT

THE TRIAL COURT'S ACTUAL BIAS
REQUIRES REVERSAL.

I. THE TRIAL COURT'S ACTUAL BIAS IS PROVED BY HIS IMPROPER COMMENT ON THE EVIDENCE.

Utah Rule of Criminal Procedure 19 states in subsection (f):

The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

In the instant matter, the trial court violated Rule 19, when he asked Christensen why he refused the intoxilyzer if he was not intoxicated (T. 215), when he informed Christensen and the jurors that diabetics usually suffer from high, not low blood pressure, and then asked Christensen in leading fashion if consuming sugars would lead to higher blood sugar (T. 216), and then asked him why his wife did not come and testify about his condition (T. 216).

In contravention of the rule, the trial court did not instruct the jurors that they were the exclusive judges of all questions of fact, or instruct them to disregard any impressions they may have formed regarding his opinion of the evidence. See R. 126-140.³ Cf. State v. Parker, 2000 UT 51, ¶ 8, 4 P.3d 778 (improper comments on the evidence are normally viewed as cured by instructions to the jury that they are the sole arbiters of fact and should disregard the trial court's perceived views on the evidence).

Rule 19 is undoubtedly premised on fundamental principles of due process recognizing that all parties to a case are entitled to an unbiased, impartial judge. "A fair

³A copy of the jury instructions is included in the Addendum to this brief.

trial in a fair tribunal is a basic requirement of due process." Anderson v. Industrial Commission of Utah, 696 P.2d 1219, 1221 (Utah 1985)(citation omitted). See also State v. Saunders, 1999 UT 59, 992 P.2d 951, 961 (impartial judge is essential to a fair trial); Constitution of Utah, Article I § 7 (due process); United States Constitution, Amendment XIV, § 1 (due process); Constitution of Utah, Article I § 12 (rights of criminal defendants).

Cannon 3 of the Code of Judicial Conduct appropriately places the burden on trial courts to *sua sponte* recuse themselves from cases wherein their "impartiality might reasonably be questioned." State v. Neeley, 748 P.2d 1091, 1094 (Utah), cert. denied, 487 U.S. 1220 (1988). The purpose of this standard is to promote public confidence in the judicial system. See id.; Madsen v. Prudential Fed'l Sav. & Loan Ass'n., 767 P.2d 538, 544 n.5 (Utah 1988). "Nothing is more damaging to the public confidence in the legal system than the appearance of bias or prejudice on the part of the judge." State v. Gardner, 789 P.2d 273, 278 (Utah), cert. denied, 474 U.S. 1090 (1990).

When trial courts comply with the requirements of Utah Rule of Criminal Procedure 29, this shifts the burden to the defendant to establish actual bias or an abuse of discretion. State v. Alonzo, 973 P.2d 975 (Utah 1998), at 979.

It appears that under Utah law, if the record reflects actual bias, reversal is warranted.⁴ Actual bias is shown if the record reflects "a hostile feeling or spirit of ill

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See e.g. State v. Neeley, 748 P.2d 1091(Utah) at 1094-95 ("But, while we

will toward one of the litigants, or undue friendship or favoritism toward one.” Haslam v. Morrison, 190 P.2d 520, 523 (Utah 1948).

In cases involving an appearance of bias, prejudice must be shown to justify a reversal. Thus, in such cases, the Court would need to conclude that there was a likelihood of a more favorable result in the absence of the appearance of bias. See, e.g., State v. Alonzo, 973 P.2d 975, 979 (Utah 1998).

The record in the instant case, discussed *supra*, demonstrates actual and prejudicial bias on the part of the trial court, which warrants a reversal of Christensen’s conviction. The trial court’s line of questioning implied that Christensen did not really have diabetes (T. 216), and effectively shot down Mr. Christensen’s otherwise unchallenged defense. This reflected bias as that term is defined by Utah law. See Haslam v. Morrison, 190 P.2d at 523 (defining bias as “a hostile feeling or spirit of ill will toward one of the litigants, or undue friendship or favoritism toward one.”), *supra*.

The only conceivable reason for the trial court to have made these statements and asked these questions in front of the jury was to convey to the jurors the trial court’s distrust of and bias against Christensen and his defense. The trial court’s conduct reflected bias as the term is defined by Haslam, and flew directly in the face of Cannon 3

recommend the practice that a judge recuse himself where there is a colorable claim of bias or prejudice, absent a showing of actual bias or an abuse of discretion, failure to do so does not constitute reversible error as long as the requirements of section 77-35-29 are met.”), cert. denied, 487 U.S. 1220 (1988).

and Neeley, *supra*.

The fact that the trial court was actually biased against Christensen is seen by reference to State v. Byington, 200 P.2d 723 (Utah 1948), overruled on other grounds, First Fed. Sav. & Loan v. Shamanek, 684 P.2d 1257 (Utah 1984).⁵

In Byington, the supreme court reversed a perjury conviction and dismissed the case, in part because the trial judge who presided over the perjury case and sentenced the defendant on the perjury conviction exhibited bias against the defendant during contempt proceedings wherein the perjury occurred, and which were presided over by the same judge.

In the contempt proceedings, there was an order to show cause why the defendant should not be held in contempt for failing to pay alimony and support, and the *pro se* defendant declined to take the stand. Id. at 724. The trial court forced him to take the stand and then opposing counsel questioned Byington regarding whether he had remarried. Byington testified that he had remarried in the last month but could not say exactly when or where this occurred, and the judge ordered the defendant to go home and retrieve his marriage certificate and purported wife. Id. The defendant returned with his purported wife, who largely confirmed his testimony, but also was unable to provide details concerning the marriage ceremony. Id. The trial court found Byington in

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Shamanek overrules the portion of Byington interpreting the applicability of the privilege against self-incrimination. See Shamanek, 684 P.2d 1257, 1263 n.6.

contempt and ordered the prosecution and sheriff to investigate possible perjury charges against Byington and the purported wife. Id.

After Byington and his purported wife eventually conceded that they were not married, they were prosecuted for perjury in a trial presided over by the same judge as presided over the contempt proceedings, despite the filing of an affidavit of prejudice. Id. at 724, 726.

After explaining why the defendant's compelled statements at the contempt hearing could not be used in evidence against him at the perjury trial, the supreme court then turned to the issue of the biased judge, stating,

Not only is a litigant entitled to have his case tried by an impartial and unbiased judge, but when, as here, he is a defendant in a criminal case, he is entitled to have the severity of his sentence determined by a jurist who has no personal bias or prejudice toward him as a defendant.

200 P.2d at 726. The Byington court then discussed longstanding Utah law recognizing that it serves the interest of public confidence in the justice system for trial courts to recuse themselves when there is an affidavit of prejudice filed in good faith. 200 P.2d at 726.

The court then proceeded to review the record of the contempt proceedings, noting that the judge's attitude changed in the midst of the proceedings when he perceived that the defendant had lied, from the attitude of the "arbiter between two litigants" to a prosecutor of the perjury issue. Id. at 727. The Byington court noted that the trial court in the contempt proceedings had sent the defendant home with the sheriff

to retrieve the defendant's purported wife so that the court could verify or dispel the defendant's testimony, in the absence of any request by either party in the contempt proceeding. Id. at 727. The court recognized that while the judge was certainly entitled to assess all relevant facts, he should have proceeded in strict conformity to the legal requirements but instead forgot all procedure and disregarded the rights and competency of the witness. Id. Writing for the Byington court, Justice Wade then documented comments made by the trial court in the contempt proceedings reflecting the growing belief that the defendant was guilty of perjury, and stated,

These statements, taken in sequence, indicate the development of a belief that defendant was guilty. Moreover, when they are considered in connection with the haste, the procedural irregularities, and the lack of consideration shown the defendant and his alleged wife, it is apparent that the judge became hostile to the defendant and biased and prejudiced to the extent that an opinion of guilt was formed by the judge before he ordered the county attorney to investigate. While the last quoted statement does not limit the investigation by the county and district attorney to the crime of perjury, that is the only crime suggested by the record and the only one the trial judge could reasonably have had in mind. For all practical purposes, the judge became the complaining witness in this prosecution. If actions and words can adequately picture bias and prejudice, then it is present in this case. I can well imagine that any reasonable person in defendant's predicament could never be convinced that he was fairly tried, convicted and sentenced. Rather, he would in good faith feel that the judge was in fact a prosecutor and that his constitutional rights to a fair trial by an impartial judge had been ignored.

Id. at 727-28.

In the instant matter, the judge apparently felt that Christensen lied under oath, and that his entire diabetes-based defense was untrue and inconsistent with the judge's

incorrect belief that diabetics do not suffer from low blood sugar. Compare (T. 216) (trial court informed jurors that diabetics suffer from high blood sugar, and asked Christensen if eating sugar would make his blood sugar level higher); with, e.g., American Diabetes Association Homepage, <http://www.diabetes.org/for-parents-and-kids/diabetes-care/hypoglycemia.jsp> (diabetics often suffer from hypoglycemia, which may be caused by lack of food, and drinking juice and eating high-sugar foods is in fact the recommended course of treatment to alleviate the symptoms of diabetic hypoglycemia, such as weakness and confusion).

As in Byington, the trial court developed a personal belief of Christensen's guilt, abandoned proper procedures in this criminal trial, took on a prosecutorial role, abused the witness, and exhibited bias and prejudice unbefitting a judge in this state. Reversal of the conviction is thus warranted. See id.

II. CHRISTENSEN WAS PREJUDICED.

Assuming *arguendo* that this record does not reflect actual bias, but only the appearance of bias, and that Christensen must show prejudice or the likelihood of a different result, he is able to do so.

Christensen was convicted of D.U.I., when there was no driving pattern necessarily indicating that he was intoxicated, when there was no chemical test, and when he passed the HGN test (T. 102), one of the only two field sobriety tests given by an officer who normally relies on five (T. 105). While Christensen did look somewhat

incredible when he tried to minimize his use of alcohol on other occasions (T. 180-213), until the judge took over the prosecutor's job, there was no meaningful challenge to Christensen's plausible defense that his impairment prior to and during the DUI investigation was attributable to diabetic hypoglycemia, and not alcohol consumption.

Compare Statement of Facts, *supra*, with Alonzo, 973 P.2d 975 at 979-980

(inappropriate comments by judge were ruled harmless because they were made prior to trial, in chambers, outside presence of the jury).

Particularly because the judge's questioning of Christensen came at the end of the defense case and proximately to the deliberations, and was the last and undoubtedly strong impression made on the jurors by the person who was running the courtroom, in a case that was otherwise less than compelling, it is fair to say that there is a reasonable likelihood of a different result absent the court's actions. Cf. id.

Unlike the judges in Tueller, and Alonzo, who instructed the jurors that they were the sole arbiters of facts, and who tried to cure any error stemming from their improprieties, Alonzo, 973 P.2d at 980; Tueller, 2001 UT App 317 at ¶ 13; the judge in the instant case did not recognize or apologize for his intemperance in front of the jurors, or give the jurors any curative instructions,⁶ but sent them to deliberate with the uncorrected impression that the judge's behavior and point of view were authoritative.

III. PLAIN ERROR AND INEFFECTIVE ASSISTANCE JUSTIFY ADDRESSING

⁶A copy of the jury instructions is in the addendum to this brief.

THE MATTER FOR THE FIRST TIME ON APPEAL.

As noted above, neither party moved for the trial court's disqualification under Rule of Criminal Procedure 29.

It is Christensen's contention that because trial courts in this state have a duty to recuse themselves if their impartiality might reasonably be questioned under Canon 3 and Neeley, this Court should reverse the conviction on the basis of this law, and need not address whether plain error or ineffective assistance of counsel occurred. See id. But see, State v. Tueller, 2001 UT App 317 ¶¶ 8 and 9, 37 P.3d 1180 (rejecting this argument and finding that if parties fail to file for recusal under rule 29, the appellant must establish plain error or exceptional circumstances to obtain relief on appeal).

While compliance with Rule 29 shifts the burden to the defendant to establish actual bias or an abuse of discretion, see Alonzo, 973 P.2d 975 at 979, the fact that the trial lawyers did not intervene in the trial and file an affidavit of prejudice under Rule 29 did not absolve the trial court of his responsibility to insure Christensen's constitutional right to an impartial judge. See e.g. Anderson, supra.

Christensen will meet the requirements of the plain error and/or ineffective assistance of counsel doctrines to obtain relief under this issue. See Tueller, supra.

The plain error doctrine requires a showing of an obvious and harmful error which occurred which prejudiced the defendant's substantial rights, although the obviousness prong may be relaxed when a highly prejudicial error occurred which is more obvious in

hindsight than it likely was before the trial court. See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989).

To demonstrate ineffective assistance of counsel, Christensen must demonstrate that trial counsel's performance fell below objectively reasonable standards of representation, and that this objectively deficient performance was prejudicial. See e.g. Parsons v. Barnes, 871 P.2d 516, 521 (Utah), cert. denied 513 U.S. 966 (1994). The prejudice prong of the ineffective assistance of counsel doctrine requires proof of a reasonable probability of a different result in the absence of the objectively deficient performance. See e.g. State v. Lovell, 758 P.2d 909, 913 (Utah 1988).

The trial court's bias in the case should have been apparent both to the court and the parties when he became progressively more angry with Christensen, and was abundantly clear when he began cross-examining Christensen about whether he really had diabetes, something the prosecutor never challenged, but conceded (e.g., T. 234).

The constitutional law entitling Christensen to an impartial judge was well-established long before this trial, as was the law requiring trial courts to recuse themselves whenever their impartiality might reasonably be questioned. See e.g. Anderson v. Industrial Commission of Utah, 696 P.2d 1219, 1221 (Utah 1985); Canon 3 of the Code of Judicial Conduct; State v. Neeley, 748 P.2d 1091, 1094 (Utah), cert. denied, 487 U.S. 1220 (1988), *supra*.

Likewise, the law is abundantly clear that judges are to refrain from commenting

on the evidence, and are to instruct jurors to disregard their perceived biases, and that the jurors are the exclusive arbiters of fact. See, e.g., Utah R. Crim. P. 19; Parker, *supra*.

Continuing the trial with a biased judge and failing to challenge and attempt to cure his comments on the evidence were obvious errors, and trial counsel's failure to assert and protect Christensen's related right to an impartial judge who refrains from invading the provinces of the prosecutor and jury constituted objectively deficient performance by both the court and counsel, because there was no way for Christensen to have a fair trial with a partial and activist judge. See, e.g., State v. Saunders, 1999 UT 59, 992 P.2d 951, 961 (impartial judge is essential to a fair trial).

As was explained above, in the absence of the trial court's actual bias and comment on the evidence, there is a reasonable likelihood of a different result. The trial court's comments and cross-examination of Christensen undercut Christensen's fundamental defense that he was impaired by diabetic hypoglycemia, and not alcohol, at the time of his arrest. The trial judge's questions made it look like Christensen's defense was scientifically unbelievable, when in fact, it was entirely consistent with known facts about diabetes. Compare Statement of Facts, *supra*, with Alonzo, 973 P.2d 975 at 979-980 (inappropriate comments by judge were ruled harmless because they were made prior to trial, in chambers, outside presence of the jury).

Even if the error should not have been challenged by trial counsel and should not have been obvious to the trial court, this Court is still empowered by the plain error

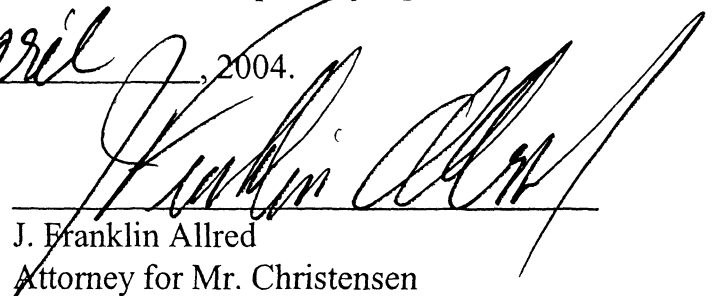
doctrine to correct it on appeal, to prevent a miscarriage of justice. See Eldredge.

Given that the performance of the trial court in this case denied Christensen his constitutional right to a fair trial, and also substantially undermines the appearance of and integrity in the justice system, this Court should recognize and correct the error and reverse Christensen's conviction. See id.

Conclusion

This Court should order a new trial in front of an impartial judge.

DATED this 2nd day of April, 2004.

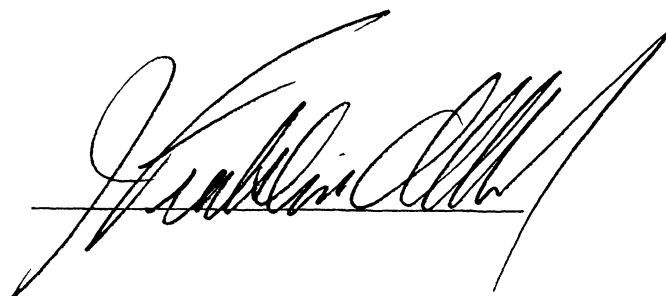


J. Franklin Allred
Attorney for Mr. Christensen

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that I hand-delivered/ mailed first class postage prepaid, two true and correct copies of the foregoing Brief of Appellant to the Office of the West Valley

City Prosecutor, 3600 Constitution Boulevard, West Valley City, Utah 84119, this 2nd
day of April, 2004.



ADDENDUM

JURY INSTRUCTIONS

THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, WEST VALLEY DEPARTMENT

West Valley City

Plaintiff,

vs.

Gordon R. Christensen

Defendant

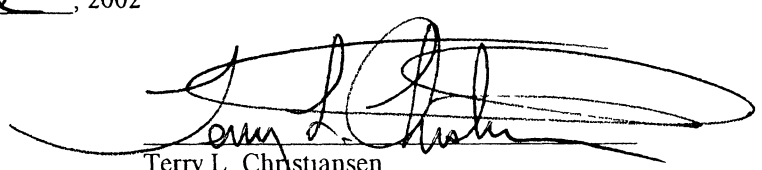
JURY INSTRUCTIONS

Case No 005103585

Judge Terry L. Christiansen

Ladies and Gentlemen Attached hereto are instructions numbered one through twenty-seven, given to you at the beginning of the trial. There are also attached instruction 28 through _____ included at a later time in the proceedings. Taken together, these instructions govern your conduct and deliberations during the trial of this case and must be carefully followed.

Dated this 11 day of June, 2002


Terry L. Christiansen
Third District Court Judge

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*[NOTE Additional instructions will be attached as numbers 28, 29, etc These will set forth particular laws, rules or directives that apply to this case]

JURY INSTRUCTIONS

1. GENERAL INSTRUCTION

There are certain laws and rules which apply to this case. I'll explain them to you from time to time during the trial. Please pay careful attention. Each of you has been given a copy of these instructions. This copy is yours to keep. As I read these instructions to you, please follow along on your copy. Keep in mind the following points:

Many Instructions There will be many instructions. All are equally important. Don't pick out one and ignore the rest. Think about each instruction in the context of all the others.

Obey Instructions You must obey the instructions. You are not allowed to reach decisions that go against the law.

Gender - Singular/Plural In these instructions, the masculine gender such as "he" or "him" includes the feminine "she" or "her" and the singular such as "defendant" includes the plural "defendants" when appropriate.

Note Taking You may take notes during the trial, but don't overdo it, and don't let it distract you from following the evidence. The lawyers will review important evidence in their closing arguments and help you focus on that which is most relevant to your decision. I also caution that notes are not evidence. Use them only to aid personal memory or concentration.

Keep an Open Mind Don't form an opinion about the ultimate issues in this case until you have listened to all the evidence and the lawyers' summaries, along with the instructions on the law. Keep an open mind until then.

2. WHAT RULES APPLY TO RECESSES

From time to time I will call for a recess. It may be for a few minutes, a lunch break, overnight or longer. During recesses, do not talk about this case with anyone, not family, friends or even each other. The Clerk may ask you to wear a badge identifying yourself as a juror so that people will not try to discuss the case with you. Don't mingle with the lawyers, the parties, the witnesses or anyone else connected with the case. You may say "hello", or exchange similar greetings or civilities with these persons, but don't engage in conversations. Don't accept from or give to any of these persons any favors, however slight, such as rides or food. Finally, don't read about this case in the newspaper or listen to any report on television or radio. These restraints are necessary for a fair trial.

3. THE GENERAL ROLE OF THE JUDGE, THE JURY AND THE LAWYERS

The judge, the jury and the lawyers are all officers of the Court and play important roles in the trial.

Judge. It is my role as judge to decide all legal issues, supervise the trial and instruct the jury on the LAW that it must apply.

Jury. It is your role as the jury to follow that law and decide the factual issues. Factual issues generally relate to WHO, WHAT, WHEN, WHERE, HOW or similar things concerning which evidence will be presented.

Lawyers. It is the role of the lawyers to present evidence, generally by calling and questioning witnesses and presenting exhibits. Each lawyer will also try to persuade you to accept their version of the facts and to decide the case in favor of their client.

Keep in mind that neither the lawyers nor I actually decide the case, because that is your role. Don't be influenced by what you think our personal opinions are; rather, decide the case based upon the law explained in these instructions and the evidence presented in court.

4. OUTLINE OF THE TRIAL

The trial will generally proceed as follows:

Opening Statements. The lawyers will outline what the case is about and indicate what they think the evidence will show.

Presentation of Evidence. The plaintiff will offer its evidence first followed by the defendant. Each side may also offer rebuttal evidence after hearing witnesses and seeing the exhibits offered by the other side.

Instructions on the Law. After each side has presented its evidence, I will supplement these written instructions and review them with you.

Closing Arguments. The lawyers will then summarize and argue the case. They will share with you their respective views of the evidence, how it applies to the law and how they think you should decide the case.

Jury Deliberation. The final step is for you to retire to the jury room and deliberate until you reach a verdict.

5. THE CHARGE(S) and THE PRESUMPTION OF INNOCENCE

The defendant in this case has been accused of committing a crime. The accusation is in a written document called an INFORMATION, which was previously read or summarized for you. Keep in mind that the defendant has answered the charge by saying “not guilty.” The defendant is presumed to be innocent of the charge.

6. WHAT IS THE JURY’S ROLE IN THIS CASE?

You must decide whether the charge against the defendant has been proven beyond a reasonable doubt. Your decision is called a VERDICT. Your verdict must be based only on the evidence produced here in court. It must be based on facts, not on speculation. Don’t guess about any fact. However, you may draw reasonable inferences or arrive at reasonable conclusions from the evidence presented.

7. WHAT IS EVIDENCE?

Evidence is anything that tends to prove or disprove the existence of a disputed fact. It can be testimony, or documents, or objects, or photographs, or stipulations that certain facts exist. You should accept any agreed or stipulated facts as having been proved. In limited instances, I may take “judicial notice” of a well-known fact. If this happens, I will explain how you should treat it.

8. OPINION TESTIMONY

Under certain circumstances, witnesses are allowed to express an opinion. A person who, by education, study or experience has become an expert in any art, science or profession, may give his opinion and the reason for it. A layman (or, a non-expert) is also allowed to express an opinion if it is based on personal observations and it is helpful to understanding his testimony or the case. You are not bound to believe anyone’s opinion. Consider it as you would any other evidence, and give it the weight you think it deserves.

9. WHAT IS NOT TO BE CONSIDERED OR USED AS EVIDENCE?

I’ve explained to you what evidence is. Now I’ll tell you about some things which do not qualify as evidence or which, for some other good reason, you should not consider in reaching your verdict.

Accusation The fact that formal charges have been filed accusing the defendant of committing a crime is not evidence of guilt.

Punishment You may be aware of the gravity of the offense charged and the range of potential penalties, but you should not consider what actual punishment the defendant may receive if found guilty. That is for the judge to decide based

upon the applicable law

Right to Remain Silent If the defendant chooses not to testify in this case, don't consider that as evidence of guilt. The Constitution provides that an accused person has the right not to testify and you should not draw any negative inferences based upon the reliance on this right.

Lawyer Statements What the lawyers say is not evidence. Their purpose is to give you a preview of expected evidence and to help you understand the evidence from their viewpoint.

Personal Investigation Evidence is not what you can find out on your own. You should not make any investigation about the facts in this case. Do not make personal inspections, observations or experiments. Do not view premises, things or articles not produced in court. Don't let anyone else do anything like this for you. Don't look for information in law books, dictionaries or public or private records which are not produced in court.

Out of Court Information Do not consider anything you may have heard or read about this case in the media or by word of mouth or other out-of-court communication. You must rely solely on the evidence that is produced and received in court.

10. THE JUDGE DECIDES WHAT EVIDENCE IS ADMISSIBLE

Sometimes a question will be raised about whether certain evidence is proper for the jury to consider. This type of question is called an OBJECTION. I rule on objections. If an objection is SUSTAINED the evidence is kept out and you should not consider it. If an objection is OVERRULED the evidence comes in and you may consider it. If evidence is STRICKEN you should ignore it.

[OPENING STATEMENTS BY COUNSEL]

11. HOW TO MAKE DECISIONS ABOUT THE EVIDENCE

Once evidence is admitted, you must decide three things about it: Whether it should be believed, how important it is, and what you can infer or conclude from it.

Use your common sense as a reasonable person in making these decisions. Review all the evidence. Don't imagine things which have no evidence to back them up. Consider the evidence fairly without any bias or sympathy toward either side.

12. DECIDING WHETHER TO BELIEVE A WITNESS

As each witness testifies, you must decide how accurate that testimony is. It may help you to ask yourself questions such as these:

Personal Interest. Does the witness have a personal interest in how the trial comes out?

Other Bias. Does the witness have some other bias or motive to testify a certain way?

Demeanor. What impression is made by the witness's appearance and conduct while answering questions?

Consistency. Did the witness make conflicting statements or contradict other evidence?

Knowledge and Memory. Did the witness have a good opportunity to know the facts and the ability to remember them?

Reasonableness. Is the testimony reasonable in light of human experience?

You're not required to believe all that a witness says. You are entitled to believe one witness as against many or many as against one, in accordance with your honest convictions.

13. WHAT IF A WITNESS PURPOSELY GIVES FALSE TESTIMONY?

If you believe a witness has purposely given false testimony about anything relevant to the case, you may disregard not only the false testimony but the remaining testimony from that witness unless it is corroborated by other evidence, in which event you should give what weight you think it deserves

14. QUESTIONS BY JURORS DURING THE TRIAL

A jury member may direct questions to the judge or to a witness by writing the question on a piece of paper and handing it to the bailiff who will hand it to me. I will share the same with the lawyers who have the right to express an opinion as to whether it is proper. If the question is not one that is allowed under the rules of evidence or is otherwise improper, I will tell you. Otherwise, the question will generally be allowed.

I remind you that the lawyers are trained in asking questions that will produce the evidence necessary to decide this case. However, if you feel there is something important that has been missed or that needs clarification, you may ask a question by complying with the procedure outlined in this instruction.

15. WHO IS RESPONSIBLE TO CONVINCE THE JURY?

The prosecution has the burden of proof. It is the one making the accusations in this case. The defendant is not required to prove innocence - you must start by assuming it. According to our law, the defendant is presumed to be innocent unless proven guilty beyond a reasonable doubt. This is a humane provision of the law intended to guard against the danger of an innocent person being unjustly punished.

16. HOW CONVINCED MUST THE JURY BE BEFORE DECIDING THE DEFENDANT IS GUILTY?

Before you can give up your presumption the defendant is innocent, you must be convinced that the defendant's guilt has been proven beyond a reasonable doubt. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind and convinces the understanding of reasonable persons who are bound to act conscientiously upon it.

17. WHAT IS REASONABLE DOUBT?

A reasonable doubt is one based upon reason and common sense rather than speculation, supposition, emotion or sympathy. It is the kind of doubt that would make a reasonable person hesitate to act. It must be real and not merely imaginary. It is such as would be retained by reasonable men and women after a full and impartial consideration of all the evidence, and must arise from the evidence or lack of evidence in the case.

18. HOW TO EVALUATE DOUBT

If after such full and impartial consideration some possible doubt exists, you must determine whether such doubt is reasonable in light of all the evidence. Ask yourselves if the doubt is consistent with reason and common sense. The law does not require that the evidence dispel all possible or conceivable doubt, but rather that it dispel all reasonable doubt. That is what is meant by the phrase “proof beyond a reasonable doubt”.

[THE EVIDENCE WILL NOW BE PRESENTED]

19. INSTRUCTIONS ON THE LAW THAT APPLIES TO THIS CASE

The clerk has attached to your copy of these instructions some additional pages which contain instructions relating to the particular laws or rules that apply in this case. These additional instructions begin with instruction number twenty-eight (28). We will read those after completing our review of the following instructions which relate essentially to the procedure that you should follow.

20. WHAT TO TAKE WITH YOU INTO THE JURY ROOM

You may take the following things with you when you go into the jury room to discuss this case:

- a. all exhibits admitted in evidence;
- b. your notes (if any);
- c. your copy of these instructions; and
- d. the verdict form or forms.

21. WHAT TO DO IN THE JURY ROOM

The first thing you should do in the jury room is choose a person to be in charge. This person is called the “Foreperson” or the “Chair”. The Chair’s duties are:

- a. To keep order and allow everyone a chance to speak;
- b. to represent the jury in any communications you make; and
- c. to sign your verdict and bring it back in court.

In deciding what the verdict should be, all jurors are equal. The Chair has no more power than any other juror.

22. CONSIDER EACH OTHER'S OPINION, THEN REACH YOUR OWN DECISION BASED UPON HONEST DELIBERATION

It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of opinion or to announce a determination to stand for a certain verdict. When that is done at the outset, a person's sense of pride may block appropriate consideration of the case. Use your common memory, your common understanding and your common sense. Talk about the case with each other as you ponder and deliberate.

Your verdict must be your own. Don't make a decision just to agree with everyone else. However, you should respect and consider the opinions of the other jurors. If you are persuaded that a decision you initially made was wrong, don't hesitate to change your mind. Help each other arrive at the truth. Also, don't resort to chance or some form of decision-making other than honest deliberation.

23. WHAT TO DO IF YOU HAVE QUESTIONS DURING DELIBERATION

If you think you need more information or a clarification, write a note and give it to the bailiff. I will review it with the lawyers. We will answer your question whenever appropriate. However, these instructions should contain all the information you need to reach a verdict based upon the evidence.

24. FOCUS ON THIS CASE ALONE

Your duty is to decide this case and this case alone. You should not use this case as a forum for correcting perceived wrongs in other cases, or as a means of expressing individual or collective views about anything other than the guilt or innocence of this defendant. Your verdict should reflect the facts as found by you applied to the law as explained in these instructions and should not be distorted by any outside factors or objectives.

The final test of the quality of your service will be the verdict you return. You will contribute to efficient judicial administration if you focus exclusively on this case and return a just and proper verdict.

25. REACHING A VERDICT

This being a criminal case, your verdict must be unanimous, all jurors must agree. When you are all in agreement, then you have reached a verdict and your work is finished.

26. VERDICT

When you retire to the jury room you will have with you a verdict form. As your deliberations may determine, your verdict in this case must be either

Count I	Guilty or Not Guilty of <u>Driving Under the Influence</u>
Count II	Guilty or Not Guilty of <u>Speeding</u>
Count III	Guilty or Not Guilty of <u>Fail to Yield to Emergency Vehicle</u>

When you reach a unanimous verdict in this case, the chair should date and sign the verdict form which corresponds to your decision. After the verdict is signed, notify the Bailiff you are ready to return to court.

27. WHAT HAPPENS AFTER THE VERDICT HAS BEEN REPORTED

After you have given your verdict to the judge, he or the clerk may ask each of you about it to make sure you agree with it. Then you will be excused from the jury box and you may leave at any time. You may remain in the courtroom, if you wish, to watch the rest of the proceedings, which should be quite brief.

After you are excused, you may talk about the case with anyone. Likewise, you are not required to talk about it. If anyone attempts to talk to you about the case when you don't want to do that, please tell the Court Clerk.

No. 28

The Defendant is a competent witness in his own behalf, and the fact that he is charged with the commission of a crime should not be regarded by you as tending to impeach or discredit his testimony. However, in weighing that testimony you may take into consideration his interest in the matter and give his testimony the same fair and impartial consideration you are obliged to give to all of the evidence in the case.

NO. 29

Before you can convict the defendant of the crime of DRIVING UNDER THE INFLUENCE OF ALCOHOL you must find from the evidence, beyond a reasonable doubt, all of the following elements of the crime:

1. That on or about the 15th day of November, 2000, the Defendant was driving or was in actual physical control of a motor vehicle.
2. That such driving or actual physical control was in West Valley City, State of Utah.
3. That at said time and place, the Defendant was either (A) under the influence of alcohol to a degree which rendered the Defendant incapable of safely operating a vehicle; or, (B) that at said time and place the Defendant had a blood alcohol content of .08% or greater as shown by a chemical test given within two hours after the alleged operation or actual physical control.

If you are satisfied from the evidence that the Prosecution has proved beyond a reasonable doubt, each and every one of the above enumerated elements, you must find the defendant guilty of DRIVING UNDER THE INFLUENCE OF ALCOHOL. On the other hand if the Prosecution has failed to satisfy your minds on one or more of the above enumerated elements then you must find the defendant not guilty of DRIVING UNDER THE INFLUENCE OF ALCOHOL.

INSTRUCTION NO. 30

In considering whether the defendant was driving under the influence of alcohol, you may look to the fact that he refused to submit to a breath test. Layton City v. Billy E. Noon, 736 P.2d 1035, (UT 1987); U.C.A., Section 41-6-44.10(8), (1986).

INSTRUCTION NO. 31

Before you find the Defendant guilty of the crime of Speeding, you must find that the evidence shows beyond a reasonable doubt the following elements for this crime:

1. That on or about the 15th day of November, 2000,
2. The Defendant, Gordon R. Christensen,
3. In West Valley City, Salt Lake County, State of Utah,
4. Operated a motor vehicle at a speeds in excess of 35 mph.

INSTRUCTION NO. 32

The defendant is charged with the crime of failure to yield the right of way to an emergency vehicle, 41-6-76 U.C.A., 1953 as amended.

Before you can convict the defendant of failure to yield the right of way to an emergency vehicle you must find from the evidence, beyond a reasonable doubt, all of the following elements of the crime:

1. That on the 15th day of November, 2000,
2. The defendant, Gordon R. Christensen,
3. In West Valley City, Salt Lake County, State of Utah,
4. Failed to yield to an audible or visual signal of a peace officer.

CONSTITUTIONAL PROVISIONS AND RULES

Constitution of Utah, Article I § 7

No person shall be deprived of life, liberty or property, without due process of law.

Constitution of Utah, Article I § 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

United States Constitution, Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code of Judicial Conduct Cannon 3

A. Judicial duties in general. The judicial duties of a full-time judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. Adjudicative responsibilities.

- (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or permitted by rule, or transfer to another court occurs.
- (2) A judge shall apply the law and maintain professional competence. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.
- (3) A judge should maintain order and decorum in proceedings before the judge.
- (4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to judicial direction and control.
- (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and should not permit, and shall use all reasonable efforts to deter, staff, court officials and others subject to judicial direction and control from doing so. A judge should be alert to avoid behavior that may be perceived as prejudicial.
- (6) A judge should require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Canon does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.
- (7) A judge shall accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law. Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding. A judge may consult with the court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges provided that the judge does not abrogate the responsibility to personally decide the case pending before the court. No communication respecting a pending or impending proceeding shall occur between the trial judge and an appellate court unless a copy of any written communication or the substance of any oral communication is provided to all parties. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the court if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with the consent of the parties either in writing or on the record, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
- (8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.
- (9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. A judge should require similar abstention on the part of court personnel subject to judicial direction and control. This Canon does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court. This Canon does not apply to proceedings in which a judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for purposes unrelated to judicial duties, information acquired in a judicial capacity that is not available to the public.

C. Administrative responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration, and cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to judicial direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments, shall exercise the power of appointment impartially and on the basis of merit, and shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary responsibilities. A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. This section does not apply to information generated and communicated under the policies of the Judicial Performance Evaluation Program.

E. Disqualification.

(1) A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge had served as a lawyer in the matter in controversy, had practiced law with a lawyer who had served in the matter at the time of their association, or the judge or such lawyer has been a material witness concerning it;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and should make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor

children residing in the judge's household.

F. Remittal of disqualification. A judge disqualified by the terms of Canon 3E may disclose the basis of the judge's disqualification and ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge need not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be entered on the record, or if written, filed in the case file.

Utah Rule of Evidence 19

(a) After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the alleged crime, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to each juror. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.

(b) During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.

(c) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties waive this requirement. Final instructions shall be in writing and at least one copy provided to the jury. The court shall provide a copy to any juror who requests one and may, in its discretion, provide a copy to all jurors.

(d) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what

part of the charge was given and what part was refused.

(e) Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In stating the objection the party shall identify the matter to which the objection is made and the ground of the objection, matter to which he objects and the ground of his objection.

(f) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(g) Arguments of the respective parties shall be made after the court has given the jury its final instructions. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court.

Utah Rule of Criminal Procedure 29

(a) If, by reason of death, sickness, or other disability, the judge before whom a trial has begun is unable to continue with the trial, any other judge of that court or any judge assigned by the presiding officer of the Judicial Council, upon certifying that the judge is familiar with the record of the trial, may, unless otherwise disqualified, proceed with and finish the trial, but if the assigned judge is satisfied that neither he nor another substitute judge can proceed with the trial, the judge may, in his discretion, grant a new trial.

(b) If, by reason of death, sickness, or other disability, the judge before whom a defendant has been tried is unable to perform the duties required of the court after a verdict of guilty, any other judge of that court or any judge assigned by the presiding officer of the Judicial Council may perform those duties.

(c)(1)(A) A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias or prejudice, or conflict of interest.

(B) The motion shall be filed after commencement of the action, but not later than 20 days after the last of the following:

(i) assignment of the action or hearing to the judge;

(ii) appearance of the party or the party's attorney; or

(iii) the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based. If the last event occurs fewer than 20 days prior to a hearing, the motion shall be filed as soon as practicable.

If the last event occurs fewer than 20 days prior to a hearing, the motion shall be filed as soon as practicable.

(C) Signing the motion or affidavit constitutes a certificate under Rule 11,

Utah Rules of Civil Procedure and subjects the party or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to disqualify in an action.

(2) The judge against whom the motion and affidavit are directed shall, without further hearing, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. If the judge grants the motion, the order shall direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

(3)(A) If the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so.

(B) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion and affidavit an affidavit responsive to questions posed by the reviewing judge.

(C) The reviewing judge may deny a motion not filed in a timely manner.

(d)(i) If the prosecution or a defendant in a criminal action believes that a fair and impartial trial cannot be had in the jurisdiction where the action is pending, either may, by motion, supported by an affidavit setting forth facts, ask to have the trial of the case transferred to another jurisdiction.

(ii) If the court is satisfied that the representations made in the affidavit are true and justify transfer of the case, the court shall enter an order for the removal of the case to the court of another jurisdiction free from the objection and all records pertaining to the case shall be transferred forthwith to the court in the other county. If the court is not satisfied that the representations so made justify transfer of the case, the court shall either enter an order denying the transfer or order a formal hearing in court to resolve the matter and receive further evidence with respect to the alleged prejudice.

(e) When a change of judge or place of trial is ordered all documents of record concerning the case shall be transferred without delay to the judge who shall hear the case.