

1984

## The State of Utah v. Richard H. Nickles And Margaret K. Nickles : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent

-v-

RICHARD H. NICKLES and  
MARGARET K. NICKLES,

Defendants-Appellants

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19221  
Case No. ~~18666~~

BRIEF OF APPELLANT

The appellants, Richard H. Nickles and Margaret K. Nickles, appeal from the conviction and judgment of Aggravated Arson, a felony in the Second Degree, and Insurance Fraud, a felony in the Second Degree, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary presiding.

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FILED  
SEP 12 1994

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
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Plaintiff-Respondent	:	
	:	
-v-	:	
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RICHARD H. NICKLES and	:	Case No. 18666
MARGARET K. NICKLES,	:	
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Defendants-Appellants	:	

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Defendants-Appellants	:	

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellants, Richard H. Nickles and Margaret K. Nickles, appeal from the conviction and judgment of Aggravated Arson, a felony in the Second Degree, and Insurance Fraud, a felony in the Second Degree, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary presiding.

DISPOSITION IN THE LOWER COURT

The appellants, Richard H. Nickles and Margaret K. Nickles, were tried and convicted of Aggravated Arson, a Second Degree Felony, and Insurance Fraud, a Second Degree Felony, in a trial from June 7, through June 22, 1982. Appellant Richard H. Nickles was sentenced to the indeterminate term of not less than one year nor more than fifteen years and was fined \$10,000 as provided by law for the crime of Aggravated Arson. He was sentenced to the indeterminate term of not less than

one year nor more than fifteen years and was fined \$10,000 as provided by law for the crime of Insurance Fraud. The sentences were to run concurrently. Appellant Margaret K. Nickles was sentenced to an indeterminate term of not less than one year nor more than fifteen years and was fined \$5,000 as provided by law for the crime of Aggravated Arson. She was sentenced to the indeterminate term of not less than one year nor more than fifteen years as provided by law for the crime of Insurance Fraud. The sentences were to run concurrently. Her sentences were suspended upon serving six months in the Salt Lake County Jail and an indeterminate period of probation.

#### RELIEF SOUGHT ON APPEAL

The appellants seek reversal of the judgment rendered by the court below or, in the alternative, a new trial.

#### STATEMENT OF FACTS

On October 30, 1980, at about 1:20 a.m., there was an explosion followed by a fire at the home of the appellants, Richard and Margaret Nickles (T. 73). The Nickles resided at 4448 Crest Oak Drive, Salt Lake City, Utah.

No members of the Nickles family were home at the time. Margaret Nickles and the two Nickles daughters, Kimberly and Diana, had driven to California on October 27, 1980, to visit friends and relatives (T. 1637, 1639, 2005). Richard Nickles stayed in Salt Lake City to attend to business (T. 279) and then flew to California on the morning of October 29, 1980.



His airport parking sticker was marked 10:35 a.m. (T. 1906). He flew instead of driving to California because his bad back made it painful for him to sit for long periods (T. 278, 1641-42). Richard Nickles attended business meetings in Los Angeles on October 29 and 30 (T. 1638) and then flew to Santa Maria, California, where he was later joined by his family.

The Nickles made typical preparations prior to their departure. A neighbor boy, David Dickert, was asked to care for their cat (T. 153). Richard Nickles also offered the Dickerts a casserole that Margaret did not want to leave in the refrigerator while they were gone (T. 111). David picked it up from the flower box outside the front door (T. 155). Many lights were on in the house the evening prior to Richard Nickles' departure (T. 113).

John Minichino of the local arm of the Bureau of Alcohol, Tobacco, and Firearms (ATF) called Richard Nickles in California to notify him of the fire on the evening of October 30 before the rest of the family had arrived in Santa Maria (T. 531). Richard Nickles' immediate response was to inquire if anyone had been hurt (T. 511). He also expressed anger at the situation (T. 532). Upon being told of the fire, Margaret Nickles' reaction was tears and uncertainty (T. 1782). The experience was devastating to the entire family (T. 1654).

The entire family began the drive back to Salt Lake City together the following day (T. 1641). They arrived in Salt Lake City on November 2 around 12:30 a.m. (T. 514). The

appellants drove directly to their home, briefly examined the remains, and then stayed at Diana's condominium for the rest of the night (T. 1643).

The next day, Sunday, the appellants viewed the remains, sifting through the debris of the remains of the fire (T. 1644). They located a floor safe which was opened (T. 1647). Items within it were six place settings of sterling silver (T. 1648) which were reported to the insurance company (T. 1850) as well as to the insurance company's attorney (T. 1225). The house was open to any passersby and not boarded up for two to three weeks (T. 1661).

On Monday morning after the fire, November 3, 1987, Richard Nickles contacted the appropriate authorities as he had been requested to do (T. 536).

The State contended that a "device" was found at the scene in the downstairs bedroom. This was the bedroom occupied by the appellants' daughter, Kim. The device, according to the State, was a light bulb in a socket that was wrapped in paper and placed in a plastic tray (T. 776). The State theorized that the paper was saturated with a liquid accelerant which exploded or ignited from the light bulb (T. 811-16). The fire investigator found a table with a bulb melted into it (T. 1117). Half of the bulb was intact and had paper around it (T. 776). Kim described a bedside lamp and eight crossword puzzles on her bedside table (T. 1614, 1614, 1778). The State further theorized that the explosion occurred after the heat had reached a certain point from the lamp. All of the State's tests, however, to determine

Experiments were conducted with an accelerant. None were done without an accelerant on a light bulb with paper under it (T. 1110). When tested under these circumstances, the bulb melted paper in ten to twenty minutes (T. 1123).

Moreover, no tests were run by the State's witnesses on the composition of the plastic material of the table, its flammability, or its reaction to acetone or any other liquid accelerant (T. 886, 1110, 1123). The melted material found at the scene was styrene plastic and was part of a small parsons table upon which a lamp was situated prior to the fire (T. 1125-26). Battalion Chief John Ungricht testified that he saw the remains of something red in the vicinity of where the "device" was found (T. 629). At the trial the appellants produced a parsons table identical to the one that had been located in the downstairs bedroom. A defense expert analyzed it and found that it was composed of styrene plastic, identical to the melted material in and around the "device" (T. 1525). The alleged tray was absolutely flat, without evidence of sides or walls (T. 1113-14).

Independent tests were conducted on the styrene plastic material. It was found that it is flammable and burns at about 500° F. In a test performed at trial, it was shown that acetone softened the plastic table (T. 1861-62). Experts further testified that a 100 watt light bulb will reach an exterior temperature of 264° to 266° F (T. 1500). A chemist testified that in a test he performed, it took a 100 watt light bulb two and fifteen minutes to melt through an identical parsons table (T. 1501).

A chemical testified that the natural gas mixture with the vapors of air must be between 2.9 and 13.3 percent explosive (T. 1884). Any dilution less than 2.9 percent that gas would neither ignite nor explode (T. 1884-85, 1889). The amount of acetone needed to create a 2.9 to 13.3 dilution of vaporization, considering the cubic footage of the residence and air exchange, would have been a minimum of 450 gallons to a maximum of 2,250 gallons (T. 1888).

There was no evidence that natural gas caused the explosion at the Nickles home (T. 552). However, the State's own witness from Mountain Fuel testified that swamp gas can back up into a house from the U-shaped pipe under a sink (T. 425). He further stated that it would take more than a day for the water to evaporate from the pipe in order to rid the gas (T. 428).

The destruction caused by the fire was virtually total (T. 210). The fire was extensive and difficult to repress because of recurring hot spots (T. 253-54). The family room and kitchen suffered heavy damage in the fire (T. 116). The living room remained where the dining room had been, and the walls were gone (T. 274-75). In fact, the entire first floor, which included the dining room, family room, living room, kitchen and master bedroom, had fallen through, leaving a gaping hole.

The State presented evidence of four points of entry to the home. These were the electrical meter, the points of entry (1) in the family room door; (2) in the master bedroom door; (3) in the center of the downstairs family room; (4) in the

Richard Nickles, the defendant's daughter, fired the shots which started the fire and thereby caused the destruction of the house (T. 817-18). The state investigated the fire and found that the initial blast was from a .38 Smith & Wesson (T. 821). The state's witnesses believed that the fire had been poured both downstairs and upstairs in the house (T. 818-19, 822). However, no pour patterns were found upstairs due to the destruction (T. 828). One of the state's witnesses testified that "trailers" can be seen after a fire; he stated that if they saw a wavy line they do not indicate a pour pattern (T. 831). Brian Hansen, of the Salt Lake County Fire Department, then testified that he only viewed "wavy line" patterns (T. 918). The State further contended that acetone was used to accelerate the fire. They claimed it was present in the linings of the suitcases which were located in the downstairs area of the home and in carpet samples. The State theorized that the suitcases were used to bring the accelerant into the house (T. 920). A fire marshall testified that he had told Richard Nickles in July of 1980 that acetone dissipates quickly and should leave a residue (T. 479). Richard Nickles had called the expert into his business because of a concern that his tenant would cause a fire with his chemicals (T. 477-79). Acetone was, in fact, present in the sealed cans which contained the linings of the suitcases (T. 962). The linings, plastic exteriors of the suitcases were intact (T. 1532-35). Tests conducted after the fire demonstrated that acetone dissolves quickly on the linings of the suitcases which were made of a plastic material (T. 1531-32). The lining itself dissolved

when placed in acetone, leaving strands of material (T. 1573). Acetone further discolored the linings of the suitcases (T. 1532, 1573). Acetone also dissolved part of the exterior lining of the suitcases and the plastic tray contained in the make-up bag (T. 1542-43, 1571). In the opinion of a chemist, David Osborn, the suitcase lining had never been exposed to acetone (T. 1535). He testified that acetone, caught in bubbles in contact glue, could be the source of the acetone found in the lining (T. 1536). The experts further testified that acetone is a component of wood that is released when the wood burns (T. 1026, 1539).

Carpet samples from the Nickles' home were also analyzed. The State's expert testified that this finding was more complex than the analysis of the suitcase lining (T. 962). He found that there was a simply compounded mixture of hydrocarbons (Id.). This indicated the presence of solvents of the same type (T. 963). Hydrocarbons are a byproduct of burning wood (T. 1043) but, according to this expert, these results were not consistent with just burning wood (T. 1045). However, no test was conducted actually burning the carpet exhibit (Id.). The defense expert testified that he conducted tests which found several substances: styrene, toluene, and possibly methyl styrene, but no acetone (T. 1541). The toluene found would be a normal vapor in a fire and the styrene would exist if there were styrene plastics in the home (T. 1542).

The Nickles home was listed for sale at the time of the fire. It was listed from May 15, 1980 to September 19, 1980 (T. 349), and again in early October of 1980 (T. 305). The

listing at the time of the fire was for \$239,000 (T. 321). The real estate agent at the time of the fire, Alice Blair, had not yet tried to sell the house. The Nickles had declined to hold an open house when Margaret's parents visited (T. 328) and asked that the house not be shown while they were in California (T. 311).

The Nickles were not destitute at the time of the fire despite a \$75,000 loan with a six-month balloon (T. 433). Margaret Nickles testified to assets of the family besides their business (T. 1951). The short-term loan was obtained in August of 1980 (T. 432-33). One payment was made on it (T. 438). The loan officer knew that the Nickles intended to pay back the loan by the sale of the house (T. 444-45). Subsequently, in late October, the Nickles planned to pay off the entire loan with new credit they believed they could obtain (T. 445-57, 1946). The loan officer was advised of this new arrangement (T. 446). No mortgage payments were made by the Nickles after the fire because of a shortage of cash flow due to living expenses incurred (T. 1960). They were, however, in constant contact with the loan officer and were quite concerned about the situation (T. 452).

The Nickles had insurance coverage in force on their home and on the contents of their home at the time of the fire. At Margaret Nickles' request in January of 1980, the insurance coverage had been increased due to the remodeling of the house (T. 736). The limits at the time of the fire were \$268,000 on the house with \$134,000 on personal property (T. 661). The

policy had increased from \$250,000 to \$268,000 due to a built-in inflation factor (T. 726). The Nickles had always maintained a "cadillac" insurance policy on their home (T. 716). The policy provided coverage for a full year with payment due each September. After only a brief lapse because he forgot to pay the bill, Richard Nickles submitted the premium due in September of 1980 (T. 103). The insurance coverage also included a \$3,800 fur rider and a \$7,280 silver rider (T. 658).

The statement of proof of loss was submitted to Great American Insurance on December 30, 1980 (T. 1208). Although Richard Nickles had requested additional time to prepare the statement because of the complexity of the information, the emotional trauma, the necessity of finding other accommodations (T. 1845), and lack of records available to the appellants (T. 1850), the insurance company refused to grant an oral extension of time (T. 694). Instead, they indicated that the Nickles would have to apply for an extension (T. 695). The proof of loss was submitted under difficult and emotionally trying circumstances (T. 695).

The appellants did their best to correctly document their losses. Only a few receipts could be found where the business account had been involved (T. 1930-31). The rest were lost in the fire. The appellants were told to utilize replacement costs rather than actual cash value on their personal property in the proof of loss (T. 723). The appellants informed the insurance company that the column marked "source" on the proof of loss was actually the place where they had obtained the replacement costs and not the source of purchase (T. 1179, 1849). A witness from Barbara Johnson Interiors verified that the Nickles had contacted them (T. 1265).



several of the businesses, including the art appraiser, admitted that they do not keep a record of the telephone calls to ask prices (T. 1315, 1361, 1397). The proof of loss was prepared by a number people, including family members and friends (T. 252, 1847). It took two to three weeks of full-time work by Margaret Nickles to complete it (T. 1847). The proof of loss was some two hundred pages (T. 252), with over 1700 items listed (T. 1167). The claim was for \$233,350.29 (T. 673). This was in line with the bid obtained to replace the structure of \$231,192.31 (T. 1911) and less than the total coverage. The silver claimed was \$12,876 (T. 676). Because of the manner and means by which it was prepared and because of the time constraints, the appellants acknowledged that there could, in fact, be errors despite their attempts to avoid them (T. 1847).

One of the major items contained in the proof of loss was the claim for silverware. The arson personnel purportedly examined the debris shovelful by shovelful looking for silver. Chief Ungricht testified that melted silver should have been in the remains (T. 548). He further testified that fire personnel were very thorough and that it would not be possible to miss more than an isolated piece of silverware in the extensive search that was performed (T. 1826-27). However, over fifty pieces of silverware were subsequently found (T. 1650), together with trays, bowls and dishes (T. 1851).

Numerous witnesses testified not only to the extensive remodeling that had been done in the Nickles home. Their neighbor had seen sterling silver flatware, bowls, a tea set, and candelabra

within six months of the fire (T. 127-28, 146). She also verified that there were new draperies within three months of the fire (T. 130). A friend of the Nickles, Lynette Daniel, as well as Margaret Nickles described the extensive remodeling that had been done in the home. This included new appliances, fixtures, and carpeting in the kitchen (T. 243, 1823-24); level recarpeting and refurnishing the family room (T. 1825-26); and new draperies throughout the home (T. 242, 1826). These furnishings were seen by Lynette Daniel the Sunday prior to the Thursday fire (T. 260-61). The furnishings in the home were described as a "quality decor" and "elegant" by the loan officer on the \$75,000 loan (T. 469). The draperies were further verified by the son of the woman who made them; he hung them in the Nickles residence (T. 1712). Both he and his wife also verified that there were two special paintings in the home (T. 1738, 1749-50).

At trial the State claimed that many of the belongings claimed by the Nickles on the proof of loss either did not exist or did not exist in the quality claimed by the Nickles. These claims centered on the silver, the furs, the paintings, designer jeans, and shoes. In fact, much of the silver was accounted for (T. 1850) with the exception of six place settings the presence of which is unknown at this time. Chief Ungricht belatedly admitted that insurance personnel had found the remains of fur and given those to him (T. 2040). The paintings claimed by the Nickles were valued at \$4,000 each on the proof

of loss. This was the value only of a copy, not the original (T. 1926-29). Several items, such as one of the paintings (T. 1943), binoculars, a watch (T. 1864), left a protected area visible to the investigators, but the actual item was missing. There was never a claim for designer jeans (T. 1787). Chief Ungricht testified that his investigators never counted the remains of the shoes that were found (T. 594). Lynette Daniel verified that Kim Nickles had about fifty pairs of shoes, Diana about twenty pairs, and Margaret about forty pairs (T. 281-82).

Subsequent to the judgment, which was entered in August 1982, and subsequent to the filing of an appeal, the appellants' case was remanded from this Court to the Third Judicial District Court for a supplemental hearing on the issue of prosecutorial misconduct. The remand was stipulated to by both the appellants and the State. The proceeding occurred on April 1 and 7, 1983, before the Honorable James F. Sawaya. The trial judge, the Honorable Peter F. Leary, recused himself from hearing this supplemental proceeding.<sup>1</sup> The basis for the remand and the appellants' subsequent motion for a new trial was Deputy County Attorney Michael Christensen's involvement with a private arson investigation company at the same time

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1. Judge Leary had presided over a motion to recuse the County Attorney's Office and Deputy County Attorney Michael Christensen specifically in another arson case, State v. Woods, Case No. CR82-593, resulting in an order prohibiting Mr. Christensen from further prosecuting that case. See order dated November 12, 1982 in the above-cited case.

as he prosecuted arson cases, including the appellants', for the County Attorney's office.

Early in 1981 the private arson firm got under way, subsequently incorporating as Arson and Fraud Investigations, Inc., (AFI) March 31, 1981 (Supp. T. 40).<sup>2</sup> The incorporators were Michael Christensen, his wife Virginia (both attorneys with the County Attorney's office then and now), and James Ashby, an investigator for the County Attorney's office (Id.). The filing letter was sent on stationery of Mr. Christensen's as a private attorney with Suite C222 Metropolitan Hall of Justice listed as an address and with two telephone numbers, one of which was the old County Attorney's number (Supp. T. 39-42). The business was started because the County Attorney's arson investigators had been advised that their jobs as investigators might terminate in June 1981 (Supp. T. 43).

AFI performed eight investigations (Supp. T. 47). In March of 1981, they investigated both the Challis, Idaho theater fire and a fire in Paul, Idaho. Jim Ashby was contacted in both these cases (Supp. T. 49). Mr. Christensen was paid for the reports by AFI on these two fire investigations (Supp. T. 47-48). The next investigation was in Worland, Wyoming, in May or July 1981 (Supp. T. 50). Commercial Union Insurance Company hired him for the Worland fire and Mr. Christensen

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2. Citations to the supplemental hearing ordered by this court will be cited as Supp. T. \_\_\_\_.

and AFI again received payment for their work (Supp. T. 51). Mr. Ashby was again retained on an investigation of a fire in Lander, Wyoming. In September 1981, AFI investigated a book store fire in Boise, Idaho and a residential fire in Cuna, Idaho (Supp. T. 53-54). Also in the fall of 1981 the Farmers Home Insurance Company group retained AFI to take photographs of fire scenes in Panguitch and Grantsville, Utah (Supp. T. 55-56).

As a result of the Cuna, Idaho, investigation, Mr. Christensen testified as an expert in February of 1982 (Supp. T. 54). Part of his qualifying credentials was his experience as a deputy county attorney (Supp. T. 54-55). Mr. Ashby, who participated in the investigation of the appellants' case (Supp. T. 76-77), also used his credentials as an investigator for the County Attorney's office to obtain work for AFI (Supp. T. 82-83). Once AFI's existence was brought to the attention of County Attorney Ted Cannon, Mr. Christensen was notified to cease his private investigations in May or June of 1981 (Supp. T. 74-75).

During about a four-year period that overlapped with AFI's existence, Mr. Christensen prosecuted about nine arson and insurance fraud cases with the County Attorney's Office (Supp. T. 20). In 1979, he tried Ray Albert Long. In 1980, he tried Edward S. Dronzank. The Nickles were prosecuted in June 1982 and John Troy was prosecuted in August 1982. Tracy Parkin was prosecuted in January or February 1983. He also tried the Busboom case in the latter part of 1981 (Supp. T. 29-30). At the time of the hearing, the Tony Beck automobile

## ARGUMENT

### POINT 1

#### THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICTS.

The standard of review where the sufficiency of evidence is questioned consists of examination of the case in the light most favorable to the jury's verdict. State v. McCardall, 652 P.2d 941 (Utah 1982). Even in reviewing the evidence presented in the light most favorable to the conviction rendered, the evidence in this case failed to link the arson or insurance fraud to the appellants. Reasonable doubt, as a matter of law, existed as to: 1) whether the explosion and fire were arson-caused; 2) if arson, whether the Nickles were responsible; and 3) regardless of the arson issue, whether there was insurance fraud.

#### A. THERE WAS INSUFFICIENT EVIDENCE OF ARSON

In State v. McCardall, supra at 945, this Court stated that it would overturn a jury's verdict only "when the evidence is lacking and insubstantial that a reasonable man could possibly have reached a verdict beyond a reasonable doubt." This is the case here. The State produced no concrete evidence that the explosion and fire occurred in the Nickles home. The theory was that a bulb wrapped in paper in a tray of matches on a parsons table in Kim's bedroom, with acetone spilled throughout the house, caused the destruction and that the fire would occur for sixteen hours after being set in place. The State's own evidence did not support this theory.

There is no evidence that the bulb was set up as a device. The State's own witness performed a test with a bulb and acetone where it was ignited in ten to twenty minutes, not sixteen hours later (T. 1123). An expert defense witness testified that the bulb would have melted through the table on its own in two hours and fifteen minutes (T. 1501). Thus, even if there were no acetone present, there would have been a hole through the table if that bulb had been left burning when Richard Nickles left the house.

Defense expert, David Osborne, tested both the so-called device and the table. He found that they were both primarily styrene (T. 1525). There was no evidence of another substance in the device that would indicate the presence of some type of paint tray as theorized by the State. There was also no evidence of an accelerant in the device. The so-called tray was completely flat on the device without any indication that there were edges that would have formed a tray (T. 1113-13). Acetone on the table itself would have dissolved the table (T. 1861-62). There was simply no evidence that the lamp had been sitting in any type of acetone. In fact, there was nothing inconsistent with a bulb sitting on a table with crossword puzzles nearby. One of the State's own investigators testified that he saw some red material nearby in the bedroom that was probably the shade that had originally been on the lamp (T. 629).

Moreover, there was no evidence that acetone was used as an accelerant. There was inconsistent testimony on the so-called pour patterns with State witnesses saying there were trailers in the house and at the same time saying that

the photographs depicted wavy lines which were not evidence of trailers (T. 631, 913). No acetone was detected in the carpet samples. If acetone had been placed on the parsons table, tests demonstrated that it would have dissolved the table and there would have been a hole in it. An incredible amount of acetone would have been necessary to cause the explosion, anywhere from 450 gallons up to 2,250 gallons (T. 1888).

These amounts clearly could not have entered the house in the suitcases that the State so carefully preserved, believing that they had been the vehicle for bringing acetone in the house. First of all, they could not have contained the amount that would have been necessary to cause the explosion. Secondly, the defense expert testified that acetone not only would have discolored the linings of the suitcases but also would have dissolved them, leaving mere threads (T. 1531-32, 1573). If acetone had been on the exterior of the suitcases, it would have caused a softening. There was no evidence that any of these effects had occurred. Instead, the evidence was much more consistent with the theory that the acetone in the suitcases was due to a release of the acetone caught in bubbles in the glue.

The cause of the explosion and fire is unknown. It is clear that it was not caused as the State theorized; the defense experts' testimony was unrebutted. It is possible that it was caused by swamp gas backing up into the home and creating the explosion. However the blaze was caused, though, there was



insufficient proof as a matter of law to indicate that there had been an arson.

B. EVEN IF THE FIRE WAS ARSON, THERE WAS NO EVIDENCE TO PROVE THE APPELLANTS WERE RESPONSIBLE.

This Court has recently reversed convictions where there was insufficient evidence to prove that the defendants had committed the crimes. In State v. Petree, 659 P.2d 443 (Utah 1983), this Court found the evidence insufficient to support a conviction for second degree murder. In Petree, the victim was last seen when her mother dropped her off at the defendant's home. The only other incriminating evidence were statements the defendant made to family members and to a girlfriend some two years later. Id. at 444-45. In Petree this Court stated:

We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

Id. at 444.

In State v. Linden, 666 P.2d 375 (Utah 1983), this Court reversed a conviction in an arson case based upon the insufficiency of the evidence. In Linden, black plastic cans found at the scene were later traced to Checker Auto Parts. The clerk at Checker remembered selling the cans to two men, one older and one younger. Although the younger was later identified as the codefendant, there was insufficient evidence to link the defendant with the sale or the arson. Id.

In this case, even if the explosion and fire at the Nickles' home were caused by arson, the State failed to prove that the appellants were the persons responsible. No one saw anyone set up a device or pour any acetone in the home. The State claims that the lights in the house were on prior to Richard Nickles' departure because he was pouring acetone. This is total speculation. The only reasonable conclusion is that he was packing. The evidence clearly established that Richard Nickles did, in fact, fly out of Salt Lake to Los Angeles the morning of the 29th of October. It is obvious that he would have needed to pack the night before. Moreover, the evidence established that Richard Nickles was gone sixteen hours prior to the explosion at his home (T. 1906). There is no evidence that he had ever purchased large quantities of acetone or set up any kind of device. There was, further, no evidence presented by the State that any of his actions could have caused a fire sixteen hours later. As noted in the previous section, under the State's theory of the cause of the fire, it would have to have been set much more recently than sixteen hours prior to the blaze.

Moreover, the evidence established that Margaret Nickles had left for California on October 27 with her daughters. There was no evidence to indicate that she was present in Salt Lake City, or in her home, at any time within forty-eight hours of the fire. Thus, even if the jury had accepted the State's theory that Richard Nickles had set some kind of a device, there was absolutely no evidence that

Margaret Nickles had any knowledge of it.

The reaction of the appellants to the news of the fire, their anger, their tears, and their devastation, was not the reaction of arsonists. Moreover, if the Nickles decided to destroy their house because they could not sell it as they theorized, why would they have relisted it as recently as early October of 1960? There was every indication that the Nickles were anxious to sell and had intended to place their home on the market with a new agent. The State further argued that the Nickles had a \$75,000 loan with a balloon on it and were concerned about paying it back. It is true that the Nickles, throughout the time before and after the fire, were concerned about repaying the debt (T. 452). However, they believed that they were going to be able to obtain another long-term loan that would repay this one if the house were not sold (T. 447, 1946). They had assets and a business to pay back as well (T. 1951).

Thus, like State v. Petros, supra, and State v. Lindquist, the State did not prove beyond a reasonable doubt that the appellants committed the crime of aggravated arson.

3. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANTS COMMITTED INSURANCE FRAUD.

The mere filing of an insurance claim does not make the appellants guilty of insurance fraud. A fraudulent act is a behavior characterized by fraud. Fraud is defined as an act of trickery or deceit, or an act of misrepresentation, or an act of intentional misrepresentation. State v. Peterson, et al

1976) (Utah 1977). State v. Galieto, 126 Ariz. 193, 611 P.2d 100 (1980), provided the same definition of fraud in an insurance case where the defendant was found guilty of making a false insurance claim. Galieto explains that the "gravamen of the offense is the accused's intent to defraud." Id. at 194. "The person must act with the specific intent to defraud. [W]hen a specific intent is required to make an act an offense, . . . the doing of the act does not raise a presumption that it was done with the specific intent." State v. Wittinghill, 192 Utah 48, 163 P.2d 342 (1945).

The appellants in this case had adequate, not excessive, insurance on their home. While an insurance agent testified that the Nickles had always had a "cadillac" insurance policy (T. 716), in fact their policy covered actual costs and not replacement costs (T. 658). The amount of insurance covered was appropriate for a very elegant home. Margaret Nickles had requested an increase after they had completed extensive remodeling of the home (T. 736). This increase was effective almost a year before the fire. Both the remodeling and the elegant decor were verified by friends and family of the Nickles (T. 130, 242-43, 35-36, 469, 1712, 1738, 1749-50).

The proof of loss filed indicated no intent to defraud the insurance company. The claim which consisted of some 200 items and 1700 lines of items was extensive. The appellants admitted there might be errors where they completed the claim under a great deal of stress without any records and in a very

short time (T. 1654, 1347). Whether the Nickles believed they were covered for replacement costs or not, they were told by an insurance agent to list the replacement costs (T. 723). The appellants explained to the insurance company that the source listed on the insurance claim was the source of the replacement costs and not the source of purchase (T. 1179, 1849). The State repeatedly tried to prejudice the jury by presenting witnesses who testified that the Nickles did not, in fact, buy the items at the store. (See testimony of nine witnesses, beginning at T. 1251, 1321, 1332, 1336, 1349, 1357, 1370, 1392, 1489).

None of the major items questioned by the State support a theory of insurance fraud. The State emphasized that the sterling silver claimed by the Nickles had not been found in the home and, yet, evidence was presented that the Nickles did, in fact, have sterling silver flatware and that six place settings of it were found safe in a floor vault (T. 127-28, 146, 1648). Many other pieces of silverware (T. 1650) and bowls and trays (T. 1851) were subsequently found. Where these were missed by the State's investigators, it is certainly possible that others were missed as well. The State further claimed that the Nickles overstated the value of two paintings. However, the Nickles did claim these paintings as originals, which would have been worth \$40,000, but claimed them as copies which were valued at \$4,000 (T. 1228-29). The existence of the paintings, as well as the silver, was verified by several friends and family members (T. 1749-50, 127-28, 146). Despite the State's allegations, there remain remains of furs that were given to the fire personnel (T. 2040).

State's investigators failed to count the remains of the shoes found and thus raised mere speculation as to whether, in fact, the number of shoes was accurate. Further, despite the State's allegations that there were no designer jeans in the home, there was no claim made for any designer jeans (T. 1787).

The logical inference regarding the missing items is that they were stolen. The protected areas where the binoculars and paintings were indicate that they were present when the fire occurred. The site was not secured for two to three weeks (T. 1661). The destruction was quite complete; any thefts prior to or subsequent to the fire would be difficult to detect. If the appellants were so anxious to collect the insurance money on a fraudulent basis, it does not make sense that they would claim items that would be questioned. Persons with a criminal intent would not risk detection. The honesty, and perhaps errors, of the Nickles indicated innocence, not guilt. The evidence was insufficient as a matter of law to support a verdict of guilty on the charge of insurance fraud.

#### POINT II

#### THE DEPUTY COUNTY ATTORNEY'S CONFLICT OF INTEREST IN PROSECUTING APPELLANTS' CASE WARRANTS A NEW TRIAL.

Pursuant to this Court's order, the appellants' case was remanded for a supplemental proceeding on the issue of prosecutorial misconduct. The appellants challenged the propriety of prosecution by Deputy County Attorney Michael Christensen when he was involved with a private arson investigation firm at the

same time as decisions in the appellants' case were made. Subsequent to the evidentiary proceeding, the appellants moved for a new trial. The court denied the motion for a new trial on the basis that it was untimely; the court further ruled that it would deny the motion on the merits if it reached them.

Utah Rule of Criminal Procedure §77-35-24(a) provides:

The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

The rule further requires that a motion for a new trial be filed within ten days after imposition of sentence or within such further time period as the court sets during the ten-day period. Utah Code Ann. §77-35-24(c).

In this case, the appellants' trial counsel, James R. Brown, was not aware of the County Attorney's conflict of interest within the ten days of the judgment in the case in August 1982. In fact, he was not aware of the situation until November 1982 (Supp. T. 14). At that time, the Salt Lake Legal Defender Association had been appointed to represent the appellants on appeal. Counsel acted as expeditiously as possible, filing both an extraordinary writ and, in the alternative, a motion to remand the appeal to the District Court for supplementary evidentiary proceedings. It was the belief of counsel for the appellants that a motion for a new trial was both appropriate given the facts and necessary in order to preserve a legal issue for appeal. The motion was filed within ten days of the supplemental proceeding.

Although counsel for the appellants has been unable to find any case law that specifically addressed the running of the time period for a new trial following a supplemental hearing, the statute would be meaningless unless the motion is appropriate after such an evidentiary proceeding. This motion could not have been raised earlier as the substance was unknown to counsel at a prior time. There is no remedy for defendants when this situation arises unless the statute is construed as allowing a timely motion after a supplemental evidentiary hearing.

The impropriety in this case had a substantial adverse effect on the appellant's right to a fair trial. This Court should grant a new trial on the basis of the prosecutor's conflict of interest in pursuing the appellants' case at the same time that he operated a private arson investigation firm.

A prosecutor occupies a special role in our judicial system, with a duty not only as an advocate but also as a fair and just decision-maker. The Utah Supreme Court recognized this duty in Walker v. State, 624, P.2d 687, 691 (Utah 1981):

We have previously stated that the State while charged with vigorously enforcing the laws "has a duty to not only secure appropriate convictions, but an even higher duty to see that justice is done." In his role as the state representative in criminal matters, the prosecutor, therefore, must not only attempt to win cases, but must see that justice is done. Thus, while he should prosecute with earnestness and vigor, it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (footnotes omitted).



The California Supreme Court similarly places a duty on a prosecutor to be fair and just in his decisions. In People v. Superior Court of Contra Costa County, 561 P.2d 1164, 1171 (Cal. 1977), the Court stated:

Nor is the role of the prosecutor in this regard simply a specialized version of the duty of any attorney not to overstep the bounds of permissible advocacy. The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. In all his activities, his duties are conditioned by the fact that he "is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." (cites omitted).

Furthermore, Standard 1.1 of the 1971 approved draft developed by the American Bar Association for prosecutors specifically states:

A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties.

The Utah Legislature has likewise addressed the issue. Utah Code Ann. §67-16-4(4) (1953 as amended) states:

No public officer . . . shall: [a]ccept other employment which he might expect would impair his independence of judgment in the performance of his public duties.

Where such a conflict arises and is known before trial, it is appropriate to recuse the prosecutor. In Contra Costa, the court refused to order the trial court to reinstate a

prosecutor it had recused where an employee of the prosecutor's office was the mother of the victim in a murder case and also a witness for the State. More recently and of most pertinence to this case, the Third District Court (Leary, J.) ordered the same prosecutor as in this case recused in State v. Woods, Case No. CR 82-593, under identical circumstances to those in this matter. (The order was attached as an exhibit to the appellants' motion at the Supplemental Hearing).

When the duty to be impartial in fact and in appearance is violated but not raised until after trial, the defendant is entitled to a new trial. In Walker v. State, supra, the defendant filed a writ and the court granted a new trial where the prosecutor failed to disclose exculpatory evidence to the defendant. In that case, the prosecutor failed to divulge the fact that a man's clothes were in the same room with a female defendant's clothes, even though defendant's defense to the distribution charge was that the heroin found in that room belonged to another. In State v. Bain, 575 P.2d 919 (Mont. 1978), the court held prosecutorial misconduct entitled defendant to a new trial where "the prosecutor's actions have deprived the defendant of a fair and impartial trial." Id. at 922. In that case, the prosecutor continued to try to introduce evidence of defendant's parole status even though ordered not to be the court.

In State v. Johnson, 663 P.2d 48, 51 (Utah 1983) this court reversed a conviction on theft by deception and announced prosecutorial misconduct would have constituted grounds for a

new trial if the convictions had not been reversed on other grounds. The appearance of impropriety is also grounds for a new trial if the convictions had not been reversed on other grounds. The appearance of impropriety is also grounds for a new trial "[J]ustice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954).

In State v. Madry, 504 P.2d 1156 (Wash. 1972), the court ordered a new trial in an assault case where the defendant discovered, subsequent to trial, that the trial-level judges had been investigating the hotel he owned for prostitution. The court stated that a judge must not only be impartial, but must also have the appearance of impartiality. The reason is that "[T]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." Id. at 1161. The Madry case is directly analogous here as the ABA standards and due process of law require that prosecutors as well as judges maintain an appearance of impartiality.

The actual or apparent impropriety in this case entitled the defendants to a new trial. There is no way to know for sure what impact the dual positions Mr. Christensen held had on his prosecutorial decisions in this case. GAB worked with Mr. Christensen on the appellants' case and simultaneously referred business to AFI. Mr. Christensen used his training and position with the County Attorney's Office as credentials for testifying as an expert in court on a case AFI investigated. Where the overlap in knowledge and jobs is so great, there is at least

an appearance of conflict. An actual bias is supported by the statement that Mr. Stroud made in the presence of county attorney personnel that he wanted Richard Nickles in prison (Supp. T. 106). This apparent conflict violated the appellants' right to a fair trial by due process of law pursuant to Article I, Section 7 of the Utah Constitution and the Fourteenth Amendment of the United States Constitution. The appellants have a right to the apparent and actual unbiased decisions of the prosecuting agency. The "substantial adverse effect" upon the appellants' right was denial of a fair and impartial prosecution and trial. If known prior to trial, it is clear that the prosecutor would have been recused as in State v. Woods, supra.<sup>3</sup> The mere fact that the impropriety was only discovered post-trial should not deprive the appellants of a remedy. Moreover, the court has a responsibility not only to protect the appellants' right to a fair trial, but also to see that public confidence is secure in the impartial administration of justice in this state. These two important functions could only have been guaranteed if the appellants were granted a new trial in this case.

### POINT III

#### THE TRIAL COURT ERRONEOUSLY ADMITTED THE TELEPHONE CALL REPORTED BY EILEEN RICE.

Over objection of defense counsel, the trial court allowed admission of a telephone conversation reportedly made by Richard Nickles (T. 264-65). Eileen Rice, secretary of ATF, had taken the phone call. The caller identified himself as Mr. Nickles.

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3. Prior to the printing of this brief, this Court reversed an arson case involving the same deputy county attorney because of his prosecutorial misconduct during opening and closing statements. State v. Troy, Case No. 18738 (August 29, 1984).

Eileen Rice reported:

He was asking about some articles that had been removed from his home and then mentioned to me that there had been a suspected arson at his home and that he had been suspect [sic] of it and commented that wasn't it lucky he had been 800 miles away with the Secretary of the Department of Energy and that he would have needed a very long fuse or a time delay.

Then, he again came back to the fact that these articles were missing and I asked what was missing and he said some silverware and other things, whole drawers full. And I told him I didn't believe we had them and that he said possibly they had been removed for safe-keeping.

I told him that I didn't think we had them, but that I would have John Minichino call when he got back to the office.

(T. 1270-71).

The trial court allowed admission of the contents of the phone call, citing 79 A.L.R. 3d 78 (T. 865)<sup>4</sup> and State v. Hess, 10 Cal. App. 3d 1071, 90 Cal. Rptr. 268 (1970) (T. 864) as authority. There is no Utah case law on point. This case is distinguishable from State v. Hess and more closely related to the factual situation of State v. Marlar, 498 P.2d 1276 (Idaho 1972). In Hess defendants made a phone call to the owner of an Arabian mare named Ingaia. They expressed an interest in purchasing her, obtaining descriptions of her which they subsequently used to obtain a duplicate registration certificate. They subsequently presented the Registry with a bill of sale

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4. 79 A.L.R. 3d 78 is, of course, a summary of law. As discussed infra, the cases require more than identification by the caller without voice recognition by the recipient. The circumstances surrounding who would have knowledge of the contents of the call is to be considered. See §20.

containing the forged signature of the rightful owner of Ingaia. Defendants then sold another horse purporting to be Ingaia. In Hess, the circumstantial evidence surrounding the telephone call pointed directly to the defendants and no one else, justifying admission of the phone call. They had obtained information which they used in the fraudulent sale. The information had not been given to anyone else, nor was it a matter of public knowledge. It was quite clear in Hess the defendants made use of the particular knowledge they had acquired during the telephone conversation.

State v. Marlar, supra, presents a different factual situation, more in line with the present case. In Marlar, the court admitted an alleged telephone conversation between the appellant and the witness Higgins. The caller threatened to put Higgins in the morgue. The phone call was admitted over counsel's objection to improper authentication. The court announced the general rule relating to admission of the substance of a phone call:

The admissibility of telephone conversations is governed by the same rules of evidence which govern the admission of oral statements made in face-to-face conversations, except that the party against whom the conversation is sought to be used must ordinarily be identified. 29 Am. Jr. 2d Evid., §380, p. 431 (1967). (Emphasis added). See Tonkin-Clark Realty Co. v. Hedges, 24 Idaho 304, 133 P. 669 (1913).

Id. at 1280. The most reliable means of identification is voice identification. Id.

Without voice identification, the general rule is that "mere statement of his identity by the caller is insufficient

proof of the caller's identity." Id. at 1281, citing Colbert v. Dallas Joint Stock Land Bank, 136 Tex. 268, 150 S.W. 2d 771 (Tex. App. 1941); McCormick, Law of Evidence, 405-06 (1954). If only the named caller has knowledge of the conversational contents, the phone call may be admissible. Id. Oregon has adopted a de minimus rule pertaining to circumstantial identification. State v. Glisan, 2 Or. App. 314, 465 P.2d 253 (1970). The court in State v. Marlar took a more cautious approach, adopting a "clearly corroborative" test regarding the admissibility of a phone call. The court considered clear identification of the caller, the subject matter of the conversation, and who would have knowledge of facts reported in the conversation.

In this case, Eileen Rice could not identify Richard Nickles' voice, nor did she place the phone call. The Nickles' number was published in the phone book. Newspapers and other media reported information on the Nickles being out of town at the time of the fire, thereby making that fact a matter of public knowledge (T. 652). The contents of the phone call were, therefore, not particular knowledge only Richard Nickles would have. Anyone could have identified himself as Richard Nickles and conveyed the same information to Ms. Rice. Where Eileen Rice was unable to identify the voice or any particular mannerisms and the contents of the phone call were a matter of public knowledge, admission of the phone call should have been denied. There was no corroborative evidence as in State v. Marlar, supra, and State v. Hess, supra.

#### POINT IV

APPELLANTS WERE DENIED A FAIR TRIAL BY  
THE INDIVIDUAL AND CUMULATIVE EFFECT OF  
ALLOWING INADMISSIBLE EVIDENCE AT TRIAL.

##### A. IRRELEVANT AND IMMATERIAL EVIDENCE

During the trial, irrelevant or immaterial testimony was allowed into evidence over the objection of defense counsel. First, a neighbor of the Nickles testified that the Nickles' home had lights on in several rooms at 3:00 a.m. on the night prior to Richard Nickles' departure for California. The neighbor saw only that lights were on. She saw no movements or any signs of activity in the Nickles' home (T. 112-14). Second, the neighbor further testified over objection that she sent her son over to the Nickles to obtain a casserole which was offered to her by Richard Nickles (T. 114). Third, an insurance agent was allowed to testify regarding policy coverage of a family room and a two-car garage if the home were rebuilt (T. 660). The Nickles had converted their garage into a family room and had no garage on the home. No claim for a garage was made in the insurance claim.<sup>5</sup> Fourth, although sustaining one objection (T. 1096), the Court repeatedly permitted the introduction of testimony regarding accelerants other than acetone (T. 1092, 1101). Fifth, the State was able to present testimony regarding the proximity of the Nickles' business to Deseret Industries, a thrift store (T. 1690). Lastly, the State was permitted to ask Leo Thorup, the building

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5. Although defense counsel did not raise the objection until after the witness had answered, we urge the Court to consider these objections where there was no subsequent admonishment of the jury to disregard inadmissible evidence.



contractor who prepared a bid for replacement of the Nickles' home, if his bid included estimates of building the same home in Arizona (T. 1922).

Rule 1(2) of the Utah Rules of Evidence in effect at the time of the trial defined relevant evidence as "evidence having any tendency in reason to prove or disprove the existence of any material fact." Rule 45 of the Utah Rules of Evidence in effect at the time of the trial stated that the court had discretion to exclude evidence if the "probative value [was] substantially outweighed by the risk that its admission [would]... (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury..."

There must be an abuse of discretion to reverse a trial court's admission of evidence. Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah 1977). The principles of two Utah cases are applicable here, even though each involved the trial court's exclusion of evidence.

In Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah 1977) this Court affirmed the trial court's decision to exclude immaterial evidence on weather conditions at the airport which was twenty miles from the scene of the plaintiff's fall on an icy sidewalk. In so doing, this Court stated "[t]he weather report... had very little, if any, probative value and it could have created a substantial risk of confusing the issues." Id. at 1141.

More recently, in Reiser v. Lohner, 641 P.2d 93 (Utah 1982), this Court affirmed the exclusion of possible negligence

in Rh antibody testing in a medical malpractice case for harm arising from an amniocentesis test. The trial court had excluded the information because the Rh sensitivity did not cause the injury and any negligence by the doctors in diagnosis and treatment of the sensitivity was potentially prejudicial to the determination of medical negligence in causing the injuries suffered. Id. at 96-97.

In this case, each admission as well as their cumulative effect constituted an abuse of discretion by the trial court. None of the testimony outlined here was relevant. It was presented by the State solely for its prejudicial impact.

No material fact was advanced by the admission of testimony regarding the lights being on in the Nickles' home the night before the fire or the casserole being placed on a flower box outside. The State was speculating that Richard Nickles was pouring acetone in his home at that time. However, unrefuted testimony demonstrated that, if acetone was used, it had to have been poured much more recently than twenty-four hours before the explosion or there must have been an unbelievable amount of the substance in the home (T. 1888-89).

There were repeated attempts to prejudice the jury's view of the Nickles' motives with irrelevant evidence. There was no probative value to either the testimony regarding coverage of a two-car garage as well as a family room or the testimony whether the rebuilding bid would apply in Arizona. Neither was ever raised by the Nickles. Moreover, the evidence of the proximity of the business to Deseret Industries served no purpose other than to suggest that the Nickles purchased

their furniture there. This was total speculation, with no redeeming, probative value.

The irrelevant testimony on accelerants other than acetone had only one purpose - to confuse the jury on what caused the fire. The State advanced a theory of a device coupled with the use of acetone as an accelerant. This theory was not viable. The additional evidence of other accelerants was designed only to obfuscate the real issue as to whether the State had met its burden of proving arson.

Each time the trial court admitted this type of irrelevant evidence, the chances for a fair trial were eliminated. At a minimum, the cumulative effect of all of this testimony warrants a finding of abuse of discretion.

#### B. HEARSAY

Inadmissible hearsay prejudiced the appellants at trial. The trial court permitted Jerry Taylor, an expert on explosives, to testify to what a County Attorney's office investigator told him about the nature of the explosion and fire (T. 1062).

The mere statement that an out-of-court declaration is not offered for the truth of the matter asserted cannot be used to circumvent the exclusion of hearsay evidence. In In re Estate of Hock, 655 P.2d 1111 (Utah 1982) this Court held that a statement by the deceased favorable to the interest of her brother and made to another brother was inadmissible hearsay Id. at 1117.

Although finding it to be harmless error in that case, the Court stated that the testimony that the deceased's brother had contributed money to buy her household items was offered for factual support of the theory that there was an on-going fiduciary relationship. The respondent had argued that the statement showed a pattern and was not offered for the truth of whether it had been given to the deceased.

In this case, Taylor's testimony regarding investigator's information on the circumstances and cause of the fire and explosion was offered for the truth of the matter. This information was the basis for further testing by Taylor (T. 1062). Those facts had to be true in order for Taylor's subsequent testing to be valid. By allowing the evidence to come in as hearsay, defense counsel could not cross-examine the accuracy of the basis for Taylor's expert testimony.<sup>6</sup>

#### C. LACK OF PERSONAL KNOWLEDGE

Rule 19 of the Utah Rules of Evidence in effect at the time required that the witness have personal knowledge of or expertise on the subject as a prerequisite to testimony. In State v. Jones, 656 P.2d 1012 (Utah 1982) this Court affirmed the trial court's exclusion of testimony by a deputy county attorney that the crime charged fit the modus operandi of someone other than the defendant on the grounds that the attorney lacked any personal knowledge of the matter. In State v. Lamorie,

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6. Although the revised Utah Rules of Evidence might allow such testimony in as a basis for the expert's opinion, former Rule 56 did not.

610 P.2d 342, 345 (Utah 1980), this Court held inadmissible Colorado court records of the defendant's prior conviction on the grounds that the witness had no personal knowledge of the documents.

In this case, the vice-president of the corporation that runs the Carriage House furniture store was allowed to testify that the records of the store did not show a particular sale to the Nickles (T. 1385). He had no direct knowledge of the records and no foundation was laid for the information to come in through the business record exception to hearsay.<sup>7</sup> The appellants were denied adequate confrontation of the evidence by this hearsay.

#### D. FACTS NOT IN EVIDENCE

Numerous objections were made and overruled at trial when witnesses were asked questions which assumed facts not in evidence. The general principle that such questions are not appropriate has been voiced by both the Wyoming and Oregon courts. In DeBaca v. State, 404 P.2d 738 (Wyoming 1965), the court found no prejudicial error in allowing such questions in that case, but restated the basic precept that it is inappropriate to ask a question on direct examination "which assumes erroneously that a material fact in issue has been proved..." Id. at 739, quoting from 4 Jones, Evidence, p. 1685 (5 ed.). The harm in such questions is both that it suggests the answer to the witness

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7. Defense counsel moved to strike the testimony. The trial court took the motion under advisement but apparently never ruled. There was also no admonishment to the jury. It is clear that this was hearsay.

and that it may be misleading. State v. Helmick, 423 P.2d 170, 171 (Oregon 1967). In Helmick, the court criticized the trial court for stating there was "nothing wrong" with a question which assumed an assault had occurred (in an assault with intent to commit rape case), but found no error where the witness had previously testified to the actions constituting the assault.

There were six major objections during the Nickles' trial to questions assuming facts not in evidence. Each one alone, and in combination, prejudiced the appellants either by suggesting an answer or misleading the witness and the jury.

A question asked of a friend of the Nickles regarding acetone being in suitcases was designed only for its prejudicial effect. The State asked Lynette Daniels if the Nickles had ever spilled acetone in their suitcases (T. 288). At that point, there had been no evidence introduced of acetone in any suitcases. It was also misleading in that subsequent testimony indicated a very small quantity of acetone, possibly from the glue in the suitcases (T. 1535-36).

A question asked about "backup" devices to cause an explosion was total speculation by the prosecutor. The prosecutor asked his own expert if he had ever seen incendiary devices that had been used as backup devices (T. 1148). Not one shred of evidence prior to this point or subsequent was introduced to show a backup device. This question clearly was misleading and confusing, designed only to speculate where there was no evidence.

The State questioned a witness regarding what she had said to Richard Nickles on the telephone when there was no

evidence that he was the caller (T. 1269). She had merely testified that the caller purported to be Richard Nickles (T. 1267-68). The prosecutor's assumption that the caller was the appellant usurped the jury's function in determining that issue and was confusing in allowing a fact to be stated by the prosecutor that was not evidence.

The State was allowed to question a witness from a retail furniture store regarding a purchase by the Nickles despite the fact that the appellants never claimed to have purchased the furniture at the store. Although originally sustaining the objection (T. 1375), the trial court subsequently permitted a question as to whether the Nickles had purchased a dresser from Carriage House (T. 1379). As explained repeatedly throughout the trial, the appellants used stores such as the Carriage House to obtain replacement costs and were not representing that they had purchased the item there (T. 1179, 1849). The State's sole purpose here was to mislead the jury into thinking that the Nickles were deceptive on their insurance claim since they had not purchased the dresser at the store listed.

The State then questioned a witness, who had hung draperies for the Nickles, as to whether such draperies could be modified for a new home (T. 1724). This question assumed that the Nickles intended to take the draperies to a new house. The State had presented no such evidence. It is clear that the prosecutor asked this question in order to suggest to the jury that the Nickles had removed the drapcries from the house prior

to the fire. The State had no such evidence and, yet, was able to introduce the idea through innuendo.

The prosecutor asked a question about a claim on the proof of loss of use for a trailer used in Arizona (T. 1765-66). The appellants are unable to find such an item in the proof of loss of use. The purpose of the prosecutor was undoubtedly to suggest that the Nickles had inappropriately claimed relocation expenses for their parents in Arizona. There was no such fact in evidence and the effect on the jury could only have been prejudicial to the Nickles.

Each of the foregoing questions permitted evidence prejudicial to the appellants to be admitted. These were not situations, as in State v. Helmick, supra, where the witness had already testified to the facts that were then assumed in the question under different wording. In each instance, the prosecutor used facts never placed into evidence. The goal of the prosecutor was attained; he introduced speculation for consideration by the jury without any evidence to support such allegations.

#### E. EVIDENCE BEYOND THE WITNESS' EXPERTISE

At three points during the trial, defense counsel objected to questions calling for answers outside the witness' expertise. County Attorney investigator Olin Yearby testified about sources of ignition (T. 388-89). Aaron Alma Nelson, the attorney for the insurance company, testified regarding what the insurance policy would cover (T. 1168). Iraj Aalam of Sunglo Energy Systems, Inc., called by the defense as an expert in heat loss analysis, was forced to answer a question on fuel-air explosions (T. 1609).



Pursuant to Rule 56 of the Utah Rules of Evidence, in effect at the time of trial, an expert witness could testify in the form of an opinion if the basis for the opinion was known to the witness and "within the scope of the special knowledge, skill, experience, or training" of the witness. The purpose of qualifying an expert is to be sure that the question will be answered by a person who is qualified to answer it. 2 Wigmore, Evidence in Trials at Common Law, §555 (3d. ed. 1979). The witness must, as Wigmore stated, be fit to answer on that point. Id. This Court, in Park v. Farnsworth, 622 P.2d 788, 790 (Utah 1980), found the trial court had not erred by excluding testimony of a witness called to interpret field notes of a survey because he had neither expertise nor personal knowledge of the survey.

The rationale of Park v. Farnsworth applies to this case. Olin Yearby was trained in processing crime scenes and had received training in arson cases (T. 369). However, there was no foundation as to what training provided him with expertise on sources of ignition. By allowing his answer in, the trial court erroneously allowed the jury to perceive the witness as someone who was fit to conclude that there were no heat sources in the house. This same prejudice arose when the attorney was permitted to testify as to policy coverage without demonstrating personal knowledge or expertise in policy coverage. Although perhaps unusual to object to the lack of expertise of a defense witness, Mr. Aalam was qualified only in heat loss analysis. The State, by its questioning a fuel-air explosion, was trying

to restate its case through an inappropriate witness. In each instance, the witness was not qualified to answer the question asked. The danger of presenting erroneous information to the jury was present. The trial court erred in permitting this testimony.

#### F. SPECULATION

It is inappropriate and prejudicial to ask a question which calls for a speculative answer. Although the appellants have found no cases directly on point, according to Wigmore an opinion which is a mere guess is inadmissible because a witness must have both the mental power or capacity to acquire knowledge in the subject of testimony as well as intelligence upon the subject of testimony. 2 Wigmore, Evidence in Trials at Common Law, §651 (3d. ed. 1979). Thus experience and knowledge provide the ground rules for testimony rather than speculation and conclusion. Rule 19 of the Utah Rules of Evidence in effect at the time of the trial embraces this concept by requiring the witness to have personal knowledge of the subject of the testimony. There were four major times during the trial of the appellants where speculative answers were admitted over the objection of defense counsel.

A loan officer was asked whether anything would have precluded someone from removing furniture from the house after the loan but before the fire (T. 463). This question was clearly designed to imply that furniture had in fact been removed when there was no such evidence to support the allegation.

An explosives expert was asked to speculate whether simulated explosion experiments would be more complicated by wind coming through a flue in the furnace or fireplace than by a broken window (T. 1098). Here the prosecutor was trying to bolster the State's ineffective experiments by conjecture.

David Osborne, a chemist called by the defense, was asked whether someone in the boat business would have acetone in a large quantity (T. 1544). There had been no evidence that the Nickles had any recent involvement in the boat business. The State was attempting to suggest a source for the acetone which was without any evidentiary foundation.

The appellants also objected as speculation to a question whether it would be possible to modify the draperies in the Nickles' home to be used in another house as calling for a speculative answer (T. 1724). This question was discussed infra at 42-43 as it also assumed a fact not in evidence. The State was trying to imply that the Nickles had removed the draperies prior to the fire without any basis for such an allegation.

The speculative evidence permitted here by itself, but especially coupled with the evidence introduced by questions assuming facts not in evidence (see infra at 40-43), constitutes prejudicial error. The only goal of the prosecutor was to introduce facts for which he had no real support. The jury was permitted to engage in guesswork with this evidence. Their verdict was not based on admissible evidence.

#### G. NON-RESPONSIVE ANSWER

During the trial, the State's expert, Jerry Taylor, volunteered that he had read about flammable liquids in general (T. 1099). This response was totally unresponsive to the question asked. The witness was asked whether an air source such as an open flue would complicate an experiment with the so-called "device" any more than a broken window (T. 1098). The court had just overruled the defense objection made on the grounds of speculation when the witness volunteered that he had read about the characteristics of flammable liquids in general (T. 1099).

Although a non-responsive answer may stand if it is otherwise competent, People v. Wong Chuey, 117 Cal. 624, 49 P. 833 (1897), there is great prejudice in irrelevant and otherwise inadmissible volunteered statements. The statement by the State's expert was gratuitous. It implied an expertise on the specific tests and substances in this case from merely reading about the general characteristics of flammable liquids. The court should have granted the motion to strike.

#### H. ARGUMENTATIVE QUESTIONS

At several points during the trial, the prosecutor overstepped the bounds of appropriate questioning by asking argumentative questions. The only purpose was to prejudice the jury against the appellants.

Although the appellants have found no Utah cases specifically on argumentative questions, the rationale of cases

balancing the prejudicial effect of the evidence against its probative value would apply here. Rule 45 of the Utah Rules of Evidence, in effect at the time of the trial, provides that a court has discretion to exclude evidence if the prejudicial effect outweighs the probative value. In Reiser v. Lohner, supra, this Court sustained the trial court's exclusion of possibly negligent collateral medical test as irrelevant and potentially prejudicial evidence under Rule 45 where it did not affect the malpractice claim at issue. The same reasoning applied in Martinez Safeway Stores, Inc., supra, where this Court noted the additional dangers of confusing or misleading the jury, sustaining the trial court's exclusion of weather conditions twenty miles away.

At one point, a witness was asked whether the insurance company's attorney and defense counsel were at the scene of the fire as a result of a Motion to Compel Discovery by the appellants. The prosecutor had to know the existence of the motion was irrelevant. The question was raised purely for its prejudicial effect in implying that the appellants were litigious.<sup>8</sup>

In another instance, a defense witness, who had an expertise in air exchange, was questioned about changing quantities of acetone and the possibility of fuel-air explosions (T. 1609). The purpose was simply to imply that the witness had no expertise. Such an irrelevant line of questioning unfairly prejudiced the credibility of this witness.

The prosecutor next tackled Kim Nickles, the daughter of the appellants, asking whether she had thrown her pom-poms over

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8. The witness responded that he did not know. The trial court allowed it to stand because the answer was already in, but failed to admonish the jury to disregard the answer.

the neighbors' fence when it was clear the explosion had carried the pom-poms to where they were found (T. 1814). This bordered on badgering the witness. It was clearly designed to attack the appellants case in an improper manner.

The prosecutor also used this technique with his own witness. Glenn Bammerlin, an insurance adjuster, was asked if he had told the Nickles they could claim items on their proof of loss that they had not had in their house (T. 2050). It is obvious that the prosecutor used this question to imply that the Nickles had in fact claimed items which they never had in their home. This baseless question could serve only to prejudice the jury; there was no probative worth to the question.

Each inadmissible statement, as well as the cumulative impact, created reversible error in this case. Although we cannot know what evidence the jury considered in reading its verdict, the amount of inappropriate evidence that was admitted in this case cannot be ignored. The jury was bombarded by it.

The cumulative effect, if not the individual errors, warrants a new trial. In Gooden v. State, 617 P.2d 248, 250 (Okla. Crim. App. 1980), the court stated:

When a review of the entire record reveals numerous irregularities that tend to prejudice the rights of a defendant and where an accumulation of errors denies a defendant a fair trial, the case will be reversed, even though one of the errors, standing alone, would not be ample to justify reversal.

In Gooden, the court reversed where there was prosecutorial misconduct in cross-examination and closing argument.

The prejudicial effect of the errors in this case cannot be quantified. Nevertheless, no juror could have ignored all of the inadmissible evidence. Hearsay, irrelevant evidence, prejudicial facts not in evidence, speculations, opinions outside an expert's area, facts of which witnesses had no direct knowledge, and inflammatory argumentative questions were erroneously permitted. The appellants are entitled to a new trial

POINT V

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT A CONVICTION ON INSURANCE FRAUD NECESSITATED MORE THAN INACCURATE ESTIMATES.

The appellants requested that the court instruct the jury on the definition of an estimate and also that insurance fraud involved more than an error in estimation. They submitted an instruction which defined "estimate" as "an opinion, a rough or approximate calculation of the cost of an item." This was given in Instruction No. 19. The appellants also requested, however, that the court include, as an element to be proved, that on the proof of loss "said submissions were more than 'estimates' Defendant's proposed Instruction No. 14. The court refused to give this part of the instruction and the appellants to ok except to it (T. 2091).

This Court has addressed the issue of appropriately instructing the jury. In Penelko, Inc. v. John Price Associates, Inc., 642 P.2d 1229 (Utah 1982), in a civil suit involving damages between a lessor and lessee, the Court found no error

the instructions on damages, but noted:

The purpose of jury instructions is to inform the jury of applicable law in terms that they can readily understand.

Id. at 1234. In a criminal context, the Court has reversed where the jury instructions impermissibly created the possibility of interpreting a presumption as conclusive. State v. Walton, 646 P.2d 689 (Utah 1982).

The possibility of incorrectly interpreting the court's instructions occurred in this case by the failure to give the requested instruction. The court apparently agreed that the distinction between an estimate and insurance fraud was significant as it instructed the jury on the definition of "estimate." The definition by itself, however, left a void as to what the jury should do if they found that any errors in the proof of loss were due to estimates. Without the requested clarification that insurance fraud required more than mere errors in estimation, the jury may well have found the appellants guilty without sufficient evidence of criminal conduct. The instructions as given, even when taken as a whole, were misleading on this issue. Where it cannot be determined whether the jury decided the case on an impermissible basis, the Court should reverse and order a new trial as in State v. Walton, supra.

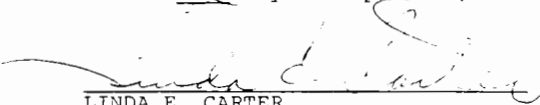
#### CONCLUSION

The appellants' convictions should be reversed. The evidence introduced at trial was insufficient to connect either of the appellants to the cause of the fire or to prove an intent



to defraud on the insurance claim. The appellants were prejudiced by the erroneous admission of the contents of a telephone call allegedly made by Mr. Nickles. The lack of an impartial prosecutor denied the appellants a fair trial. The multitude of evidence erroneously admitted also abrogated the appellants' right to a fair trial. And finally, the jury should have been instructed on the distinction between inaccurate estimates and insurance fraud. For all of these reasons, the resulting convictions should be reversed and a new trial should be ordered.

RESPECTFULLY SUBMITTED this 12 day of September, 1984.

  
LINDA E. CARTER  
Attorney for Appellant

DELIVERED/MAILED a copy of the foregoing Brief of Appellant to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah this \_\_\_\_ day of September, 1984.

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