

1983

State of Utah v. Fred Velarde : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 18976
FRED VELARDE, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

- - - - -

AN APPEAL FROM A CONVICTION FOR THEFT, A
SECOND DEGREE FELONY, IN THE SECOND
JUDICIAL DISTRICT COURT IN AND FOR MORGAN
COUNTY, STATE OF UTAH.

- - - - -

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol Bldg.
Salt Lake City, Utah 84114

Attorneys for Respondent

BERNARD L. ALLEN
Public Defender Association
2568 Washington Blvd.
Ogden, Utah 84401

Attorney for Appellant

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Attorney General
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Assistant Attorney General
236 State Capitol Bldg.
Salt Lake City, Utah 84114

Attorneys for Respondent

BERNARD L. ALLEN
Public Defender Association
2568 Washington Blvd.
Ogden, Utah 84401

Attorney for Appellant

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STATEMENT OF THE NATURE OF THE CASE

Appellant, Fred Velarde, appeals his conviction for Theft, a Second Degree Felony, Utah Code Ann. § 76-6-412(1)(a), (1953) as amended, in the Second Judicial District Court in and for Morgan County, State of Utah.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty of Theft in a jury trial held November 16, 1982 in the Second Judicial District Court of Morgan County, the Honorable J. Duffey Palmer, Judge, presiding. Appellant was sentenced to serve one to fifteen years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the conviction below.

STATEMENT OF THE FACTS

In the early morning hours of October 1, 1982, John Pentz, a resident of Morgan, Utah, arrived in Salt Lake City with his brother (R.94-95). Pentz's brother went into the Western Club on Redwood Road in Salt Lake City, but Pentz was refused admission because he did not have proper identification (R.95, 103).

Pentz walked down the street to the 7-11 store. Pentz testified that while he was there appellant drove into the parking lot of the store in a yellow pickup truck (R. 95-96, 105-106). Although appellant appeared to be drunk, Pentz asked appellant whether he would give him a ride to the freeway so that Pentz could hitchhike home because Pentz believed his brother planned to stay the night in Salt Lake City (R.96, 106-107). Appellant asked Pentz where he was going. Pentz replied, "Morgan." Appellant then, according to Pentz's testimony, offered to drive Pentz to Morgan because appellant had nothing else to do (R.96, 107).

Pentz further related at trial that as they drove appellant told him he had been "partying" and that he had hit a telephone pole or two (R.98). After appellant exited the freeway at the Morgan turnoff, appellant began to weave back and forth across the road. Approximately five miles outside of Morgan, appellant passed out and slumped over on the seat. Pentz testified that he grabbed the steering wheel and pulled the truck over to stop at the side of the road. Pentz then

got out of the pickup truck, walked around to the driver's side, slid appellant over to the passenger side of the cab, and drove the truck toward Morgan (R.98, 109-110, 114-115).

As Pentz drove to Morgan, appellant opened his coat, and Pentz saw that appellant was bloody. Appellant told Pentz that he had been stabbed, then added, "I hope you know you're drivin' a hot truck" (R.99, 110). Pentz drove the truck into Morgan and parked in front of the Country Cafe on Main Street. Pentz then telephoned the Sheriff's Office from a telephone booth in front of the cafe (R.99-100, 112).

Morgan County Deputy Sheriff Vincent Nelson responded to the call at approximately 2:30 a.m. on October 1, 1982 (R.100, 112, 116-117). Pentz related to Deputy Nelson what had happened (R.102, 117). Deputy Nelson walked over to the pickup truck and observed appellant lying on the seat of the cab, his head toward the driver's side (R.117). Deputy Nelson noted the license number of the pickup truck and initiated a stolen vehicle check through dispatch. Deputy Nelson then rapped on the window of the pickup truck for two minutes in an effort to arouse appellant. Appellant eventually responded (R.118, 125). As appellant got out of the truck he recognized that Deputy Nelson was a law enforcement officer, and appellant immediately went into a search position against the side of the truck without any prompting by Deputy Nelson (R.118-119).

After Deputy Nelson frisked appellant, Deputy Nelson

took him to the patrol car. Dispatch informed Deputy Nelson that the pickup truck had been stolen from the Portland Cement Company in Salt Lake City (R.119). Deputy Nelson then placed appellant under arrest and advised him of his Miranda rights (R.120). Deputy Nelson asked appellant whether he owned the vehicle. Appellant said, "No." (R.21.). The officer next asked appellant who did own it. Appellant replied he did not know. Deputy Nelson then asked appellant how he had come to Morgan. Appellant told him that he had come in the truck, but appellant was apparently unaware that he was in Morgan (R.121). Deputy Nelson testified that he asked appellant other questions, but appellant was unable to provide much information. Nelson recalled at trial that appellant appeared to be intoxicated (R.121).

Appellant was charged with Theft and tried by jury on November 16, 1982 in the Second Judicial District Court of Morgan County, the Honorable J. Duffy Palmer presiding. At trial appellant contended that he had been picked up while hitchhiking from Redwood Road to his residence at 100 South 200 East in Salt Lake City (R.135-137). According to appellant, the driver, presumably State's witness Pentz, passed appellant's residence and drove toward Morgan on Interstate 15. Appellant claims he passed out on the way to Morgan (R.137).

On cross-examination the prosecutor, over appellant's objections, asked appellant whether he had told

his version of the facts to Deputy Nelson at the time of his arrest or to any other person before trial. Appellant had not (R.92, 94, 96; See Appendix A). The prosecutor also mentioned in his closing argument appellant's failure to relate his exculpatory story before trial (R. 104-105, 109-110; See Appendix A).

Appellant was found guilty of Theft and sentenced to serve one to fifteen years in the Utah State Prison.

ARGUMENT

POINT I

THE PROSECUTOR'S REFERENCES TO APPELLANT'S FAILURE TO RELATE HIS EXCULPATORY STORY BEFORE TRIAL WERE PERMISSIBLE BECAUSE APPELLANT WAS NOT SILENT.

Appellant contends that the prosecutor's references to appellant's failure to relate his exculpatory story before trial violated his right to a fair trial. The United States Supreme Court in Doyle v. Ohio, 426 U.S. 610 (1976), cited by appellant, said, "We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the due process clause of the Fourteenth Amendment." Id. at 619. This Court followed Doyle in State v. Wiswell, Utah, 639 P.2d 146 (1981).

However, Doyle is not applicable where, as here, the defendant has not remained silent. In United States v. Agee, 597 F.2d 350 (3d Cir. 1979), the court said:

The Supreme Court has described [the right to silence] as "the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." The rationale which the Supreme Court adopted for its decision in Doyle was that it is fundamentally unfair for the prosecution to impose a penalty at trial on a defendant who has exercised that right by choosing to remain silent. The very statement of that rationale demonstrates that Doyle can have no application to a case in which the defendant did not remain silent.

Id. at 355 (footnotes omitted). The Supreme Court of Maine in State v. Kane, 432 A.2d 442 (Me. 1981), stated: "Once a defendant decides to speak, her failure to speak in exculpation cannot be explained away as a response to Miranda warnings." Id. at 444. The Maine Supreme Court went on to quote Vitali v. United States, 383 F.2d 121, 123 (1st Cir. 1967):

A defendant cannot have it both ways. If he talks, what he says or omits is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to. This was not a case where the government commented upon . . . a prior exercise of rights. The government asked the jury to measure what the defendant said when he had no rights because he had voluntarily waived them.

The United States Supreme Court has also recognized that Doyle is inapplicable in such situations. In Anderson v. Charles, 447 U.S. 404 (1980), the Court said: "But Doyle does not apply to cross-examination that merely inquires into prior

inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent." Id. at 408.

In the instant case appellant was not silent after being advised of his Miranda rights. Deputy Nelson asked appellant several questions concerning his presence in the stolen pickup truck. Appellant voluntarily responded to each question (R.120-121). Thus, Doyle is inapplicable.

The prosecutor impeached appellant's trial story by use of appellant's prior inconsistent statements. The prosecutor contrasted Deputy Nelson's testimony that appellant stated at the time of his arrest that he could not remember anything relating to his presence in the stolen pickup truck with the fact that six weeks later at trial appellant claimed to remember exculpatory facts explaining his presence in the truck (R. 92-93, 103-104, 110; See Appendix A).

Furthermore, where a defendant claims, as here, to be a victim and not the perpetrator of the criminal conduct charged, it is permissible for the prosecutor to attempt to show that the defendant's actions and responses were not the usual actions and responses of a victim. State v. Taylor 223 Kan. 261, 574 P.2d 210 (1977). Thus, the prosecutor properly commented on appellant's taking the search position against the truck immediately upon recognizing that Deputy Nelson was a law enforcement officer and on appellant's

failure to protest his innocence in his voluntary responses to Deputy Nelson's questions.

CONCLUSION

The prosecutor did not impermissibly comment on appellant's exercise of his right to silence because appellant was in fact not silent. The prosecutor merely impeached appellant's exculpatory trial story by use of appellant's prior inconsistent statements and by noting the inconsistency between appellant's trial story and his actions and responses at the time of his arrest. Therefore, appellant was not denied a fair trial, and the conviction should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of October, 1983.

DAVID L. WILKINSON
Attorney General

Robert N. Parrish
ROBERT N. PARRISH
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief of Respondent, postage prepaid, to Bernard L. Allen, Attorney for Appellant, 2568 Washington Blvd., Ogden, Utah, 84401, this ~~4th~~ day of October, 1983.

Kathleen D. Kellersberger

APPENDIX A

This appendix contains the challenged portion of the prosecutor's cross-examination of appellant as well as the complete closing argument and rebuttal argument of the prosecutor. Segments have been highlighted to facilitate reading ease.

1 A Well let me explain what happened.

2 THE COURT: You have to just answer.

3 A No, but when he came up to me he told me --

4 THE COURT: Will you listen?

5 A -- to get by the car --

6 THE COURT: You are getting in a lot of trouble just
7 talking. You answer the question. That's the reason that you
8 have this man here. Just answer and then he will ask you
9 questions so you can get it in.

10 A I don't recall that.

11 THE COURT: I control the court, you don't control
12 the court.

13 A All right.

14 THE COURT: They ask you questions, you answer the
15 questions.

16 A Yes, sir.

17 Q (By Mr. Patterson:) Mr. Velarde, you did go into a
18 search position against the vehicle.

19 A Yes, I did.

20 Q Now are you telling me that you did that because
21 Officer Nelson told you to or because he didn't tell you to?

22 A Because he told me that I was under arrest.

23 Q Okay, so there is something else you remember.

24 Now Mr. Velarde, your position is that Mr. Pentz
25 stole this vehicle, isn't it?

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1 A. I don't know if he did or not.

2 Q. Well come on, Mr. Velarde, your position very clear,
3 is that Pentz should be here explaining how he got that
4 vehicle, right?

5 A. I don't know if he, if he stole it or not. Don't
6 even know the car was stolen.

7 Q. Mr. Velarde, on that evening, why didn't you tell
8 Officer Nelson your side of the story?

9 MR. ALLEN: I will object. I will object. The
10 defendant has a right not to talk to an officer.

11 THE COURT: Objection is overruled, he can answer
12 why he didn't if he didn't want to.

13 A. 'cause he read me my Miranda rights and I felt that
14 I didn't have to answer him any questions that would put my,
15 that would be used against me in a court of law.

16 Q. Mr. Velarde, haven't you repeatedly told Mr. Nelson
17 after the Miranda Warning, I think, that you couldn't remember
18 anything?

19 A. Well that's just like not talkin' to him.

20 Q. Now but, Mr. Velarde, have you repeatedly told
21 Mr. Nelson upon direct questioning from him did you not, that
22 you didn't want to talk because of your legal rights, but
23 simply you couldn't remember anything?

24 A. I remember when he come and pounded on the window,
25 well I didn't remember when he come poundin' on the window,

1 when I woke up, I remember him standin' out there and tellin'
2 me to come out of the car. And prior to that, I remember hitch-
3 hikin' from that bar, Farrel's?

4 Q Did you or did you now at the time Officer Nelson
5 upon questioning from him, tell him why you were in the truck,
6 where the truck came from?

7 A No, I did not.

8 Q That you couldn't remember anything?

9 A No, I did not.

10 Q So to that extent you are going to say that Officer
11 Nelson's testimony is incorrect and your testimony is correct?

12 MR. ALLEN: I will object, Your Honor. I don't recall
13 the testimony of Officer Nelson being what the prosecution is
14 saying.

15 MR. PATTERSON: It's in the record, Your Honor.

16 THE COURT: I don't recall it being that way either,
17 but it's easy to varify.

18 MR. ALLEN: I object that it's --

19 THE COURT: Well the objection is sustained on the
20 form of the questions.

21 Q Mr. Velarde, did you, or did Officer Nelson ask you
22 where you got the truck?

23 A No, he never.

24 Q Did he ask you why you were in the truck?

25 A I don't think he asked me any of that.

1 Q And to any questions that Officer Nelson may have
2 asked you about where the truck came from, or how you may have
3 got it, or what you had been doing with it, you don't remember
4 him asking you any questions of that nature?

5 A It's -- I don't know, it kind of lays in my head.
6 I was pretty high that night in, ahh, I don't know.

7 Q And is it your position, Mr. Velarde, that, do I
8 understand your testimony correctly, is that you chose not
9 to tell Mr. Nelson anything because you don't trust police officers?

10 A That's correct.

11 Q So you have elected to go forward with this entire
12 criminal prosecution, be arrested for vehicle theft, and wait
13 until today for the first time to give your version of what
14 happened?

15 MR. ALLEN: Your Honor, I will object to the question.
16 Anyone arrested under the law has the right not to speak.

17 THE COURT: I can't even hear you. I can't hear you!
18 I can't hear you, Mr. Allen. (Note: Mr. Allen was not standing.)

19 MR. ALLEN: Excuse me.

20 THE COURT: I can't hear you.

21 THE BAILIFF: Stand up.

22 MR. ALLEN: I apologize, Your Honor. The defendant
23 has the right at the time he is arrested not to say anything.
24 He has the right not to have that used against him. Now counsel
25 has repeatedly tried to infer some kind of negative inference

from that. Now it's possible that he had this experience before and has been told by attorneys not to speak and I think he has a right not to speak and not to use that against him.

THE COURT: That's correct, but he asked if this was the first time he has ever told his story. I think that's a proper question. That's the substance of his question.

MR. PATTERSON: Yes.

THE COURT: I think that's a proper question.

Q (By Mr. Patterson:) Answer the question, Mr. Velarde.

A. What are you referring to?

Q Okay. You chose, you answered certain questions from Officer Nelson, did you not?

A No, I never.

Q You never answered any questions that Mr. Nelson asked you?

A No, I didn't. It states in the police report that there was, I answered no questions.

Q I'm not asking you about the police report, Mr. Velarde, I'm simply asking you, did you answer any questions Officer Nelson asked you?

MR. ALLEN: I believe he's answered that question, Your Honor.

A No, I said no. I don't know how many times I have got to say no.

THE COURT: Mr. Velarde, you just answer the question.

1 A. No, no.

2 Q Mr. Velarde, this is the first time that you have
3 elected to state your version of what occurred in Salt Lake
4 County and in Morgan County, is that true?

5 A. Well yea, it's the first time I have said anything
6 about the case. This is --

7 Q And that, and notwithstanding that this offense
8 occurred in excess of six weeks ago?

9 A. What do you mean by that?

10 Q For six weeks you have chosen to remain silent and
11 to utilize just today to say --

12 A. I have talked to my attorney.

13 Q what has occurred.

14 I have no further questions.

15 THE COURT: Mr. Allen.

16 REDIRECT EXAMINATION

17 BY MR. ALLEN:

18 Q Mr. Velarde, you have come in contact with the
19 police before, is that correct?

20 A. Yes, I have.

21 Q And have you had opportunity to be reopresented by
22 counsel before; is that correct?

23 A. Yes, I have.

24 Q You recognize that you have a right not to tell the
25 police anything?

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to be argued to you and the Court has some other instructions to read. I'm not going to thrill you with me reading those that I have already read, but we will send them with you in the jury room so you have them to read and go over.

Each of the parties have rested their cases and after I read the instructions, they each have an opportunity to speak to you concerning their case.

Starting with instruction number eight, I have read seven.

(Whereupon the Judge read the remaining jury instructions to the jury after which the following proceedings were had:)

CLOSING ARGUMENTS

BY MR. PATTERSON:

MR. PATTERSON: This is the time for closing arguments. By law, both of the parties are allowed to do so at this time. And after we have been given it, I have a chance to go again. I am going to speak for ten minutes and I am going to speak for five minutes after Mr. Allen takes his time.

We have two witnesses to testify because, unfortunately so, because nobody saw the actual taking. We did know where the truck was an hour later. It was some 17 blocks removed from the theft site. How did it get there? Well we have two witnesses and two witnesses only and that's Mr. Pentz and that's Mr. Velarde. You are going to have to believe in whole or reject in whole either what Mr. Pentz has said or what

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1 Mr. Velarde said. People like you and me tend to take differing
2 view of the same and tend to reconcile. We assume that people
3 talk to us in good faith. We assume that people talk to us
4 honestly. But, Ladies and Gentlemen, you can't do that here.
5 Either Mr. Pentz or Mr. Velarde has intentionally lied under
6 oath. One of these gentlemen has intentionally misrepresented
7 the truth. One of them does know what indeed did happen. One
8 of them has chosen to lie about it. So there is no grey area
9 here, it's an either-or.

10 Now is Mr. Velarde truthful? I ask you to consider
11 these factors. Why did he immediately go into the search
12 position upon being woken up by Officer Nelson? Now Officer
13 Nelson was, saw he was intoxicated. Officer Nelson is a
14 professional police officer. Officer Nelson doesn't have a
15 saw to grind. He's not on the line, his reputation is not on
16 the line. He has very accurately represented to you what
17 happened. I'm not going to go through the testimony except
18 to say that Officer Nelson read Mr. Velarde the Miranda Warnings
19 to him some ten minutes after he arrived. And after the
20 Miranda Warnings were read, Officer Nelson said, "Who's truck
21 is this?" Mr. Velarde said, "I don't know." He didn't say
22 I'm not going to talk to you, I don't like police officers,
23 he said, "Why are you in the truck?" "I don't know, I can't
24 remember." It wasn't -- "I can't remember." "I can't remember."

25 Now, I can't remember is a world apart from what Mr.

1 Velarde now says. Why does Mr. Velarde remember now but he didn't
2 remember then? Why the immediate search position against the
3 truck? I know Mr. Velarde doesn't like police officers, let's
4 assume he doesn't. Why does Mr. Velards have to assume that
5 Mr. Nelson knows anything? In fact Mr. Velarde says he is
6 innocent.

7 Now why does an innocent man go into a search against
8 a truck? In that basis, why did Mr. Pentz call the Sheriff's
9 Office? If Mr. Velarde's statement is true, Mr. Pentz had
10 everything to lose because Mr. Velarde was drunk. On what
11 basis could Mr. Pentz fairly think that Mr. Velarde would ever
12 recognize him again? Why does Mr. Pentz in effect put himself
13 back into the boiling water by calling the Sheriff's Office,
14 telling him where to go and then unlike Mr. Velarde, relate
15 to the officer what happened? Mr. Pentz in effect was messing
16 with success then wasn't he. Why would he do that? Why would
17 Mr. Pentz in effect return to the scene to invite an arrest
18 and to invite felony charges being filed. Mr. Pentz didn't
19 have anything to lose. He was being truthful. Mr. Pentz, if he
20 had in fact stolen that vehicle, should have walked away into
21 the night and simply disappeared, never heard from again, never
22 seen again, but he didn't do it. Very inconsistent.

23 And why does Mr. Velarde wait six weeks? Why not
24 at the accident scene say, I'm innocent? Mr. Pentz had that truck,
25 not me. You have got the wrong man. I don't even know how to

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1 drive a four-speed. What's wrong with the outrage? My heavens,
2 there, according to Mr. Velarde, the guilty man is walking
3 away. But Mr. Velarde said, I can't remember. Where is the
4 outrage? Think about it, you know.

5 There you are, there Mr. Velarde is. Hey, you have
6 got the wrong man. I don't even drive a four-speed. I didn't
7 even know where Morgan is. Why am I here? Where is the outrage?
8 Where is the indignation? Where is the sense of being victimized?

9 Thank you.

10 THE COURT: Mr. Allen.

11 CLOSING ARGUMENTS

12 BY MR. ALLEN:

13 MR. ALLEN: Ladies and Gentlemen of the Jury. This
14 will be my last opportunity to talk to you. As I spoke in the
15 opening statement that I made, what you have to do here is
16 determine if the State has proven their case beyond a reasonable
17 doubt. And what could cause a reasonable doubt in that could
18 the fact that the man was supposed, according to the State, to
19 have driven that truck all the way from Salt Lake to Morgan
20 and was too drunk to walk? Could that create a reasonable
21 doubt? Could the fact that the truck wound up in Morgan, a
22 place where Mr. Velarde would have no probable reason for
23 wanting to go to, could that create a reasonable doubt? Could
24 the fact that Mr. Velarde has testified that he has trouble
25 with four-speed transmissions in anyway, could that create a

1 He has stated forthright that he was absolutely drunk. He
2 stated forthrightly that he had problems before. He tells us
3 that he had a felony conviction before that he pled guilty
4 to meaning that at the time when he was charged with that
5 crime, he felt he was guilty and went ahead and pled guilty.

6 Here he is today, before you, pleading not guilty,
7 putting this case before the jury for you to make the determin-
8 ation whether the State has proven beyond a reasonable doubt
9 that he stole a truck.

10 I think, in reiterating in closing, the reasonable
11 doubts are everywhere in this case. The fact that Mr. Velarde
12 is to drunk to drive is unusual enough, but the fact that he is
13 too drunk to drive and then manages to drive all the way up
14 to Morgan County where he was found in the passenger side of
15 the truck, creates more than a reasonable doubt in my mind.
16 And my client, Mr. Velarde and I ask you to look at the
17 evidence and determine that there is not sufficient evidence
18 to convict my client of any crime and we ask you to find him
19 not guilty.

20 THE COURT: Mr. Patterson.

21 REBUTTAL ARGUMENT

22 BY MR. PATTERSON:

23 MR. PATTERSON: Ladies and Gentlemen, you simply take
24 a look at Mr. Pentz and take a look at Mr. Velarde and tell
25 me why a guilty man would call the police and then give his

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1 witness statement and appear at trial. I think we are watching
2 either too much TV or we are too fascinated by complicated plots
3 But human nature is not such that Mr. Pentz would put everything
4 on the line to put himself back into a crime with no expectation
5 that Mr. Velarde in a sense of outrage, in a sense of absolute
6 pure indignation will say hey, wait a minute, let's get this
7 story straight. He picked me up in Salt Lake. I passed out.
8 He drove me here. I didn't ever have that truck.

9 But instead he said, when Officer Nelson asked him
10 who's truck it is, I don't know, I can't remember. Ahh, why
11 are you in it? I don't know, I can't remember. He does.

12 Now, we have a lot of, "what if's". We only have
13 two stories. It's very simple. This isn't a complex case at
14 all. Just simply two stories. You either believe Mr. Pentz
15 or you believe Mr. Velarde because one of them is lying.

16 Mr. Velarde, by his own testimony, understands he is
17 going no further than 6th South or something like Kaysville;
18 that at 6th South when he asked, his response is to pass out.
19 Now he has never seen Mr. Pentz before in his life and he
20 apparently would have to perceive himself in sort of a helpless
21 situation if we review Mr. Velarde's testimony, but he sure is
22 relaxed about it. He has no idea where he is going or why,
23 where he is being taken to or what is in store for him so he
24 just passes out.

25 I summarize that didn't happen. Mr. Velarde knew where

1 he was going and he was driving.

2 Perhaps you, of the jury, and counsel, don't put in
3 a 24 hour day the way Mr. Velarde, Mr. Pentz do. We are not
4 here to pass upon the quality of Mr. Pentz, you know, daily life-
5 style or of Mr. Velarde and by that I mean we are not here to
6 admire Mr. Pentz or admire Mr. Velarde. We are simply here
7 to hear a fact pattern and decide who is being truthful.

8 Mr. Velarde has no choice but to say what he did on
9 the witness stand today or he is guilty. Mr. Pentz had a
10 choice of never to call the Sheriff's Office and just walk .
11 away because by that man's testimony, he never saw Pentz before,
12 wouldn't have recognized him, and would have certainly never
13 planned on seeing him again. And why was Pentz so doing and
14 being nervous?

15 Thank you.

16 (Whereupon, the Bailiff was sworn to take the jury to
17 the jury room and watch over them during their deliberations.)

18 THE COURT: Now the Bailiff will escort you to the
19 jury room where you may commence your deliberations. You should
20 first choose one of your members as the foreman to act as a
21 presiding officer. The foreman should sign whatever verdict you
22 have agreed upon. When you agreed upon the verdict and it's been
23 signed and dated, notify the Bailiff that you agree. Do not
24 reveal your verdict to the Bailiff. The foreman will keep the
25 verdict in his possession or her possession until such time as