

1995

Layton City v. Kenneth Kemp : Opening Brief of Defendant-Appellant

Utah Court of Appeals

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DEALS

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IN THE UTAH COURT OF APPEALS

LAYTON CITY,

Plaintiff-Appellee,

v.

KENNETH KEMP,

Defendant-Appellant.

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**OPENING BRIEF OF
DEFENDANT-APPELLANT**

Case No. 950293-CA

Category 2

JURISDICTION

Defendant-Appellant Kenneth Kemp appeals from his Second Circuit Court conviction of Interference with Public Servant, a class B misdemeanor, in violation of Utah Code Ann. § 76-8-301(1) (1953, as amended). This Court has jurisdiction over Mr. Kemp's appeal pursuant to Utah Code Ann. § 78-2a-3(2)(d) and (f) (1953, as amended).

STATEMENT OF THE ISSUES PRESENTED

1. Is Utah Code Ann. § 76-8-301 unconstitutionally vague or overbroad on its face?
2. Was Utah Code Ann. § 76-8-301 unconstitutionally applied to Mr. Kemp?

3. Was the evidence insufficient to establish beyond a reasonable doubt that Mr. Kemp committed the offense of Interference with Public Servant?

4. Did the trial court commit plain error in failing to adequately define the essential element of "intimidation" in the jury instructions?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The First Amendment to the United States Constitution states in pertinent part that "Congress shall make no law ... abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution states in relevant part that "No State shall ... deprive any person of life, liberty or property, without due process of law."

Article I, Section 1 of the Utah Constitution states in pertinent part that "All men have the inherent and inalienable right ... to communicate freely their thoughts and opinions, being responsible for the abuse of that right."

Article I, Section 7 of the Utah Constitution states that "No person shall be deprived of life, liberty or property, without due process of law."

Article I, Section 15 of the Utah Constitution states in pertinent part that "No law shall be passed to abridge or restrain the freedom of speech."

The Utah Criminal Code defines the offense of Interference with Public

Servant as follows:

A person is guilty of a class B misdemeanor if he uses force, violence, intimidation, or engages in any other unlawful act with a purpose to interfere with a public servant performing or purporting to perform an official function.

Utah Code Ann. § 76-8-301(1).

STATEMENT OF THE CASE

Mr. Kemp's prosecution for Interference with Public Servant arose from two May 1994 encounters with Brent Johnstun, a Davis County deputy constable. Mr. Kemp's housemate, Gretchen Graehl, had been sued by a collection agency after she bounced a check at a Salt Lake City bookstore.¹ (R. 301).

On May 9, 1994, Mr. Johnstun went to the Kemp-Graehl home to serve a bench warrant for Gretchen's arrest for failure to appear.² (R. 217-18). Mr. Johnstun approached Mr. Kemp, who was outside the home, and stated that he was looking for Ms. Graehl. Mr. Kemp stated incorrectly that she was not home, said he did not want to talk to Mr. Johnstun and attempted to go into his home and close the

¹ Judgment against Mr. Graehl in the amount of \$251.38 was entered on November 23, 1993. (R. 86)

² The bench warrant was issued by the Layton Circuit Court on April 12, 1994. (Exhibit P-1, R. 83)

door. (R. 217). Mr. Johnstun put his foot in the door to prevent its closing and informed Mr. Kemp that he had a bench warrant for Ms. Graehl's arrest. He also told Mr. Kemp that he was "obstructing justice." (R. 262). According to Mr. Johnstun, Mr. Kemp said he did not care about the bench warrant and slammed the door after the constable moved his foot. (R. 218).

According to Mr. Kemp, Mr. Johnstun was wearing a gun and speaking loudly and appeared to be angry. (R. 316). On May 10, 1994, Mr. Kemp called a lawyer at the Davis County Attorney's office. He wanted to know whether he could walk away from a constable, rather than be required to continue to talk, if he was not the person upon whom the constable was attempting to serve documents. (R. 317).

On May 11, 1994, the court issued a writ of execution and praecipe authorizing the seizure of Ms. Graehl's 1991 Honda automobile. (Exhibit P-1; R. 85-86). On the evening of May 12, 1994, Mr. Johnstun drove to the Kemp-Graehl home to serve these documents and the bench warrant. As he drove up, he saw Mr. Kemp and Ms. Graehl in the front yard. (R. 197). He called for a tow truck and asked the Layton City Police Department to send an officer for back-up. (R. 198).

According to Mr. Johnstun, Ms. Graehl went into the house as he began to walk up the driveway. (R. 199). Mr. Johnstun got the papers ready and approached

the door. (R. 200). When Ms. Graehl came outside, he gave her the writ of execution and began to explain that he had to take her car. (R. 200-01). According to Mr. Johnstun's testimony, Mr. Kemp then came over, stepped in between the two and said "What's going on?" (R. 201, 203). Mr. Kemp also told the constable to direct the conversation to him rather than to Ms. Graehl, who was upset. (R. 202).

Mr. Johnstun's 6-page statement, prepared the day after the incident, did not assert that Mr. Kemp stepped in between the constable and Ms. Graehl. (R. 235). Rather, the report stated that Mr. Kemp "interrupted and said, what's all this? I told him I didn't wish to speak for him and for him to stand over on the sidewalk. I explained the papers were for Gretchen. With this, I proceeded to explain the paperwork but was interrupted again." (R. 236).

Officer Dale May of the Layton City Police Department saw the three arguing when he arrived at the Kemp-Graehl residence. As he walked from the car for a period of about 15 seconds, the officer observed Mr. Kemp talking to Mr. Johnstun. (R. 278). Ms. Graehl was behind and to the side of Mr. Kemp. (R. 268). Officer May testified that Mr. Kemp was "in Mr. Johnstun's face," (R. 274), although his report did not include that statement. (R. 280-1). He did not hear Mr. Kemp threaten Mr. Johnstun. (R. 279).

As Officer May approached, Mr. Kemp told him that he had talked with a Davis County attorney and did not have to answer questions or say anything to the constable. (R. 268). Officer May told Mr. Kemp to stand to the side so that he could deal with Ms. Graehl and the constable. (R. 274). Mr. Kemp stood on the sidewalk for a while, but came back over to the group when Mr. Johnstun began to arrest Ms. Graehl, who "started getting hysterical and yelling." Officer May again told Mr. Kemp to move away, and he did as he was told. (R. 209). The officer testified that when he was firm, Mr. Kemp complied with his orders. (R. 283).

Mr. Johnstun, who carries a gun when serving bench warrants and writs of execution, (R. 213), testified that he felt "insecure" and "threatened" because of the May 9 incident at the home. (R. 204-05, 208). He admitted that Mr. Kemp did not touch him or threaten to hurt him, although he may have sworn at him. (R. 248-49). Officer May also testified that Mr. Kemp did not touch him or threaten him, other than to say that he would contact an attorney at some point in the future. (R. 294).

On June 8, 1994, an Information was filed in Layton Circuit Court charging Mr. Kemp with Interference with Public Servant, in violation of Utah Code Ann. § 77-8-301. The Information alleged that the offense had been committed on May 12, 1994. (R. 6). An Amended Information, changing the date of the offense to May 9, 1994, was filed on September 16, 1994. (R. 33). On December 15, 1994, the date

set for trial to a jury, the City of Layton moved to amend the charges again, to return to the original offense date of May 12, 1994. The City's motion was granted and the trial was continued. (R. 2).

After substitution of defense counsel, Mr. Kemp's Motion for Bill of Particulars was filed on March 16, 1995. (R. 77). In response the City filed an Amended Bill of Particulars on March 28, 1995, stating that the offense occurred on May 12, 1994 as follows:

As constable Brant [sic] Johnstun attempted to execute an arrest warrant and serve a Praeipie and Writ of Execution on Gretchen Graehl, Defendant placed himself in between the constable and Ms. Graehl and yelled at the constable using foul and abusive language, with the purpose of intimidating the constable and interfering with the execution and service of the warrant and praecipe.

(R. 79-80).

Trial to a jury began on March 30, 1995. Mr. Johnstun and Officer May testified for the prosecution. Mr. Kemp testified that he did not get between Mr. Johnstun and Ms. Graehl, or otherwise get in the constable's face. When Mr. Johnstun began to speak with Ms. Graehl, Ms. Kemp was petting his cats. After overhearing the constable say that he was going to arrest her and take her car, Mr. Kemp walked over to Mr. Johnstun and asked what he was doing and why. (R. 318). Officer May arrived as Mr. Kemp was asking those questions. (R. 319).

Ms. Graehl also testified that Mr. Kemp did not stand in front of Mr. Johnstun or get in between them. (R. 303, 306-07). She said that Mr. Kemp was not involved to any significant degree in interactions with the constable. (R. 305). She did not remember Mr. Kemp saying he would speak for her or that Mr. Johnstun did not have any authority to serve the documents and carry out their orders. (R. 306). Ms. Graehl's parents also testified. They contradicted testimony from Officer May that Mr. Kemp had walked with him and yelled comments as he took Ms. Graehl to his patrol car, (R. 293).³ (R. 312-13, 331-32).

At the end of the prosecution's case, Mr. Kemp reserved his right to argue a motion to dismiss the charge against him. (R. 300-01). In arguing the motion at the conclusion of the case, defense counsel contended that Utah Code Ann. § 76-8-301 would be unconstitutionally vague and overbroad unless it was interpreted to define "interference" as requiring more than mere remonstrance, criticisms, interruption or distraction of a police officer. (R. 340-1). Counsel argued that there was insufficient evidence to convict Mr. Kemp of violating the statute as properly construed. (R. 342). The prosecutor that Mr. Kemp could be convicted based on testimony that he physically placed himself between Mr. Johnstun and Ms. Graehl

³ The charge against Mr. Kemp was based on his interaction with Mr. Johnstun before Officer May arrived, and not his supposed actions when Ms. Graehl was taken into custody. (R. 288-89, 360).

and that he was in Mr. Johnstun's face. According to the prosecutor, that action, together with the words spoken by Mr. Kemp, established "intimidation." (R. 344-45). The trial court took the Motion to Dismiss under advisement. (R. 348).

The jury returned a verdict finding Mr. Kemp guilty as charged. (R. 128). He was sentenced to 40 days in jail and a fine of \$300, with the jail term and \$100 of the fine suspended. He was placed on probation for 12 months. (R. 4, 129).

On April 7, 1995, the trial court entered an Amended Memorandum of Decision, denying Mr. Kemp's Motion to Dismiss. (R. 4, 132). According to the court:

In this case, there was more than name calling; it went beyond the verbal. Had Defendant stayed aside and expressed his criticism of what the constable was doing, we'd have had another scenario entirely. ... Here we had more on Defendant's part. It was his physical interference, his repeated placing of himself between the constable and the person the constable was dealing with that went too far. It was the positioning of Defendant's person, his body, between the constable and Defendant's girl friend [sic] and his making statements which could reasonably be taken as threatening that constituted the interference. Defendant forced the constable either to cease doing his job or to use force against Defendant. A person may not impose that choice on a public servant attempting to carry out his responsibilities. ... Defendant's demeanor here was hostile and threatening. An officer is not required to mix it up in a street fight with a defendant's live-in boyfriend in order to carry out a personal property execution and a warrant of arrest.

(R. 132-33).

SUMMARY OF THE ARGUMENT

Utah Code Ann. § 76-8-301 fails to adequately define the offense of Interference with Public Servant and includes conduct protected by the free speech clauses of the United States and Utah constitutions. The statute is vague and overbroad on its face.

The application of Utah Code Ann. § 76-8-301 to convict Mr. Kemp was unconstitutional because it punished him for constitutionally-protected speech.

Even taken in the light most favorable to the prosecution, the evidence was insufficient to prove that Mr. Kemp committed Interference with Public Servant in violation of Utah Code Ann. § 76-8-301.

The trial court committed plain error in failing to adequately define "intimidation," an element of the offense of Interference with Public Servant, in the jury's instructions.

ARGUMENT

I. UTAH CODE ANN. § 76-8-301 IS UNCONSTITUTIONAL ON ITS FACE.

In addressing a facial challenge to the overbreadth or vagueness of a statute, a court must first "determine whether the enactment reaches a substantial amount of constitutionally protected conduct." City of Houston v. Hill, 482 U.S. 451, 458

(1987). *Accord*, Kolender v. Lawson, 461 U.S. 352, 359, n.8 (1983). If a criminal statute is attacked, it must be examined with particular care. Criminal laws that punish "a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." Hill, 482 U.S. at 459; *accord*, Kolender, 461 U.S. at 358 n.8.

In Hill and Kolender, the Court recognized the vitality of facial challenges to statutes affecting the right to free speech and free association. The Court explicitly rejected the argument that a law "should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications."⁴ Kolender, 461 U.S. at 358 n.3; *accord*, Hill, 482 U.S. at 459.

Here, § 76-8-301 proscribes, *inter alia*, the use of "intimidation" with the purpose of interfering a public servant. On its face, the interference statute applies to constitutionally-protected conduct. In the absence of a narrowing construction, it authorizes the prosecution of someone who makes statements which are "intimidating" but nonetheless protected by the free speech clauses of the federal

⁴ Utah courts have used this language, derived from Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). Greenwood v. City of North Salt Lake, 817 P.2d 816, 819 (Utah 1991); State v. Archambeau, 820 P.2d 920 (Utah App. 1991). However, as the United States Supreme Court explained, Hoffman Estates addressed economic regulations, to which a less strict test applied, rather than a law which imposed criminal penalties in situations where free speech or free association were affected. Kolender 461 U.S. at 358 n.8. The Greenwood and Archambeau decisions are inconsistent with Kolender unless they are interpreted to include this distinction.

and state constitutions. On its face, the statute does not require some criminal action in addition to verbal "intimidation," and no such requirement has been announced by Utah's appellate courts.

A. Mr. Kemp's conviction under Utah Code Ann. § 76-8-301 violates the due process clauses of the United States and Utah Constitutions, because the statute is unconstitutionally vague.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). To withstand a vagueness challenge, a statute must satisfy two discrete standards. First, to provide fair warning, the law must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. Second, to prevent arbitrary and discriminatory application, the law must provide explicit standards for law enforcement officers, prosecutors and the courts. Kolender v. Lawson, 461 U.S. at 357 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Greenwood v. City of North Salt Lake, 817 P.2d 816, 819 (Utah 1991).

Beyond these principles, "where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1974). Inadequately-defined

statutes chill the exercise of First Amendment rights because "uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked'" Grayned, 408 U.S. at 109.

A law proscribing "interference" would be unconstitutionally vague if it did not provide more specific definitions. State v. Bradshaw, 541 P.2d 800, 803 n.5 (Utah 1975) (Henriod, J., concurring). The offense of Interference with Public Servant is defined in Utah as the following:

A person is guilty of a class B misdemeanor if he uses force, violence, intimidation, or engages in any other unlawful act with a purpose to interfere with a public servant performing or purporting to perform an official function.

Utah Code Ann. § 76-8-301(1).

The Utah Supreme Court has rejected a vagueness challenge to § 76-8-301. State v. Theobald, 645 P.2d 50 (Utah 1982) (per curiam). Mr. Kemp contends that Theobald was wrongly decided. The opinion contains no analysis; it simply recites the first vagueness standard -- whether a statute's terms tell the ordinary reader what is prohibited -- and concludes that § 76-8-301 specifically describes the proscribed conduct. 645 P.2d at 51. The supreme court did not analyze the second vagueness standard -- whether the statute provides sufficient guidelines for its enforcement by police, prosecutors and the courts..

The United States Supreme Court has identified this second standard as the more important of the two. Kolender v. Lawson, 461 U.S. at 358. In Kolender, the Court addressed a California statute which required persons to provide "credible and reliable" identification and account for their presence on the street if requested by the police under circumstances justifying a stop pursuant to Terry v. Ohio, 392 U.S. 1 (1968). 461 U.S. at 357.

The California courts had defined "credible and reliable" identification to be that "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." 461 U.S. at 356-57. The Supreme Court held that, even with this limiting construction, the California statute was unconstitutionally vague. According to Justice O'Connor, it "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute." 461 U.S. at 358.

In the instant case, § 76-8-301 does not define "intimidation" and the Utah Supreme Court did not provide a narrowing construction in Theobald. The statute does not adequately provide notice of what is prohibited by the proscription against "intimidation." Moreover, it is subject to interpretation by individual public servants

and may be applied in some situations but not other, based upon a public servant's feeling that he or she has been "intimidated." As a result, § 76-8-301 is unconstitutionally vague.

B. Utah Code Ann. § 76-8-301 is overbroad in violation of the First Amendment to the United States Constitution and Article I, Sections 1 and 15 of the Utah Constitution.

A statute may be invalid on its face if it is overbroad -- "susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments." Lewis v. City of New Orleans, 415 U.S. 130, 134 (1974). The defendant in Lewis was convicted of violating a New Orleans ordinance which made it a crime for any person "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." 415 U.S. at 132. She allegedly yelled and cursed at a police officer who stopped a truck in which she was a passenger and asked the driver, her husband, for his license. 415 U.S. at 131, n.1.

According to the United States Supreme Court, "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." City of Houston v. Hill, 482 U.S. at 461. As the Court explained in Hill, speech may be provocative or defiant, but it is "nevertheless protected against

censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." 482 U.S. at 461 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

A statute may only penalize speech considered to be within the "fighting words" doctrine. "Fighting words" are defined as "those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace." They are not protected by the First Amendment. Lewis, 415 U.S. at 132 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). In Lewis, the New Orleans ordinance thus was overbroad since it could be applied to speech which, although offensive, did not meet the constitutional definition of "fighting words." 415 U.S. at 134.

The overbreadth doctrine also has been applied to a state statute punishing breach-of-the-peace, which was not limited to "fighting words." Gooding v. Wilson, 405 U.S. 518 (1972). In Hill, the Court noted Justice Powell's earlier suggestion, in his concurring opinion in Lewis, that the "fighting words" doctrine might apply more narrowly to speech addressed to police officers, because they could be expected to react with more restraint than other citizens. 482 U.S. at 462 (citing Lewis, 415 U.S. at 135 (Powell, J., concurring)). The ordinance in Hill made it unlawful to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his

duty." 482 U.S. at 461. In using a broad prohibition aimed at speech, rather than simply punishing physical obstruction of police action, the Houston ordinance was unconstitutional on its face.

Here, § 76-8-301 on its face goes beyond prohibiting physical conduct. Instead, the proscription against "intimidation" does not on its face require physical action, but criminalizes the mere utterance of words. The statute aims at speech of a particular content-based category -- words which might "intimidate" or cause fear in a public servant in some manner. The resulting classification of speech outlawed by § 76-8-301 is subjective and does not distinguish speech protected by the First Amendment of the United States Constitution and by Article I, Sections 1 and 15 of the Utah Constitution.

II. EVEN IF UTAH CODE ANN. § 76-8-301 IS VALID ON ITS FACE, ITS APPLICATION TO MR. KEMP WAS UNCONSTITUTIONAL.

Assuming, *arguendo*, that the Court determines that Utah Code Ann. § 76-8-301 is valid on its face, the statute was unconstitutionally applied to Mr. Kemp to punish him for the content of protected speech to Mr. Johnstun. As argued below, at its best the city's case against Mr. Kemp was that he stood between Ms. Graehl and Mr. Johnstun and basically said "you can't do this, what are you doing." (R.

345). The prosecutor admitted that the city's allegation that Mr. Kemp used intimidation was based on the **statements he was making**, coupled with the physical act of placing himself between Mr. Johnstun and Ms. Graehl. (R. 361, emphasis added).

In focusing on the content of Mr. Kemp's words, constitutionally protected speech must be distinguished from that which can be criminalized. For example, in applying statutes punishing threats of death and physical injury, "only 'true threats' may be criminalized."⁵ Melugin v. Hames, 38 F.3d 1478, 1484 (9th Cir. 1994) (quoting Watts v. United States, 394 U.S. 705, 707 (1969)). Cf., Landry v. Daley, 280 F.Supp. 938, 961-62 (N.D. Ill. 1968) (State lacks a legitimate interest in penalizing as "intimidation" statements that do not reasonably tend to coerce or which, although alarming, are not expressions of an intent to act.").

Here, Mr. Kemp's statements to Mr. Johnstun may have implied the belief that he did not have the authority to legitimately arrest Ms. Graehl or take his car. They also may have disparaged Mr. Johnstun and his actions. Even so, they did not amount to "fighting words" or to a "true threat" as those doctrines have been

⁵ "True threats" are statements which are reasonably foreseeable to be interpreted as a serious expression of an intention to inflict bodily harm upon or to take the life of a person Melugin, 38 F 3d at 1484 Utah Code Ann § 76-8-508(2)(c), which punishes the communication of a threat, contains a similar limitation

described above. Unless these statements were reasonably likely to provoke an immediate breach of the peace or reasonably tended to create an apprehension of immediate harm, punishing Mr. Kemp for speaking them violates the First Amendment to the federal constitution and by Article I, Sections 1 and 15 of the state constitution.

III. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH MR. KEMP'S GUILT BEYOND A REASONABLE DOUBT.

A criminal conviction violates due process of law if it is obtained based on evidence which does not establish proof beyond a reasonable doubt as to every essential element of the offense. In re Winship, 397 U.S. 358 (1970). A conviction may not rest upon evidence which is "sufficiently inconclusively or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." State v. Verde, 770 P.2d 116, 117 (Utah 1989).

In analyzing a challenge to the sufficiency of the evidence, the evidence and all of its reasonable inferences must be viewed in the light most favorable to the jury's verdict. State v. Booker, 709 P.2d 342, 345 (Utah 1985); State v. Webb, 790 P.2d 65, 84 (Utah App. 1990). Even under this strict standard of review, the evidence against Mr. Kemp did not show that he was guilty of each element of the crime of Interference with Public Servant.

The offense required proof that Mr. Kemp used "intimidation" to interfere with Mr. Johnstun. As explained above, to comply with the state and federal constitutions, § 76-8-301 must be interpreted to require more than the armed constable's assertions that he "felt threatened" or that he believed he would not be able to carry out his responsibilities. This is especially true in light of his admission that he felt threatened "because of a previous incident at that resident." (R. 204-05). In that incident, on May 9, 1994, Mr. Johnstun had attempted to forcibly prevent Mr. Kemp from closing the door to his own home and had asserted erroneously that he was subject to prosecution for obstructing justice.

At most, the testimony shows that Mr. Kemp simply challenged Mr. Johnstun's authority and criticized him. There is no evidence to support the idea that it would have been reasonable for Mr. Johnstun to believe that Mr. Kemp had the imminent intent and ability to harm him to prevent him from acting on the bench warrant and writ of execution. In the absence of evidence establishing the crucial element of "intimidation," Mr. Kemp's conviction violates due process.

IV. THE TRIAL COURT'S FAILURE TO DEFINE THE ELEMENT OF "INTIMIDATION" IN THE JURY INSTRUCTIONS WAS PLAIN ERROR.

Jury instructions must set forth the issues and applicable law "in a clear, concise and orderly manner, so that the jury will understand how to discharge its responsibilities." State v. Torres, 619 P.2d 694 (Utah 1980). "An accurate instruction upon the basic elements of the offense charged is essential." State v. Laine, 618 P.2d 33, 35 (Utah 1980); *accord*, State v. Jones, 823 P.2d 1059 (Utah 1991).

When the defense has not objected to an erroneous jury instruction at trial, a showing of plain error is required. Utah R. Crim. P. 19(c); State v. Gibson, 908 P.2d 352 (Utah App. 1995). An error is plain if it should have been obvious to the trial court and it is harmful, because in its absence, there would have been a reasonable likelihood of a more favorable outcome, or confidence in the jury's verdict is undermined. State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993).

In Mr. Kemp's case, jurors were told in Instruction No. 6 that the use of intimidation or any other unlawful act was necessary to convict him, but "intimidation" was not defined. (R. 115). In Instruction No. 8, jurors were instructed that, to find that Mr. Kemp used intimidation with the purpose to interfere, they had to find that he:

[D]id more than remonstrate or criticize the public servant. Interrupting or distracting a public servant, without more, are insufficient to justify a finding that a person used intimidation with a purpose to interfere. A person is said to remonstrate when he earnestly presents reasons of opposition or grievance.


(R. 117).

In describing what was **not** "intimidation," Instruction No. 8 failed to provide a definition of this crucial term. *Cf.*, State v. Standiford, 769 P.2d 254, 262 (Utah 1988) (Although it was not technically incorrect to give an instruction which did not affirmatively define "grave risk of death" but stated what the risk need not be, the term should have been defined.). Here, a definition of "intimidation" could have been drafted using, by analogy, the definition of "communicating a threat" under Utah Code Ann. § 76-8-508(2)(c): communicating "to a person a threat that a reasonable person would believe to be a threat to do bodily injury to the person."

The lack of an adequate definition of the essential element of "intimidation" should have been obvious to the trial court. Because an appropriate instruction was not given, it is reasonably likely that jurors applied an incorrect view of the law to the facts of the case, when a jury accurately instructed about what was necessary for conviction would not have returned a guilty verdict. In short, the lack of an adequate instruction allowed Mr. Kemp's conviction on less than proof beyond a reasonable doubt and for speech which was constitutionally protected.

CONCLUSION

For the reasons and authorities contained in Arguments I - III, Mr. Kemp requests the Court to vacate his conviction. For the reasons and authorities in Argument IV, Mr. Kemp asks the Court to remand the case for a new trial before a properly-instructed jury.



JAMES C. BRADSHAW

CERTIFICATE OF SERVICE

I certify that a copy of this Opening Brief of Defendant-Appellant was placed in the United States Mail, postage prepaid addressed to the following on this 28th day of May, 1996:

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