

1995

# Layton City v. Kenneth Kemp : Brief of Appellee

Utah Court of Appeals

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James C. Bradshaw; attorney for defendant/appellants.

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 950293-CA

LAYTON CITY,	)	
	)	
Plaintiff and Appellee,	)	BRIEF OF
	)	PLAINTIFF/APPELLEE
vs.	)	
	)	Case No. 950293-CA
KENNETH KEMP,	)	
	)	Category 2
Defendant and Appellant.	)	

RESPONSE TO DEFENDANT'S APPEAL FROM A CONVICTION IN THE  
SECOND CIRCUIT COURT, LAYTON DEPARTMENT, HONORABLE K.  
ROGER BEAN, PRESIDING, OF INTERFERENCE WITH A PUBLIC  
SERVANT, IN VIOLATION OF UTAH CODE ANN. § 76-8-301.

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IN THE UTAH COURT OF APPEALS

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LAYTON CITY,	)	
	)	BRIEF OF
Plaintiff and Appellee,	)	PLAINTIFF/APPELLEE
	)	
vs.	)	Case No. 950293-CA
	)	
KENNETH KEMP,	)	Category 2
	)	
Defendant and Appellant.	)	

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**JURISDICTION AND NATURE OR PROCEEDINGS**

Defendant, Kenneth Kemp, appeals from his conviction of interference with a public servant in violation of Utah Code Ann. § 76-8-301 (1993). This Court has jurisdiction to hear the case pursuant to Utah Code Ann. § 78-2a-3(2)(d) and (f) (Supp. 1994).

**STATEMENT OF THE ISSUES PRESENTED AND STANDARD  
OF APPELLATE REVIEW**

1. Did defendant waive the issue of the constitutionality of Utah Code Ann. § 76-3-801, by failing to preserve the issue before the Trial Court?

“As a general rule, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances.” State v. Brown, 856 P.2d 358, 359, (Utah App. 1993) (citations omitted). See also, State v. Archambeau, 820 P. 2d 920, 922 (Utah App. 1991) (court declined to reach the merits of a constitutional challenge of a statute because the defendant failed to raise the issue before the trial court.).

2. Was Utah Code Ann. § 76-8-301 unconstitutionally applied to the defendant?

A constitutional challenge to a statute presents a question of law that is reviewed for correctness. State v. Davis, 787 P. 2d 517, 519 (Utah App. 1990).

3. Was the evidence sufficient to establish beyond a reasonable doubt that defendant committed the offense of interference with a public servant in violation of Utah Code Ann. § 76-8-301?

When a defendant challenges a jury verdict, this court reviews “the evidence and all reasonable inferences that may be drawn from it in a light most favorable to the jury’s verdict.” State v. Olsen, 869 P.2d 1004, 1012 (Utah App. 1994) (citing State v. Hamilton, 827 P.2d 232, 236 (Utah 1992)). See also State v. Eldredge, 773 P.2d 29, 38 (Utah 1989), cert. denied 493 U.S. 814, 110 S.Ct. 62 (1989).

4. Did the Trial Court commit plain error in failing to define the term “intimidation” in the jury instructions?

“This court reviews the Trial Court’s jury instructions on elements of a crime under a correctness standard. State v. Stevenson, 884 P. 2d 1287, 1290 (Utah App. 1994), cert denied, 892 P. 2d 13 (Utah 1995). However, jury instructions to which a party failed to object at trial will not be reviewed absent of showing of manifest injustice.” State v. Gibson, 908 P. 2d 352 (Utah App. 1995), Utah R. Crim. P. 19(c) (other citations omitted).

### **STATEMENT OF THE CASE**

On June 7, 1994, Layton City filed an information charging Kenneth Kemp, defendant/appellant with interference with a public servant on May 12, 1994, under Utah Code Ann. § 76-8-301 (1993). (R. 6 -7). A jury trial was held March 30, 1995.

At trial, Layton City called two witnesses, Davis County Constable Brent Johnstun

(R.186) and Layton City Police Sergeant Dale May. (R.265). On May 12, 1994, Johnstun went to the home of Gretchen Graehl in Layton to serve a Praeipe and Writ of Execution and a Bench Warrant for Graehl's arrest. (R.194-197). Johnstun was wearing a Constable's uniform (R. 205), and identified himself. (R. 206). As Johnstun was attempting to explain the paperwork to Graehl in the driveway of her home, he was interrupted by the defendant. (R. 201). Defendant approached, stepped in between Johnstun and Graehl (R.203), and asked Johnstun what was going on. (R.201). Johnstun explained to defendant that he needed to talk to Graehl about the papers he was serving on her, (R. 201). Defendant became upset and argued with Johnstun in a loud voice. (R. 257, 278-279). Defendant said to Johnstun, "no, you will talk to me." (R. 202). Defendant also stated, "you don't have any power to be here, you don't even have a right to be on my property." (R. 202). When Johnstun asked defendant to step aside so he could speak with Graehl, defendant refused and stated, "Gretchen you don't have to talk to him, you don't have to do anything he says." (R. 203). Defendant told Johnstun that he had no authority to be there, had no authority to give Graehl the papers, that Johnstun was not taking anything, and that Johnstun was to deal directly with defendant and not with Graehl. (R. 207). During this conversation defendant continued to stand between Johnstun and Graehl. (R. 236). Before defendant approached Graehl and Johnstun, Johnstun was standing three to four feet away from Graehl. (R. 256). When defendant stepped between Johnstun and Graehl, defendant was one to one and a half feet away from Johnstun. (R. 256).

The above described conduct by defendant made it impossible for Johnstun to continue explaining the paperwork that he needed to serve on Graehl. (R.203). Johnstun felt threatened by defendant's conduct (R.203), and would not have been able to execute the bench warrant without

the assistance of a Layton City police officer. (R. 205). Shortly after Johnstun's arrival at the residence, Sergeant Dale May of the Layton City Police Department arrived (R. 208) in response to an earlier request by Johnstun to Layton City to have a police officer assist him with the service of the papers. (R. 198). May took defendant ten to fifteen feet away from Johnstun and Graehl so Johnstun could continue serving the papers on Graehl. (R.208).

When May arrived at the Graehl residence he observed defendant angrily arguing with Johnstun in the driveway of the residence. (R.267). May observed that the defendant was in between Graehl and Johnstun and "in Mr. Johnstun's face," (R. 274). He observed that Johnstun and defendant were so close to one another that they could have touched. (R. 279). Defendant told May that the defendant did not have to talk to Johnstun and that he did not have to do what Johnstun said. (R. 274).

At the conclusion of the City's case, defendant made a Motion to Dismiss. (R. 339). Defendant argued that the evidence presented by the City was insufficient to support a finding of guilt if the Court interpreted the statute under which the defendant was charged in a constitutional manner. (R. 339-342).

The court denied defendant's motion in an Amended Memorandum of Decision issued April 7, 1995. (R. 132-133). At the conclusion of the trial, the court issued a number of instructions to the jury. (R. 111-127). Some of the Court's verbal instructions to the jury were omitted from the transcript. (R. 354). However, the instructions were given to the jury in writing as well and are included in the record. Three of the instructions read as follows:

## INSTRUCTION NO. 6

### DEFINITION AND ELEMENTS OF THE OFFENSE

Before you can find the defendant guilty of interference with a public servant, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that offense:

1. That the defendant used intimidation or engaged in some other unlawful act,
  2. That he did so with a purpose to interfere with a public servant,
  3. That the public servant was performing or purporting to perform an official function, and
  4. That the defendant's act occurred in Layton, Utah, on or about May 12, 1994.
- If you believe that the evidence has established each and all of the above elements of the offense beyond a reasonable doubt, it is your duty to find the defendant guilty. On the other hand, if the evidence has failed to establish one or more of the above elements, then you should find the defendant not guilty. (R. 115).

## INSTRUCTION NO. 7

### DEFINITION OF INTERFERENCE WITH A PUBLIC SERVANT

A person is guilty of interference with a public servant if he uses force, violence, intimidation, or engages in any other unlawful act with a purpose to prevent the public servant from performing an official function. (R. 116).

## INSTRUCTION NO. 8

### BEHAVIOR TOWARD A PUBLIC SERVANT

You are instructed that under the laws of the State of Utah, in order to find that the defendant, Kenneth Kemp, used intimidation with the purpose to interfere with a public servant, you must find that he did 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 has used intimidation with a purpose to interfere.

A person is said to remonstrate when he earnestly presents reasons of opposition or grievance. (R. 117).

The Court asked counsel if there were any objections to the instructions. (R. 375). In response the court's question, defendant's counsel, Mr. Bradshaw stated, "No exceptions, your honor." (R. 375). Defendant never requested an instruction defining the term "intimidation".

The jury found defendant guilty of interference with a public servant. (R. 376). Defendant subsequently filed this appeal (R. 134-135). In his docketing statement, defendant raised two issues for the appeal:

- "a. The jury verdict was not supported by the evidence.
- b. The trial court abused its discretion when it denied defendant's Motion to Dismiss."

On May 17, 1995, this Court filed a Sea Sponte Motion for Summary Disposition. Defendant filed a Memorandum in Opposition to the Motion for Summary Disposition asserting additional grounds for his appeal. On October 6, 1995, this court filed an order denying the Motion for Summary Disposition.

### **SUMMARY OF ARGUMENT**

Defendant's failure to raise the issue of whether Utah Code Ann. § 76-8-301 is unconstitutional constitutes a waiver which precludes the Court's consideration of the issue on appeal. Defendant's motion to dismiss presented to the trial court, addressed only the merits of the case, and not the constitutionality of the statute.

The application of Utah Code Ann. § 76-8-301 to convict defendant was constitutional because defendant engaged in more than constitutionally protected speech. Testimony at trial established that defendant engaged in physical and verbal conduct with the purpose of intimidating and interfering with a public servant who was attempting to perform an official

function. While a constable was attempting to serve legal documents on another person, defendant loudly argued with the constable, questioned the constable's authority, and placed himself in a threatening and intimidating position in front of the constable. As a result of defendant's conduct, the constable was unable to perform his duties.

Taken in the light most favorable to the jury's verdict, the evidence presented at trial was sufficient to prove that defendant committed the crime of Interference with a Public Servant in violation of Utah Code Ann. § 76-8-301 (1993).

The trial court did not commit plain error in failing to instruct the jury on the definition of "intimidation". "Intimidation" is a term of common usage and need not be explicitly defined in order for the average juror to understand the meaning of the term. Moreover, the jury's instructions, taken as a whole, adequately portrayed to the jury that verbal exchanges alone were not enough to establish the offense.

### **ARGUMENT**

#### **I. DEFENDANT WAIVED HIS RIGHT TO ARGUE THAT UTAH CODE ANN. § 76-8-301 IS UNCONSTITUTIONAL BECAUSE HE FAILED TO RAISE THE ISSUE BEFORE THE TRIAL COURT.**

Defendant raises the issue of the unconstitutionality of the interference with a public servant statute, Utah Code Ann. § 76-8-301, for the first time on appeal. By not preserving this issue at the Trial Court level the defendant waives his right to argue it before the Court of Appeals. State v. Brown, 856 P. 2d 358, 359 (Utah App. 1993).

At the close of the plaintiff's case at the trial, defendant moved the court to dismiss the charge of interfering with a public servant. (R. 339). Defendant's argument went to the sufficiency of the evidence presented by the prosecution. Specifically, defendant argued that if

the court interpreted the statute in a constitutional manner, there was insufficient evidence to establish a prima facie case. (R. 342). Defendant never addressed the statute nor explained how it was unconstitutional.

A defendant is precluded from raising a constitutional issue on appeal if he failed to raise the issue before the trial court. State v. Archambeau, 820 P.2d 920, 928 (Utah App. 1991). This Court will make an exception only when the defendant demonstrates “plain error” or “exceptional circumstances.” Id. In this case defendant never asked the trial court to rule on the constitutionality of Utah Code Ann. 76-8-301. Furthermore, defendant does not explain why this court should find plain error nor does he identify any exceptional circumstances that would justify this Court’s consideration of the issue on appeal.

## **II. THE APPLICATION OF § 76-8-301 TO DEFENDANT WAS CONSTITUTIONAL.**

Defendant argues that he was engaging in constitutionally protected conduct on May 12, 1994, when he engaged in the altercation with Johnstun. Defendant asserts that to punish him for the conduct upon which the charge of interference with a public servant was brought, would violate his right to free speech.

In this case, the evidence demonstrated that defendant engaged in more than just speech to constitute his interference with a public servant. Specifically, defendant engaged in both verbal and physical conduct with a purpose to intimidate Johnstun and interfere with Johnstun’s attempt to serve legal documents on Graehl. As Johnstun was attempting to explain the Praeipce and Writ of Execution and Bench Warrant to Graehl, defendant approached Johnstun and stepped in between Johnstun and Graehl. (R. 203). At this time defendant was one to one and a half feet

away from Johnstun. (R. 256). Defendant argued loudly with Johnstun and questioned Johnstun's authority to be there. (R. 207). Defendant further told Graehl that she did not need to speak with Johnstun and told Johnstun that he was to deal directly with defendant. (R.207). During the entire exchange defendant was standing directly in front of Johnstun and between Johnstun and Graehl. (R. 236). During the incident Johnstun felt threatened by defendant (R. 203), and was unable to perform the service of the papers. (R. 203). Finally Johnstun was required to engage the assistance of a Layton City Police Officer to be able to execute the papers. (R. 205). There was other testimony at the trial that defendant was "in Johnstun's face" (R. 274), and that he was so close to Johnstun that the two could have been touching. (R. 279).

In this case there was substantial evidence that defendant was engaging in more than constitutionally protected free speech. In this case the evidence showed that defendant engaged in both verbal and physical acts that together constituted intimidation of a constable and that interfered with the constable's performance of his duties. Defendant's actions of placing himself in between Johnstun and Graehl and placing himself so close to Johnstun that Johnstun felt threatened, together with defendant's heated and loud verbal exchange with Johnstun constitute the violation of the statute as the defendant's conduct prevented Johnstun from explaining to, and serving papers upon, Graehl. This conduct is not protected by the constitution.

### **III. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO THE JURY TO ESTABLISH DEFENDANT'S GUILT WITHOUT A REASONABLE DOUBT.**

When a defendant challenges a jury verdict, this court reviews "the evidence and all reasonable inferences that may be drawn from it in a light most favorable to the jury's verdict." State v. Olsen, 869 P.2d 1004, 1012 (Utah App. 1994) (citing State v. Hamilton, 827 P.2d 232,

236 (Utah 1992); State v. Eldredge, 773 P.2d 29, 38 (Utah 1989), cert. denied 493 U.S. 814, 110 S.Ct. 62 (1989). This Court has stated that it will reverse a jury verdict “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.” State v. Scheel, 823 P.2d 470, 472 (Utah App. 1991) (citations omitted); State v. Wright, 893 P. 2d 1113, 117 (Utah App. 1995).

This court has also stated “[w]e do not weigh conflicting evidence, nor do we substitute our own judgment on the credibility of witnesses for that of the jury’ . . . Moreover, ‘the existence of contradictory evidence or of conflicting inferences does not warrant disturbing the jury’s verdict.’” *Id.* (citations omitted); see also Penrod v. Carter, 737 P.2d 199, 200 (Utah 1987) (stating that “[a]lthough the issues are the subject of conflicting testimony at trial, this Court does not overturn a jury’s verdict so long as there is ample record evidence to support the jury’s finding.”) and Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985).

A person is guilty of interfering with a public servant “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 (1993). There was substantial testimony at trial to establish that the defendant engaged in physical and verbal conduct with the purpose of intimidating and interfering with a public servant who was attempting to perform an official function. The specific testimony presented at trial identifying defendant’s unlawful conduct is outlined above in Part II of the Argument section of this brief. There was some conflicting testimony offered by the defendant and Graehl. The jury received instructions on the elements of the offense of interfering with a public servant.

The jury was also instructed that to convict defendant they must find that he did more than remonstrate, criticize, interrupt or distract the public servant. (R.117). After hearing all the evidence presented, it is the right and the duty of the jury to weigh the credibility of the evidence and reach its own conclusion. See, State v. Ireland, 773 P.2d 1375, 1379 (Utah 1989) (stating that choosing between conflicting testimony is “within the province of the jury.”) (citing State v. Gentry, 747 P.2d 1032, 1039 (Utah 1987)).

Moreover, in its Memorandum of Decision on defendant’s Motion to Dismiss, the trial court noted:

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 would have another scenario entirely . . . It was his physical interference, his repeated placing of himself between the constable and the defendant’s girlfriend and his making statements which could reasonably be taken as threatening that constituted interference.

If four jurors and a judge found the evidence sufficient to convict him, defendant cannot establish that reasonable minds would have a reasonable doubt that he committed the crime.

**IV. IT WAS NOT PLAIN ERROR FOR THE TRIAL COURT TO FAIL TO INCLUDE A DEFINITION OF INTIMIDATION IN THE JURY INSTRUCTION**

Appellant’s final claim on appeal is that it was plain error for the trial court to fail to specifically define “intimidation” in the jury instructions. Defendant did not object to instructions numbered six through eight, nor did he offer his own instruction defining “intimidation” at trial. (R. 375). This court “may review jury instructions or the lack thereof for error in the absence of an objection only ‘to avoid a manifest injustice.’” State v. Powell, 872 P.2d 1027, 1029 (Utah 1994); citing Utah R. Crim. P. 19(c) and State v. Verde, 770 P.2d 116,

121-22 (Utah 1989).

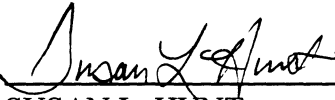
When instructions six through eight are read together, the meaning of the statute and what was required by the term “intimidation” is clear. “Intimidation” is a term of common understanding. The jury did not need an instruction defining the term. Further, Instructions six through eight make clear that mere verbal communication is not enough to constitute a violation of Utah Code Ann. § 76-8-301. Mere verbal communication without more would be protected by the First Amendment to the United States Constitution. But, physical actions in conjunction with verbal communication that interferes with a public servant attempting to perform an official function, is not protected conduct. Instructions six through eight provide sufficient definition and instruction to any reasonable juror that “intimidation” cannot be established through the mere utterance of words. The jury was instructed that physical conduct was necessary to violate the statute. The jurors did not apply incorrect law to the facts of the case and it is unlikely that with a more precise definition of “intimidation” that a jury would have returned a different verdict. The instructions were clear, the jury understood them and they properly convicted defendant of interference with a public servant.

### **CONCLUSION**

Based on the foregoing arguments, this Court should affirm the conviction of the defendant for interfering with a public servant in violation of Utah Code Ann. § 76-8-301.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of July,

1996.

  
\_\_\_\_\_  
SUSAN L. HUNT  
LAYTON CITY PROSECUTOR

10.4. The following information is provided for the purpose of the addendum:

## **ADDENDUM**

or other writings appertaining or belonging to his office or mutilates or destroys or takes away the same.

(2) Unofficial misconduct is a class B misdemeanor.

**History:** C. 1953, 76-8-203, enacted by L. 1973, ch. 196, § 76-8-203.

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 63A Am. Jur. 2d Public Officers and Employees § 407.

**C.J.S.** — 67 C.J.S. Officers § 255 et seq.  
**Key Numbers.** — Officers ☞ 121.

### PART 3

## OBSTRUCTING GOVERNMENTAL OPERATIONS

### 76-8-301. Interference with public servant.

(1) 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.

(2) For purposes of this section, "public servant" does not include jurors.

**History:** C. 1953, 76-8-301, enacted by L. 1973, ch. 196, § 76-8-301; 1993, ch. 42, § 3.

**Amendment Notes.** — The 1993 amend-

ment, effective May 3, 1993, added the (1) designation and added Subsection (2).

#### NOTES TO DECISIONS

##### ANALYSIS

Constitutionality.  
Game wardens.  
Interference.  
Official function.

##### Constitutionality.

This section is not unconstitutionally vague. *State v. Theobald*, 645 P.2d 50 (Utah 1982).

##### Game wardens.

Game wardens were by law peace officers who had same power and followed same procedure in making arrests as other peace officers. *State v. Sandman*, 4 Utah 2d 69, 286 P.2d 1060 (1955).

Defendant's refusal to permit game warden to inspect his bait and subsequent disposal of bait amounted to obstruction or resistance of officer in performance of his duty; since game warden had identified himself after his suspicions had been aroused, his request to see bait was not unreasonable and was consistent with

his duty. *State v. Sandman*, 4 Utah 2d 69, 286 P.2d 1060 (1955).

##### Interference.

Employer who refused to bring employee out of factory so that deputy sheriff could serve her with small claims court order was not obstructing officer in performing his duty where employer had no objections to service during various work breaks, but not during working hours, since particular manufacturing process became dangerous if work was impeded. *State v. Ludlow*, 28 Utah 2d 434, 503 P.2d 1210 (1972).

##### Official function.

University security officer who arrested student in area where sole interests of university were location of fraternity and religious institute for students was not discharging, or attempting to discharge, any duty of his office, and subsequent interference with arrest by fellow student was not resistance or obstruction of officer in discharge of duty. *State ex rel. Hurley*, 28 Utah 2d 248, 501 P.2d 111 (1972).

## Rule 19. Instructions.

(a) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally, or otherwise waive this requirement.

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

(c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

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

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

### NOTES TO DECISIONS

#### ANALYSIS

Effect of submitting.

Elements of offense.

Failure to request or object.

Review without objection.

Objections.

Failure to object.

Specificity.

Time.

Presumptions.

Requests by jury.

Specific instructions.

Circumstantial evidence.

Elements of offense.

Lesser included offenses.

Unreliability of eyewitness identification.

Verdict-urging instruction.

Timely request.

Effect of submitting.

When an instruction is submitted by a party,

the same party cannot later object to it; he has

already waived any objection and endorsed it

as legally sound. *State v. Perdue*, 813 P.2d

1014 (Utah Ct. App. 1991).

When a party submits more than one in-

struction on a single issue, it is reasonable to

assume that one instruction represents that

the party's preferred position, while the others rep-

resent backup positions. Therefore, the party

may not complain when the court uses only one

of the requested instructions. *State v. Perdue*,

822 P.2d 1201 (Utah Ct. App. 1991).

Elements of offense.

An information instruction is not a substi-

tute for an elements instruction. The jury must

be instructed with respect to all the legal ele-

ments of the crime; that it must find to convict of the crime

and the absence of such an instruction

is reversible error as a matter of law. Failure to give the instruction can never be harmless error. *State v. Jones*, 823 P.2d 1059 (Utah 1991).

Even though defendant failed to object to the lack of an elements instruction when the instructions were given, trial court's complete failure to give an elements instruction was clear error and required reversal of his conviction and remand for a new trial. *State v. Jones*, 823 P.2d 1059 (Utah 1991).

#### Failure to request or object.

Where a defendant does not request an instruction on a certain subject, he cannot later claim that the trial court's failure to instruct on that subject is error. *State v. Cowan*, 26 Utah 2d 410, 490 P.2d 890 (1971).

Except when necessary to avoid manifest injustice, this rule prohibits the assigning as error the trial court's failure to give a jury instruction where no objection is made before the jury is instructed. *State v. Malmrose*, 649 P.2d 56 (Utah 1982), overruled on other grounds, 721 P.2d 483 (Utah 1986).

Where oral admissions of defendant in a criminal trial are introduced without an instruction that such evidence ought to be viewed with caution, there is no error as long as such an instruction has not been specifically requested, especially in a case where the subject matter is generally covered by the instructions that are given. *State v. Shabata*, 678 P.2d 785 (Utah 1984).

When faced with a claim that a particular assertion of instructional error not raised at trial should be considered on appeal because failure to do so would result in "manifest injustice" under Subdivision (c), the Supreme Court will determine whether to review such a claim

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing Opening Brief of Plaintiff-Appellee was mailed, postage prepaid to the following this 12<sup>th</sup> day of July, 1996:

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