1990

State of Utah v. Thomas W. Schnoor : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 900330-CA
v.	:	
		Priority No. 2
THOMAS W. SCHNOOR,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A JUDGMENT AND CONVICTION OF FORGERY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-501 (1990), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE MICHAEL R. MURPHY, PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 900330-CA
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a judgment and conviction of forgery, a second degree felony, in violation of Utah Code Ann. § 76-6-501 (1990), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy, presiding.

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (1992).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. (a) Did the prosecution breach a duty to clarify an allegedly false impression arising from defendant's cross-examination of one of the State's witnesses? This Court must determine whether false testimony or a false impression existed below and will not disturb the conviction absent "a reasonable likelihood the false impression . . . could have affected the judgment of the jury." Walker v. State, 624 P.2d 687, 690-91 (Utah 1981); see also State v. Shabata, 678 P.2d 785, 789 (Utah 1984); State v. Jarrell, 608 P.2d 218, 224 (Utah 1980).

(b) Was the allegedly false impression improperly fostered by the giving of jury instruction number 7 relating to defendant's status as a party to the offense? No standard of review is presented for this issue because defendant failed to preserve the issue for appellate review.

(c) In the alternative, was defendant denied effective assistance of trial counsel due to counsel's failure to 1) enter into the trial record evidence establishing the State's verbal commitment made at the preliminary hearing, and 2) make a record of objections to jury instructions made at unrecorded bench conferences at trial? Because this issue was not raised at the district court, there is no order to review. Instead, this Court must determine whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced defendant under the test set forth in State v. Frame, 723 P.2d 401, 405 (Utah 1986).

2. Did the prosecutor's statements during trial and in closing argument deny defendant a fair trial? This Court may reverse a conviction only if the prosecutor's statements are improper and prejudicial. State v. Harrison, 805 P.2d 769, 786 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991); State v. Humphrey, 793 P.2d 918, 925 (Utah App. 1990). When reviewing an allegation of prosecutorial misconduct, this Court must determine whether counsel's statements "call[ed] to the attention of the jurors matters which they could not properly consider in determining their verdict", and whether the error was

"substantial and prejudicial such that there is a reasonable likelihood that without the error the result would have been more favorable for the defendant." Humphrey, 793 P.2d at 925; see also Harrison, 805 P.2d at 786; State v. Lopez, 789 P.2d 39, 45 (Utah App. 1990); State v. Valdez, 30 Utah 2d 54, 60, 513 P.2d 422, 426 (1973).

3. Did the prosecutor's limited inquiry into defendant's opinion as to the veracity of another witness at trial prejudice defendant? Although the questions may be deemed improper, see State v. Emmett, 184 Utah Adv. Rep. 34, 36 (Utah April 7, 1992), this Court should not disturb the conviction unless it determines that there is "a reasonable likelihood of a more favorable result" absent the questioning. State v. Tuttle, 780 P.2d 1203, 1213 n.1 (Utah 1989), cert. denied, 494 U.S. 1018, 110 S. Ct. 1323 (1990); Utah R. Evid. 103; Utah R. Crim. P. 30.

4. Is defendant entitled to reversal of his conviction based on the aggregate of the alleged errors if none of the individual allegations of error warrant reversal? This Court will not apply the cumulative error doctrine unless it finds that multiple, substantial errors were committed below. State v. Ellis, 748 P.2d 188, 191 (Utah 1987); State v. Rammel, 721 P.2d 498, 501-02 (Utah 1986).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-6-501 (1990):

> (1) A person is guilty of forgery if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:
> . . .

(b) Makes, completes, executes, authenticates, issues, transfers, publishes, or utters any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance purports to be the act of another, whether the person is existent or nonexistent, or purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed.

(2) As used in this section "writing"includes printing or any other method of recording information, checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbols of value, right, privilege, or identification.

(3) Forgery is a felony of the second degree if the writing is or purports to be:

. . .

(b) A check with a face amount of $100 or more . . . .

The text of other relevant constitutional, statutory, or rule provisions pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

On February 21, 1990, defendant Thomas W. Schnoor was charged with forgery, a second degree felony, in violation of Utah Code Ann. § 76-6-501 (1990) (R. 6).[1] Schnoor pled not guilty (R. 16), and trial was set for May 1, 1990 (R. 16). The jury found Schnoor guilty as charged (R. 27; Tr. at 219-20), and

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[1] Citations herein to the record on appeal are as follows:

Court's Record	R. (page)
Preliminary Hearing Transcript	P.H. at (page)
Trial Transcript	Tr. at (page).

Pages 48 through 53 of the trial transcript are out of order and may be found between pages 92 and 93 in the transcript.

the court sentenced him to serve an indeterminate term of one to fifteen years in the Utah State Prison (R. 76, 77). Schnoor filed his notice of appeal on the day of sentencing (R. 78).

STATEMENT OF FACTS

During January, 1990, defendant Thomas W. Schnoor resided with his ex-wife and their two children in an apartment in Salt Lake City (Tr. at 158-60, 167). He was also romantically involved with the mother of Brent and Brenda Lindsey, sixteen-year-old fraternal twins (Tr. at 18, 40, 65-66, 157-58). Early on January 25, 1990, defendant called Brent, asked him if he wanted to earn $ 50.00, and told him he could not tell anybody what he was going to do (Tr. at 19-21). Brent agreed and defendant arranged to pick him up at work that afternoon (Tr. at 21). Around 2:00 p.m., defendant picked up Brenda so she could show him where Brent worked, and the two picked up Brent (Tr. at 19, 21, 67-70). Defendant gave Brent a paycheck drawn on the account of defendant's employer, Huish Detergents, and made payable to Robert B. Saupe (Tr. at 22-24, 147-48, 157; State's Exhibit 1). Defendant directed Brent to memorize the name so he could try to cash the check (Tr. at 22-26, 72). The trio went to Mike's Pawn, a pawn shop frequented by defendant and owned by Jack Lords (Tr. at 26, 124, 152, 169). Defendant repurchased his television and took it to his car while Brent attempted to cash the check at another counter (Tr. at 26-27, 51-55, 153, 169-71). When Lords required an indorsement on the check, Brent, who suffers a learning disability, misspelled "Saupe" (Tr. at 26-27,

43, 48-51, 53-54). Lords refused to cash the check, and Brent followed defendant out of the shop (Tr. at 26-27, 53-54, 73-74).

Defendant drove the Lindseys to their apartment and made two phone calls, each time asking if the establishment on the other end cashed checks (Tr. at 28-33, 75-77, 153-54, 178-81). He asked Brenda to get him a pair of scissors which he used to cut off the end of the check on which the misspelled indorsement appeared (Tr. at 33-34, 56-57, 75-79). He then drove Brent and Brenda to "Cash-A-Check", stopping across the street to let Brent out (Tr. at 34-35, 55, 79). Defendant gave Brent the check, told him what to do, and admonished him not to mention defendant's name, his description, or where he was parked should there be a problem (Tr. at 35-36, 79-80). Because Brent had no identification, the store's manager required that he fill out an information sheet (Tr. at 36-37, 109). He again misspelled the name of the payee, provided some general information, and left the majority of the document blank (Tr. at 110-11; State's Exhibit 2). The manager went to the back room, phoned Huish Detergents for verification, spoke with Robert Saupe, discovered that the check had been reported missing, and then called the police, who arrived minutes later and arrested Brent (Tr. at 37, 111, 114, 119-20). Defendant and Brenda drove away when the police arrived (Tr. at 80).

SUMMARY OF THE ARGUMENT

Brent Lindsey's responses to defendant's inquiries concerning an alleged grant of immunity were accurate, were fully supported by the preliminary hearing transcript, and were not otherwise proven to be false. Further, the exchange created no false impression affecting the jury's credibility determination. Accordingly, the State had no duty to "correct" the accurate testimony, and defense counsel's failure to introduce the preliminary hearing testimony to clarify the impression did not constitute deficient performance. Alternatively, any false impression which may have been generated by the exchange was invited by defendant and was not reasonably likely to have affected the jury's judgment. Any possible prejudice stemming from the prosecutor's objection to defense counsel's examination of Brent was adequately mitigated by the court's ruling and subsequent instruction to the jury. The prosecutor's statements in his closing remarks to the jury were within the scope of proper closing argument and did not foster the allegedly false impression. Any objection to instruction number 7 was waived below. Defendant's assertion that the impression affected the jury's judgment by impacting on its credibility assessment is unpersuasive given the evidence at trial relating to credibility and guilt together with the reasonable inference therefrom contrary to the impression challenged on appeal and affirmatively argued by defendant to the jury. Accordingly, defense counsel's failure to correct the allegedly false impression was not so

prejudicial as to undermine confidence in the reliability of the verdict.

Defendant failed to preserve all but one of his challenges to the prosecutor's closing remarks by registering no objections, registering inadequate objections, or failing to request clarifying instructions below. Even on the merits, none of the prosecutor's remarks warrant reversal of defendant's conviction because he did not bring to the jury's attention matters which they could not consider in reaching their decision, and defendant suffered no prejudice in light of the circumstances and the evidence in this case.

Defendant waived appellate review of the prosecutor's initial question to him at trial regarding the veracity of another witness, and any impropriety in the remaining questions was harmless where the actions of both the court and defendant mitigated any potential prejudice.

The aggregate of the alleged errors does not warrant reversal of defendant's conviction because defendant waived most of the alleged errors below, and any remaining error constitutes at most harmless error. Therefore, the cumulative error doctrine does not apply.

ARGUMENT

POINT I

THE CHALLENGED TESTIMONY WAS TRUE AND FOSTERED NO FALSE IMPRESSION; ALTERNATIVELY, EVEN IF A FALSE IMPRESSION WAS GENERATED BY THE EXCHANGE, IT DID NOT AFFECT THE JUDGMENT OF THE JURY AND, HENCE, DOES NOT WARRANT REVERSAL OF THE CONVICTION

Defendant contends that Brent Lindsey, the State's first witness at trial, gave false testimony in response to defendant's cross-examination. He asserts that the testimony generated a false impression which was fostered by jury instruction number 7, the prosecutor's failure to correct the testimony, and the prosecutor's alleged misconduct in actively arguing the claimed impression in his closing remarks. Defendant contends that the false impression prejudicially tainted the credibility determination underlying the verdict, thereby requiring reversal of his conviction. In the alternative, he contends that his trial counsel was ineffective for failing to make the preliminary hearing events and his objections to instruction number 7 below part of the trial record (Brief of Appellant at 14-15). However, reversal is not warranted because the challenged testimony at trial was fully consistent with that rendered at the preliminary hearing, it did not foster any false impression, and there is no reasonable likelihood that it affected the jury's judgment.

A. The Challenged Trial Testimony was True and Fostered no False Impression

Defendant contends that Brent gave "incorrect testimony" which fostered a false impression "that Brent was testifying in spite of the effect that it may have on his own trial" (Brief of Appellant at 12). However, Brent's responses to defendant's cross-examination regarding immunity were truthful and accurate and generated no false impression.

The knowing use of false evidence to obtain a conviction is a violation of the due process clause of the Fourteenth Amendment. Walker v. State, 624 P.2d 687, 690 (Utah 1981).[2] If false testimony is given or a false impression is generated and the State knows it to be false, the State has a duty to correct it, whether or not it was solicited by the State. State v. Shabata, 678 P.2d 785, 789 (Utah 1984) (citing Walker, 624 P.2d at 690). However, the duty arises only upon the State's knowing use of false evidence. Shabata, 678 P.2d at 789; Walker, 624 P.2d at 690-91. Because the challenged testimony in this case is not false and did not generate a false impression, the State had no duty to act.

The "immunity" which defendant claims was granted by the State to Brent at the preliminary hearing was a verbal

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[2] Although he claims a violation of both the state and federal constitutions (Brief of Appellant at 11), defendant claims no broader protection under the state constitution and provides no separate analysis for the state claim. Hence, this court need not conduct a separate analysis under the state constitution. State v. Jensen, 818 P.2d 551, 552 n.2 (Utah 1991); State v. Earl, 716 P.2d 803, 805-06 (Utah 1986).

"commitment" to not file future charges against Brent and was not given to obtain Brent's testimony. The commitment was elicited by the preliminary hearing court in response to defendant's voiced concerns:

> [DEFENSE COUNSEL GRINDSTAFF]: Your Honor, there--there's one matter I might address the Court on. It's my--looking at the police report, it appears that Mr. Lindsey is identified as a suspect and there's been a juvenile referral on this particular case. And I don't think that it's appropriate that--that we--I give him legal advice, or even the Court; but if he testifies, what he says may incriminate himself.

(P.H. at 3). Both the court and the prosecutor questioned Brent to determine the extent of his involvement with the Juvenile Court. Defense counsel then conducted his voir dire of the witness, closing his questioning with the following:

> [DEFENSE COUNSEL]. Have you been granted immunity--
>
> [BRENT LINDSEY]. No.
>
> Q. --from charges? You have no written--nothing in writing or no promises made that you wouldn't be charged in the future?
>
> A. No.
>
> THE COURT: I don't see any problem in going ahead with this witness at this point.
>
> [DEFENSE COUNSEL]: Two problems, one is--obviously, we can't give him advice but--we're not his attorney, but potentially, looking at the --
>
> THE COURT: Well, let me ask, is it the intention of the State to charge this defendant in Juvenile Court?
>
> [PROSECUTOR VERHOEF]: It's my understanding, Detective Mossier has just informed me that the charges were once filed in Juvenile Court but have been dismissed; isn't that right?

UNIDENTIFIED SPEAKER: That's correct.

THE COURT: Okay. And are you making a commitment now on behalf of the State that you're not going to file charges against the defendant in Juvenile Court based on this incident?

[PROSECUTOR]: Yes, I will, your Honor. For the record, the State will not charge this young man with the crime.

[DEFENSE COUNSEL]: Even if the State makes a statement on the record, the--the only grant of immunity that's valid under the statute's a written grant signed by the County Attorney himself, and again, I think that before--

THE COURT: Do you have any other problem, other than that?

[DEFENSE COUNSEL]: --we go forward, I think that he should probably [have] someone--if he has an attorney, I think if he doesn't, I think one should be appointed.

THE COURT: I don't see a problem at this point. I'm certainly going to hold the County Attorney to it, to the comment and commitment that's been made. I realize what you've said, under the statute, is correct, it's legally correct; but obviously, the County Attorney's Office is going to be hard-pressed to bring any action out at the Juvenile Court based on the statements [sic] that's been made by the Deputy County Attorney.

So at this point, I'll allow him to go forward with the examination of the witness. You've made your record.

(P.H. at 4-8; see Addendum A, attached). The State received no evidence as a result of its commitment at the preliminary hearing where Brent's testimony was already available to the State in the form of his earlier confession to the police (P.H. at 14) rendered without the use of promises or exchanges (P.H. at 7, 24-25).

Based on the exchange at the preliminary hearing, defendant contends that the following trial testimony, elicited by defendant on cross-examination of Brent, was false (Brief of Appellant at 7-14):

> [DEFENSE COUNSEL GRINDSTAFF]. Now, you admit you tried to forge a check; right?
>
> [BRENT LINDSEY]. Yes.
>
> Q. And you were promised you wouldn't go to jail, right, if you came and testified against [defendant]?
>
> A. If I what? -- I don't get it.
>
> Q. Weren't there promises made to you?
>
> A. No.
>
> Q. No? Have you been charged with the crime? Have you had to go to the detention center?
>
> A. No. Oh, yes, once.
>
> Q. That was right after you were arrested; right?
>
> A. A few weeks -- about a week later.
>
> Q. About a week later you went to court; right?
>
> A. Yes.
>
> A. Well, it's not really court. It was --
>
> A [sic]. You went and met with police officers?
>
> A. I don't know if it was a police officer.
>
> Q. Probation officer? From the juvenile system?
>
> A. I think that's what it was.
>
> Q. Did they promise you that if you testified against [defendant], they wouldn't press any charges against you?
>
> A. No. No, they didn't.
>
> Q. Have they pressed charges against you?

[PROSECUTOR MORGAN]: We are proceeding in bad faith. At this point all of that has been answered . .

[DEFENSE COUNSEL]: I don't believe he's answered that question.

THE COURT: He can answer that question.

[DEFENSE COUNSEL]. Have there been charges pressed against you?

A. Um, no.

Q. No. And why haven't there been charges pressed against you?

[PROSECUTOR]: Objection. Beyond the personal knowledge of the witness. As phrased.

THE COURT: You can answer the question, if you know.

A. I don't know. .

[DEFENSE COUNSEL]. You don't know whether or not you haven't be [sic] charged because of your testimony in this case?

A. Yes. I don't know. .

Q. You don't know. Your [sic] were in court for a preliminary hearing, weren't you? And didn't you hear the prosecutor represent to you that they would not file charges against you? For your testimony?

A. I can't remember.

Q. Isn't that what happened?

[PROSECUTOR]: Objection, your Honor. May we approach the bench?

THE COURT: You may.

(Bench conference off the record.) . .

[DEFENSE COUNSEL]. Now, have you been told that if you didn't testimony [sic] that you would go to jail?

A. No.

Q. No? About a month and a half ago, wasn't it true that you and your sister sat in a room with a police officer and you two were told that if you didn't come over and testify against Tom --

[PROSECUTOR]. Objection. This is getting argumentative and -- I mean, he's asked -- each time the the [sic] witness has answered each time that he has not been offered anything in this case. Now we are going through testimony, I think, that is going way collateral to any issues here.

THE COURT: Well, I'm going to overrule the objection on the presumption that a the [sic] question is asked i[n] good faith.

Members of the jury, you remember when the jury selection process was going on, and I indicated to you that what counsel says is not evidence. The only evidence is what witnesses say. The mere fact that a question is asked in such a way that it may sound like a statement from counsel, is that is not evidence, and I caution you to consider that as we proceed.

(Tr. at 43-46; see Addendum A, attached).

A review of the preliminary hearing transcript fully supports the accuracy of Brent's testimony that he was not testifying because he had received immunity. In response to defendant's questions at the preliminary hearing, Brent testified that he was not promised that the State would not press charges against him if he testified against defendant (P.H. at 7, 25), he did not know why charges had not been pursued against him (P.H. at 25), and he was not told that if he testified against defendant he would not go to detention or jail (Id.).[3] This testimony is fully consistent with the responses given by Brent

[3] At one point, Brent responded "[y]es" when defense counsel asked him, "You've had certain promises made to you to testify, isn't that true?" (P.H. at 16). Counsel did not elaborate on the question, and the record does not disclose any promises.

at trial and the State's commitment given at the preliminary hearing. Defendant provides no evidence that Brent's assertion at trial that he could not remember the events of the preliminary hearing was perjured testimony requiring correction.

Brent's truthful testimony in response to defendant's questioning at trial did not engender any false impression which would affect the jury's judgment. The false impression alleged by defendant is that Brent was testifying "in spite of the effect it may have on his own trial" (Brief of Appellant at 12). However, the jury knew that Brent had not been charged for his part in the crime and therefore knew that no trial was scheduled for him. Upon hearing that defendant began making threats to Brent after defendant's arrest (Tr. at 59-61, 97), the jury could reasonably infer that the threats motivated Brent's testimony. The challenged exchange at trial accurately indicated that Brent had not been promised immunity from prosecution or detention in exchange for his testimony. In light of the remaining evidence, the exchange is more fairly interpreted as indicating that Brent testified in hopes of later receiving some unspecified form of favorable treatment from the State--a point actively argued by defendant in closing (Tr. at 208-09). Finally, no objection or reference to the alleged false impression was made during trial by either counsel or by the trial court, indicating that at the time, neither the parties nor the court had identified any false impression from Brent's testimony. See, e.g., State v. Smith, 700 P.2d 1106, 1113 (Utah 1985). Thus, it is unlikely the jury

received and was affected by the impression defendant identifies as false and prejudicial.

Brent's testimony at trial was truthful and is reinforced by the preliminary hearing transcript. The exchange gave no false impression to the jury in light of the remaining evidence and their reasonable inferences. Accordingly, there was no false evidence for the State to correct.

Alternatively, defendant acknowledges that his trial counsel may have waived this issue by failing to offer at trial either the recording or a transcript of the preliminary hearing. He contends that his counsel's failure to preserve the issue constitutes ineffective assistance. To establish his claim, defendant must show that his counsel's failure to act fell below an objective standard of reasonableness and that he suffered prejudice from counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 688, 690, 104 S. Ct. 2052, 2064-66 (1984); State v. Oliver, 820 P.2d 474, 478 (Utah App. 1991); State v. Templin, 805 P.2d 182, 186 (Utah 1990); State v. Frame, 723 P.2d 401, 405 (Utah 1986). Because Brent's trial testimony was accurate, there was no error to be preserved by defendant's counsel and his action could not be deficient.[4]

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[4] Defense counsel's failure to present the preliminary hearing testimony at trial may also be viewed as a matter of trial strategy where the testimony would have corroborated and reinforced Brent's contention that he was not promised immunity in exchange for his testimony. The fact that counsel's decision to avoid the possible adverse consequences to the defense did not prove beneficial to defendant does not compel a finding of ineffective assistance. State v. Jones, 823 P.2d 1059, 1063 (Utah 1991); State v. Bullock, 791 P.2d 155, 160 (Utah 1989); State v. Medina, 738 P.2d 1021,

B. Reversal is Not Warranted Because Any False Impression did not Affect the Judgment of the Jury

If this Court finds that the cross-examination created a false impression, it must then determine whether the impression materially impacted the conviction. A material impact occurs when there is "a reasonable likelihood the false impression . . . could have affected the judgment of the jury." Walker, 624 P.2d at 690-911; see also Shabata, 678 P.2d at 789; State v. Jarrell, 608 P.2d 218, 224 (Utah 1980). This materiality standard is similar to the "prejudice" prong applied to defendant's alternative claim that his trial counsel was ineffective, requiring that defendant demonstrate that his counsel's failure to act was so prejudicial as "to undermine confidence in the reliability of the verdict." Frame, 723 P.2d at 405. Defendant has met neither standard here.

Application of the materiality standard requires a review of the evidence presented to the jury. See, e.g., Walker, 624 P.2d at 690-91. In this case, the false impression defendant advances is not reasonably likely to have affected the jury's judgment when weighed against: 1) the facts uncontested by defendant at trial confirming part of Brent's testimony; 2) the testimony of other witnesses corroborating Brent's testimony; and 3) the evidence and reasonable inferences suggesting, as defendant argued, that Brent received some form of favorable treatment from the State.

1023-24 (Utah 1987).

This is not a case where the evidence of guilt is sufficiently weak or the facts so controverted as to warrant a determination that the allegedly false impression affected the jury's judgment. See, e.g., id., 624 P.2d at 690-91 (knowingly false police testimony linking defendant with a controlled substance presented in support of case based solely on circumstantial evidence). There is no question in this case that the offense occurred. Defendant confirmed numerous facts surrounding both the offense and his involvement, including: the origin of the check; his call to Brent the morning of the offense to arrange to pick Brent up at work (Tr. at 151-52, 162-63, 166-67); his presence at both venues where Brent tried to cash the check (Tr. 152-54); his active phone search for places to cash the check without identification (Tr. at 153-54, 178); and Brenda's presence throughout the ordeal. The testimony of numerous witnesses corroborated Brent's testimony, including: the testimony of the pawn shop owner and the store manager regarding the events inside their establishments (Tr. at 108-15, 124-29); the testimony of the arresting officer that when she arrested Brent, he stated that defendant's car was parked across the street (Tr. at 120-21); and Brenda's testimony verifying defendant's active role in cashing the check, his offer of $50.00 to Brent in exchange for Brent's success (Tr. at 80), his repeated admonitions that he not be mentioned in the pawn shop or check cashing store (Tr. at 70-72, 80), his use of the scissors to cut off the misspelled indorsement on the back of the check

(Tr. at 78), and his use of the phone to locate a place to cash the check (Tr. at 75-76). Both parties fully argued this evidence and the reasonable inferences therefrom in their closing remarks.

Finally, the evidence established that Brent was a juvenile with a learning disorder caught in the commission of a crime to which he confessed to police (Tr. at 18, 37-38, 42-43, 48-51, 54, 59), that he had to meet with officers related to the juvenile court (Tr. at 45), and that no charges were being pursued as of trial (Id.). Not only could the jury reasonably infer that by telling the authorities about an adult's involvement in the crime Brent hoped to obtain some form of leniency or favorable treatment from the State for himself, but defense counsel expressly argued that inference in his closing remarks (Tr. at 208-09).

Defendant further contends that the prosecutor actively fostered the false impression in three respects. First, the prosecutor registered an objection to defense counsel's cross-examination of Brent, stating, "We are proceeding in bad faith. At this point all of that has been answered" (Tr. at 44). Defendant argues that the statement attributed improper motives to his counsel and compounded the effect of the false testimony (Brief of Appellant at 12-13). However, the trial court overruled the prosecutor's objection, allowed the questioning to proceed, and thereafter specifically stated that it presumed that the questioning was pursued in good faith (Tr. at 46). The court

then directed the jury not to consider either counsel's comments as evidence (Id.). The jury is presumed to have followed the court's instructions absent evidence to the contrary. State v. Hodges, 30 Utah 2d 367, 370, 517 P.2d 1322, 1324 (1974). Hence, any adverse effect from the prosecutor's objection was mitigated.

Second, defendant contends that the State submitted an instruction, later given to the jury as instruction number 7, which reinforced the false impression with the authority of the trial court (Brief of Appellant at 13). However, defendant waived this allegation of error, first by expressly informing the court at trial that he had no objections to any of the instructions (Tr. at 145), State v. Medina, 738 P.2d 1021, 1023 (Utah 1987) (actively informing the trial court that there are no objections to jury instructions waives appellate challenge to the instructions); see also State v. Perdue, 813 P.2d 1201, 1206 (Utah App. 1991) (approving application of the invited error doctrine to jury instruction challenges), and second by making an insufficient objection after the jury had been instructed, claiming that instruction number 7 should be "a little more clear" (Tr. at 201). See State v. Kotz, 758 P.2d 463, 466 (Utah App. 1988) (objection indicating that an instruction was not "appropriate" was insufficient to preserve the issue for appeal); State v. Schoenfeld, 545 P.2d 193, 196 (Utah 1976) (a general statement that an instruction does not correctly state the law is not a sufficient objection to preserve the issue for appeal); Utah R. Crim. P. 19(c) (defendant must state "distinctly the

matter to which he objects and the ground of his objection"). Consequently, this Court need not reach defendant's allegations of error regarding instruction number 7.

However, should this Court address the merits of this challenge, it will find that the instruction does not warrant reversal. Defendant challenges this instruction's adverse effect on the jury's credibility determination. When reviewing a challenge to a single jury instruction, this Court considers the instructions as a whole, and, if the instructions "fairly tender the case to the jury, the fact that one or more of the instructions, standing alone, are not as full or accurate as they might have been is not reversible error." State v. Brooks, 638 P.2d 537, 542 (Utah 1981) (citations omitted); see also Perdue, 813 P.2d at 1203; State v. Haston, 811 P.2d 929, 931 (Utah App. 1991). Although standing alone, instruction number 7 may not be as clear as it could be, it is not misleading in light of the remaining instructions given the jury. A fair reading of instruction 7 with the court's verbal clarification accurately establishes that the offense involved several people and that defendant was charged as a party to the offense (for text of instruction number 7, see R. 32 and Addendum B, attached). The trial court specifically admonished the jury that its credibility determination ran to all witnesses and was to be had pursuant to the remaining instructions relating to credibility (Tr. at 199,

201). Those instructions are not challenged on appeal.[5] The jury was further admonished to consider the instructions as a whole and to avoid any emphasis on any one instruction (R. 43). The instruction lacks any reference to the existence or lack of immunity and neither misled nor confused the jury regarding its credibility determination in light of the remaining instructions given. Consequently, instruction number 7 did not foster the allegedly false impression.

Third, defendant contends that the prosecutor made statements in his closing remarks to the jury which fostered the allegedly false impression that supposedly bolstered Brent's credibility (Brief of Appellant at 12-14; for closing arguments, see Addendum C, attached).[6] However, the statements were within the scope of permissible closing argument and were not reasonably likely to have affected the jury's judgment. Throughout the trial and during opening and closing remarks, both the court and counsel repeatedly reminded the jury about its responsibility to find the facts, determine the credibility of the witnesses, weigh all the evidence, and make their ultimate decision concerning the

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[5] The record indicates that defendant neither submitted nor requested an instruction providing "important and correct information concerning the credibility of Brent Lindsey" (Brief of Appellant at 13-14). Consequently, he may not assert error in the court's failure to instruct on the additional information. See State v. Cowan, 26 Utah 2d 410, 413, 490 P.2d 890, 892 (1971) (failure to request an instruction on a certain subject bars a later claim that the court's failure to instruct on that subject is error).

[6] Defendant alleges that these remarks also constitute prosecutorial misconduct. See Point II, below.

guilt or innocence of the defendant (R. 30, 32, 34, 36, 43-46; Tr. 12-13, 14-16, 46, 62, 117, 132, 198-201, 203, 204, 206, 209, 213). Because more than one individual was involved in commission of the offense charged against defendant, the court took great care to instruct the jury immediately prior to the prosecution's closing statement that its verdict was to be limited to defendant's guilt or innocence only and not that of any other person involved in the offense (R. 32; Tr. at 198-201). In his initial closing remarks, the prosecutor discussed the evidence, acknowledging that the jury must decide the credibility of the witnesses (Tr. at 203-05). He then pointed out the evidence corroborating Brent's testimony and the lack of evidence supporting defendant's story (Tr. at 205-06), immediately following which he said:

> Keep in mind, I would ask you, that Brent is not on trial. That is for another day. The defendant is on trial. It is his credibility that I would suggest is really in issue in this case. . . .

(Tr. at 206). Defendant contends that this improperly suggests to the jury that Brent had not received immunity and would, in fact, be tried at some future date. However, the distinction made between the ultimate determination of defendant's guilt or innocence and that of Brent is proper in the context of this case and is an appropriate matter to be considered by the jury. Both the parties and the court exhibited genuine concern that the jury recognize the boundaries of its responsibilities. The prosecutor's comments, a small part of his closing remarks, were at the end of his initial closing argument, indicating a desire

to refocus the jury's attention from the evidence previously discussed to their ultimate decision of the guilt or innocence of defendant. Although not artful, they are not improper as they constitute an accurate admonition to the jury that the ultimate decision should not encompass Brent's guilt, thereby reinforcing the court's similar admonition to the jury. Even assuming the statements were improper, their effect likely was negligible in view of the remaining evidence and defendant's subsequent argument which not only emphasized the likelihood of favorable treatment for Brent due to his testimony against defendant (Tr. at 208-09), but also echoed the prosecutor's remarks: "[Brent and Brenda] are not on trial in this case; [defendant] is" (Tr. at 209).

Defendant also challenges statements made by the prosecutor in the rebuttal portion of his closing argument as fostering the allegedly false impression to the jury. Defendant's closing argument focused on the credibility and bias of Brent and Brenda, emphasizing that Brent was lying in an attempt to escape "the penalties that he may face" and that Brenda lied for her brother because he faced "a possible long term detention" (Tr. at 208-10). In his rebuttal statements, the prosecutor refuted defense counsel's bias arguments, at one point saying, "[Brent] incriminates himself all the away [sic] through the case" (Tr. at 215). Defendant contends that this statement fosters the allegedly false impression that Brent testified without regard for its effect on his own trial. However, that

simple statement is one of fact based on Brent's admission of guilt, which was part of the evidence to be considered by the jury.

Given the evidence before the jury discussed above, together with defense counsel's express argument that the evidence supported a determination directly opposite the impression he alleges on appeal, it is unlikely that the prosecutor's statements sufficiently emphasized the challenged impression, assuming it ever existed, to render the impression reasonably likely to have affected the jury's judgment. To hold otherwise would be to sanction invited error. The record is clear that defendant initiated and prolonged the immunity discourse at trial, mischaracterized the State's commitment as an exchange of immunity for Brent's testimony despite full knowledge to the contrary, and failed to correct the false impression he now claims the exchange created, despite ample opportunity to do so. He cannot now successfully assert error from a situation he created, then ignored. See State v. Taylor, 818 P.2d 561, 573 (Utah App. 1991) (defendant's failure to seek court's assistance in masking parts of transcript at trial prevented assertion of error on appeal; defendant cannot "ignore a potentially improper situation at trial, thus inviting or compounding error, and opt to raise it on appeal after the outcome of the action is adverse to him"); State v. Day, 815 P.2d 1345, 1349-50 (Utah App. 1991) (it is not appropriate for the defense to invite error and rely on it for appeal); State v. Bullock, 791 P.2d 155, 158 (Utah

1989), cert. denied, ___ U.S. ___, 110 S.Ct. 3270 (1990) ("[I]f a party through counsel has made a conscious decision to refrain from objecting or has led the trial court into error, we will then decline to save that party from the error.").

Because the allegedly false impression, assuming that it actually arose, was not reasonably likely to have affected the jury's judgment under the circumstances of the case, it follows that defense counsel's alleged failure to correct the false impression was not so prejudicial as to "undermine confidence in the reliability of the verdict", Frame, 723 P.2d at 405, and defendant's alternative claim of ineffective assistance must also fail.

POINT II

DEFENDANT WAIVED REVIEW OF THE PROSECUTOR'S CLOSING REMARKS; ALTERNATIVELY, THE REMARKS WERE NEITHER IMPROPER NOR PREJUDICIAL AND WERE WITHIN THE SCOPE OF PROPER CLOSING ARGUMENT

Defendant asserts that in closing argument the prosecutor made several statements which amount to prosecutorial misconduct. First, he contends that the prosecutor's closing remarks improperly emphasized Brent Lindsey's alleged "lack of immunity" (Brief of Appellant at 20). Second, he argues that several statements made in the prosecutor's initial closing remarks as well as an assertion of defendant's guilt made at the end of the prosecution's closing argument improperly urged the jury to base its decision on societal concerns extraneous to the evidence at trial, and erroneously injected the prosecutor's

personal opinions which inflamed the jury to "act out of improper motive" (Brief of Appellant at 20-24). However, defendant failed to preserve these objections for appellate review. In the alternative, if defendant's challenges are deemed preserved for appeal, the conviction should be affirmed because, under the totality of the circumstances of the case, the statements neither suggest to the jury matters it may not consider in deliberations nor exceed the scope of permissible closing argument. See State v. Harrison, 805 P.2d 769, 786 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991); State v. Humphrey, 793 P.2d 918, 925 (Utah App. 1990).

Defendant failed to object to all but one of the prosecutor's closing statements to which he assigns error on appeal.[7] Although a trial court may have an obligation to correct, sua sponte, improper remarks made to the jury, this Court has held that a party's failure to make a contemporaneous and specific objection at trial will preclude appellate review of an alleged improper prosecutorial argument. Compare State v. Smith, 700 P.2d 1106, 1112 (Utah 1985), with Humphrey, 793 P.2d at 925, and State v. Dibello, 780 P.2d 1221, 1226-27 (Utah 1989), and State v. Hales, 652 P.2d 1290, 1292 (Utah 1982). Even where appellate review is had, the absence of an objection is a factor in determining the prejudicial impact of the challenged argument.

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[7] The sole objection to the prosecutor's remarks which was registered by defendant at trial relates to the prosecutor's characterization of the importance of this case and is addressed at the end of Point II.

See Smith, 700 P.2d at 1113 (finding a failure to object as indicative that "defendant's concerns about improper influence have arisen in the course of the preparation of this appeal, rather than from perceptions at the time of trial."). If appellate review is granted to defendant's challenges, those allegations will be found meritless.

"Counsel for both sides have considerable latitude in their arguments to the jury; they have a right to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom." State v. Valdez, 30 Utah 2d 54, 60, 513 P.2d 422, 426 (1973); see also State v. Seel, 827 P.2d 954, 959 (Utah App. 1992); State v. Lafferty, 749 P.2d 1239, 1255 (Utah 1988), rev'd on other grounds, Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1942 (1992). A prosecutor's remarks will not warrant reversal unless they meet the two-part test established by the Utah Supreme Court: "(1) did the remarks call to the attention of the jurors matters which they could not properly consider in determining their verdict, and (2) was the error substantial and prejudicial such that there is a reasonable likelihood that without the error the result would have been more favorable for the defendant." Humphrey, 793 P.2d at 925; see also Harrison, 805 P.2d at 786; State v. Lopez, 789 P.2d 39, 45 (Utah App. 1990); Valdez, 30 Utah 2d at 60, 513 P.2d at 426. Application of part two of the test involves consideration of the entire record and the circumstances involved in each case, including an

evaluation of the evidence of guilt. State v. Andreason, 718 P.2d 400, 402-03 (Utah 1986); State v. Troy, 688 P.2d 483, 486 (Utah 1984). The more compelling the proof of guilt, the less closely this Court will scrutinize the conduct. Troy, 688 P.2d at 846.

Defendant's first challenge regarding the prosecutor's allegedly improper emphasis on Brent's "lack of immunity" is discussed fully in Point I(B) above, regarding the State's alleged use of false testimony. That discussion also illustrates that the challenged comments do not meet either prong of the test for prosecutorial misconduct. The remarks reflect facts already in evidence and do not present the jury with matters not properly considered by them. Similarly, the absence of the challenged remarks would not likely have resulted in a more favorable result for defendant in light of the remaining evidence discussed in Point I(B), including defendant's express assertion that the evidence implies some grant or hope of favorable treatment for Brent due to his testimony, and the fact that defendant's own testimony reinforced Brent's admission of guilt.

Defendant also challenges several additional excerpts from the prosecutor's closing remarks which may be divided into two groups. The first group follows the prosecutor's discussion of the evidence relating to the elements of the crime and defendant's intent and knowledge of numerous facts presented at the trial. He then summarizes the State's deduction from its view of the evidence, saying:

> Ladies and gentlemen of the jury, that defendant is guilty. He's the guiltiest defendant that has ever engaged in this business. That is a despicable crime, to use someone else to commit the crime that you, if you had the guts to, would at least commit yourself.

(Tr. at 204-05; see Addendum C, attached). Defendant contends that these statements represent the prosecutor's personal opinion regarding the defendant's guilt and improperly asks the jury to punish defendant out of a "policy to punish 'despicable' people" (Brief of Appellant at 24). However, the prosecutor has a right to discuss fully from the State's viewpoint the evidence, inferences and deductions which establish defendant's guilt. See Seel, 827 P.2d at 959; Valdez, 30 Utah 2d at 60, 513 P.2d at 426. Consequently, the remarks are within the range of permissible arguments available to both sides. See Day, 815 P.2d at 1350; State v. Tillman, 750 P.2d 546, 560 (Utah 1987) (citations omitted). Although his characterization of the crime as despicable is more spirited than may be desirable, it is not improper. He ties his conclusion of guilt directly to the evidence presented at trial, and does not inject a plea regarding societal concerns or the jury's duty to address those concerns. See, e.g., Andreason, 718 P.2d at 402 (finding improper an argument that defendant's "conduct was pervasive, that others were involved in similar conduct, and that the jury needed to be concerned about those 'who aren't innocent but are turned loose.'"); Smith, 700 P.2d at 1112 (finding improper an argument asking, "[d]o we go so far in determining that we don't punish an innocent man that we let too many guilty ones go . . . "). In

the context of the totality of the case, including repeated instructions to the jury that statements by counsel were not to be considered as evidence, the comments would have little impact. The lack of objections by defense counsel to the comments supports their minimal prejudicial impact. See Smith, 700 P.2d at 1113.

The second group of comments challenged by defendant occurred as the prosecutor began his initial closing remarks:

> [PROSECUTOR]: . . . I think that in this case, more than any other, I think we have to consider that everyone in this country has a right to be protected under the law. I think Mr. Schoor [sic] deserves that protection.
>
> I think the witnesses who have testified in this case deserve that protection. Brent Lindsey, as well as the defendant, has put his faith in that system. Brent Lindsey, as you heard him testify at the conclusion of this case, said, "No, I'm not afraid of the defendant," even though he testified he was threatened by him.
>
> He says that because he has people around him that will protect him. I'd like to think the State of Utah did its job in protecting Brent Lindsey and allowing him to get up on that stand and give his story.
>
> Now this is as far as I can go. From here on it's up to you. You can either look at the evidence, come to a just conclusion and render a verdict that protects Mr. Lindsey, or you can not come to a conclusion, you can get upset, you can get angry about things that really have nothing to do with this case, and you can walk away from this.
>
> I'm going to be back here tomorrow. So is Mr. Grindstaff, so is the Judge. We've lots of other cases. You may have noticed during that trial that I got pretty angry at times. This isn't a murder trial. I've done murder trials before, but I don't think I have seen such an important case as this for a long, long time.

[DEFENSE COUNSEL]: I object to him discussing his personal opinions. And his personal views.

THE COURT: Overruled.

[PROSECUTOR]: It's important for that very reason, that in this case we have to discuss something that only jurors can decide.

(Tr. at 202-03; see Addendum C, attached) (emphasis added). Defendant challenges each of the three highlighted segments as advancing the prosecutor's personal opinions and improperly urging the jury to decide the case based on extraneous societal concerns.

The prosecutor's reference to the basic premise of protection under the law is no more than a broadly accurate prefatory statement, and any prejudice flowing therefrom would be abated by counsel's blanket application of the protection to the country's entire populace, all the witnesses in this case, and, more specifically, to Brent as well as to defendant (Tr. at 202). His example of Brent's "faith" in the judicial system is simply a restatement of evidence received at trial and already properly before the jury (Tr. at 59-62).

Defendant compares these statements with those condemned in West Valley City v. Rislow, 736 P.2d 637 (Utah App. 1987). However, the prosecutor in this case, unlike the one in Rislow, did not urge that defendant's guilt or innocence hinged on whether the jurors wanted to encourage or stop other people in society from committing the same crime in areas frequented by the jurors. Although in verbally shifting the burden of a final decision to the jury the prosecutor urges a verdict "that

protects Mr. Lindsey", he mitigates any potential prejudice by expressly and accurately tying the jury's verdict to the evidence in this case and does not urge improper consideration of matters extraneous to the case. See Troy, 718 P.2d at 486 (reiterating the jury's duty to convict solely on the evidence and condemning statements suggesting a different basis for the decision). Defendant's failure to object to the statements below indicates their minimal prejudicial potential. Smith, 700 P.2d at 1113.

In accordance with his objection below, defendant challenges the prosecutor's characterization of the importance of this case as an improper personal opinion "calculated to inflame the jury to act out of improper motive" (Brief of Appellant at 23-24). The State does not condone the prosecutor's comparison, but contends that the prosecutor's immediate explanation of his remark adequately mitigated any prejudice which may otherwise have resulted. After advancing the statement, the prosecutor specifically interpreted it for the jury, indicating, as does defendant on appeal, that the importance stems from the fact that jurors alone can decide the extent of knowledge to be imputed to the parties, the credibility of the witnesses heard at trial, and the ultimate guilt or innocence of this defendant (Tr. at 203-04; Brief of Appellant at 23). The statement neither urges the jury's use of extraneous information nor advocates that the jurors ignore either the court's instructions or the evidence before them. The jury reasonably could differentiate between a murder trial and the forgery case before it, and defendant has

failed to establish any reasonable likelihood that absent the comparison the verdict would have been more favorable. Without prejudice, the remark could be no more than harmless error. Tillman, 750 P.2d at 555; Valdez, 30 Utah 2d at 60, 513 P.2d at 426; see also Utah R. Crim. P. 30 ("[a]ny error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded").

Under the totality of the circumstances of this case, the prosecutor's comments are within the scope of permissible argument as they concern the State's perspective of the evidence before the jury and the reasonable inferences and deductions arising therefrom. The comments do not urge a decision based on extraneous matters, and did not prejudice defendant.

POINT III

ANY ERROR IN THE STATE'S CROSS-EXAMINATION OF DEFENDANT CONCERNING ANOTHER WITNESS' VERACITY WAS HARMLESS WHERE DEFENDANT SUFFERED NO PREJUDICE AND THE COURT SUSTAINED DEFENDANT'S TIMELY OBJECTIONS

Defendant contends that the prosecutor improperly cross-examined defendant concerning Mr. Lords' veracity, thereby unfairly commenting on defendant's credibility and urging the jury to deal improperly with the credibility issue (Brief of Appellant at 25). Regardless of the propriety of the prosecutor's inquiries, any error in the questioning was harmless where the court sustained defendant's timely objections and thereby mitigated any potential prejudice.

During the prosecutor's cross-examination of defendant, he asked three questions (highlighted below) which defendant challenges on appeal as being unfairly prejudicial:

> [PROSECUTOR:] You heard Mr. Lords testimony that he served Brent and that he recalls very distinctly that he is the one that took the check from Brent on that occasion and it was misspelled on the back?
>
> [DEFENDANT:] Yes, I did hear Mr. Lords say that.
>
> Q. Is that different what [sic] than what you're telling the jury now? It is, isn't it?
>
> A. Yes. But -- what I do remember is Mr. Lords helping me, and Danny helping Brent.
>
> Q. So Jack is not telling the truth?
>
> A. I am sure Jack is telling what he can remember.
>
> Q. Well, a misspelled check, that was an unusual occurrence, isn't it?
>
> A. Awe, I --
>
> [DEFENSE COUNSEL]: Objection. Your Honor, I don't think it's relevant.
>
> THE COURT: Overruled. It's cross-examination.
>
> [PROSECUTOR:] Wouldn't you agree that a person who endorses a check made out to him and misspells their own name is an unusual occurrence?
>
> A. Yes.
>
> Q. And wouldn't you remember the person who presented you a check and misspelled his own name?
>
> [DEFENSE COUNSEL]: Objection, asking for conjecture.
>
> THE COURT: Overruled.
>
> A. Yes.
>
> [PROSECUTOR:] So why do you think Jack Lords is confused?

A. I don't think it's --

[DEFENSE COUNSEL]: Objection, I don't think he has the --

THE COURT: Sustained.

[PROSECUTOR:] Why, under these ciscumstances [sic], do you believe that Jack Lords is mistaken?

A. I believe --

[DEFENSE COUNSEL]: I don't think it's relevant. what his opinion is as to Jack Lords --

THE COURT: I'm going the [sic] sustain the objection.

(Tr. at 174-76) (emphasis added).

The courts in this jurisdiction have not directly ruled on the propriety of asking a witness or a defendant at trial questions regarding the veracity of another witness. But see State v. Emmett, 184 Utah Adv. Rep. 34, 36 (Utah April 7, 1992) (indicating in dicta that such questions would be improper). Of the other jurisdictions addressing the issue, a clear majority have found such questioning to be improper to varying degrees. See, e.g., People v. Best, 424 N.E.2d 29, 32 (Ill. App. 1981) (although improper, "veracity opinion questions alone do not constitute reversible error"); State v. Flanagan, 801 P.2d 675, 679 (N.M. App.), cert. denied, 801 P.2d 659 (N.M. 1990) (imposing strict prohibition on asking a defendant on cross-examination if another witness is "mistaken" or "lying", but providing that admission of all other forms of such questions lies within the trial court's discretion; finding the trial court's failure to sustain defendant's objection to prohibited questions was

harmless error); Pankratz v. State, 663 P.2d 26, 28 (Okl. Cr. 1983) (such questioning is an effort to impeach which, although not desirable, is not necessarily error); State v. Casteneda-Perez, 810 P.2d 74, 79 (Wash. App. 1991) (condemning practice as improper). Regardless of the degree of disapproval accorded such questioning, courts have not held that the practice requires reversal per se. Instead, they universally turn to a harmless error analysis to determine whether the evidentiary impropriety resulted in sufficient prejudice to defendant to warrant reversal. Best, 424 N.E.2d at 32; Flanagan, 801 P.2d at 679-80; Casteneda-Perez, 810 P.2d at 79.

Even if the contested questions before this Court are found to be improper, reversal would not be warranted because defendant suffered only minimal, if any, prejudice. Defendant has the burden of establishing the existence of reversible error. State v. Gotschall, 782 P.2d 459, 463 (Utah 1989). An error requires reversal only if there is "a reasonable likelihood of a more favorable result" absent the error. State v. Tuttle, 780 P.2d 1203, 1213 n.12 (Utah 1989); Utah R. Evid. 103; Utah R. Crim. P. 30.

The only objections made by defendant to the three veracity inquiries occurred following the second and third questions and were sustained by the trial court (Tr. at 175-76). Because defendant failed to object to counsel's first question concerning Lords' truthfulness, he waived appellate review of the question. Day, 815 P.2d at 1349-50 (failure to raise an

objection constitutes waiver of the alleged error); Humphrey, 793 P.2d at 925 (failure to object to cross-examination constitutes waiver of appellate review of the alleged errors); Hales, 652 P.2d at 1292; see also Casteneda-Perez, 810 P.2d at 79 (defendant waived review of the initial stage of the improper cross-examination due to his failure to make a definite objection until after the questioning was well underway).

Even on the merits, defendant's appellate challenge to the prosecutor's initial question must fail because the prejudicial dangers feared in such a situation did not materialize. Defendant's response to this question offered a plausible explanation for the suggested discrepancy, thereby sidestepping the predicted response of labeling either Lords or himself as a liar and suggesting instead that neither was deliberately lying. See Flanagan, 801 P.2d at 679-80 (questions intended to clarify discrepancies are acceptable; holding that improper questions are harmless where defendant's responses avoided the dangers feared by the court). It was well within defendant's knowledge to provide an opinion as to the reason for the differences in the testimony, Id., 801 P.2d at 679-80, and his response diffused the possibility that the jury would feel bound to label one or the other a liar. See Casteneda-Perez, 810 P.2d at 79-80 (witnesses' responses alerted the jury that any discrepancies may not be due to false testimony).

The prosecutor's subsequent questions do not warrant reversal because any prejudice resulting from the questions was

avoided by timely, successful objections forestalling any response by defendant. Additionally, there was minimal, if any, impact on the proceedings where the questioning was neither prolonged nor argumentative, the issue was not argued in closing argument, and the questions were restricted to a single discrepancy in the testimony of one witness who did not testify regarding any criminal behavior by defendant (see Brief of Appellant at 25). Any potential prejudice from the single discrepancy was minimized where both sides vigorously argued the credibility of numerous witnesses in their closing arguments, the differences between the parties' versions of the evidence was abundantly clear to the jury, and the jury was adequately admonished throughout the proceedings that the questions by counsel did not constitute evidence (Tr. at 5-6, 46). Absent evidence to the contrary, the jurors are presumed to have followed the instructions. State v. Hodges, 30 Utah 2d 367, 370, 517 P.2d 1322, 1324 (1974); see also State v. White, 577 P.2d 552, 555 (Utah 1978). Given such brief, isolated questioning and the adequate mitigation provided by the prompt action of both defendant and the court, there could be no reasonable likelihood of a more favorable outcome absent the questioning. Accordingly, any error in the cross-examination was harmless, and reversal is not warranted.

POINT IV

THE DOCTRINE OF CUMULATIVE ERROR IS INAPPLICABLE TO THIS CASE BECAUSE NO MULTIPLE, SUBSTANTIAL ERRORS WERE COMMITTED BELOW

Defendant finally contends that even if the individual errors he asserts do not warrant reversal of his conviction, the aggregate of the errors constitutes "fundamental and reversible error" (Brief of Appellant at 25-26). However, the cumulative error doctrine does not apply where no multiple, substantial errors were committed. State v. Ellis, 748 P.2d 188, 191 (Utah 1987); State v. Rammel, 721 P.2d 498, 501-02 (Utah 1986).

Defendant claims error relating to production of false testimony, prosecutorial misconduct, improper cross-examination, and, alternatively, ineffective assistance of counsel. As the preceding arguments demonstrate, defendant has waived most of the alleged errors, and the remaining errors are at most harmless. Accordingly, the cumulative error doctrine should not apply, and defendant's conviction should be affirmed. See State v. Johnson, 784 P.2d 1135, 1146 (Utah 1989); State v. Eldredge, 773 P.2d 29, 38 (Utah), cert. denied, 493 U.S. 814, 110 S. Ct. 62 (1989); Rammel, 721 P.2d at 501-02; but see State v. Emmett, 184 Utah Adv. Rep. 34, 36 (Utah April 7, 1992) (several potentially harmless errors combined with an egregious instance of prosecutorial misconduct warrant a new trial).

CONCLUSION

Based on the foregoing arguments, the State respectfully requests that this Court affirm defendant's conviction.

RESPECTFULLY SUBMITTED this 11th day of August, 1992.

R. PAUL VAN DAM
Attorney General

KRIS C. LEONARD
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed, postage prepaid, to Joan C. Watt and Robert L. Steele, Salt Lake Legal Defender Assoc., attorneys for appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 11th day of August, 1992.

ADDENDA

ADDENDUM A

ORIGINAL

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE STATE OF UTAH,

PLAINTIFF, :

VS. :

: NO. 900330-CA

: CR90-574

THOMAS W. SCHNOOR, :

DEFENDANT. :

REPORTER'S TRANSCRIPT

HEARING OF MAY 1, 1990

BEFORE THE HONORABLE MICHAEL R. MURPHY

REPORTED BY GAYLE B. CAMPBELL, CSR, RPR.

THAT THE JURY INSTRUCTIONS WERE READ IN SUBSTANTIALLY THE FORM THAT THEY ARE TYPED, AND THAT ANY DEVIATION THEREFROM IS OF NO PARTICULAR SIGNIFICANCE?

MR. MORGAN: FROM THE STATE, YES, YOUR HONOR.

MR. GRINDSTAFF: YES, YOUR HONOR.

THE COURT: COUPLE OF ITEMS, MEMBERS OF THE JURY, BEFORE WE BEGIN CLOSING ARGUMENT. I WANT YOU TO REFER TO INSTRUCTION NUMBER SEVEN. THERE MAY BE A SUGGESTION TO YOU IN THERE THAT MORE THAN ONE PERSON HAS BEEN NAMED IN THIS INFORMATION.

THAT IS NOT THE CASE. I BELIEVE WHAT THE INTENT OF THIS INSTRUCTIONS IS, IS TO POINT OUT TO YOU THAT MORE THAN ONE PERSON -- THAT IT CAN BE ALLEGED THAT MORE THAN ONE PERSON WAS INVOLVED IN THE CHARGE IN THIS CASE. THE POINT OF THIS IS TO INDICATE THAT MR. SCHNOOR IS BEING CHARGED AS A PARTY TO THE OFFENSE.

AM I CORRECT IN THAT?

MR. MORGAN: YES.

THE COURT: IS THERE ANY FURTHER ELABORATION NECESSARY, OR RETRACTION OF ANYTHING THAT I'VE JUST SAID THERE, MR. MORGAN?

MR. MORGAN: PERHAPS WE OUGHT TO APPROACH THE BENCH, YOUR HONOR.

(BENCH CONFERENCE OFF THE RECORD.)

THE COURT: ONE THING FURTHER ON INSTRUCTION

NUMBER SEVEN, MEMBERS OF THE JURY. THAT INSTRUCTION IS OBVIOUSLY REFERRING, ALBEIT OBLIQELY, TO THE TWO LINDSEYS WHO TESTIFIED, BRENT AND BRENDA.

IN THAT CONNECTION, YOU'RE TO ADHERE TO THIS INSTRUCTION, THE LAST SENTENCE, WHICH INDICATES THAT YOU ARE NOT TO CONCERN YOURSELF WITH THEIR STATUS. YOU'RE TO CONSIDER THEIR TESTIMONY IN ACCORDANCE WITH OTHER INSTRUCTIONS OF THIS COURT WHICH ARE IN THIS PACKAGE WHICH WILL ASSIST YOU IN MAKING YOUR DETERMINATION AS TO THE CREDIBILITY OF THE WITNESSES.

ONE OTHER THING I THINK I NEED TO TELL YOU IS THAT I RAPIDLY PUT THIS SET OF INSTRUCTIONS TOGETHER OF ONES THAT ARE ON THE WORD PROCESSER IN THE HOPE THAT WE WOULD BE ABLE TO INSTRUCT YOU YESTERDAY AND GET THIS COMPLETED.

IN MY HASTE TO DO SO, YOU WILL SEE THAT THERE WERE TYPOGRAPHICAL ERRORS, BUT MORE PARTICULARLY, THAT THERE WERE SOME ERRORS IN GENDER REFERENCE. THE SET OF INSTRUCTIONS THAT I NORMALLY USE, THAT I LIKE TO KEEP, ARE GENDER-BLIND, AND IF ANYONE IS OFFENDED BY THAT, I APOLOGIZE.

IT'S JUST AN OLD SET, AND I WON'T USE THEM AGAIN. ALSO, I WANT TO INDICATE TO YOU THAT YOU DON'T HAVE TO WORRY ABOUT DRAFTING A VERDICT OF YOUR OWN. WE HAVE VERDICT FORMS THAT WILL GO WITH YOU INTO THE JURY ROOM THAT PRESENT EACH OF THE TWO ALTERNATIVES THAT YOU WILL

THAN PRESENTED WITH.

AFTER YOUR DELIBERATIONS, YOU SELECT THE APPROPRIATE ONE AND HAVE THE FOREPERSON DATE AND EXECUTE THE APPROPRIATE ONE, AND SEND BACK TO ME BOTH THE ONE SIGNED THE ONE NOT SIGNED, THE JURY INSTRUCTIONS, AND THE EXHIBITS WHICH WILL BE IN THERE WITH YOU.

DO COUNSEL HAVE ANY OBJECTION AS TO ANY OF THE THINGS THAT I HAVE INDICATED TO THE JURY SINCE READING THE JURY INSTRUCTIONS? MR. MORGAN?

MR. MORGAN: NOTHING FROM THE STATE.

MR. GRINDSTAFF: ONE OBJECTION. BUT I WOULD RATHER DO IT AFTER--

THE COURT: WELL, I NEED TO BE ALERTED IF THERE IS SOMETHING I CAN CORRECT. I'M CERTAINLY GOING TO CORRECT IT IF IT'S APPROPRIATE. SO WHY DON'T YOU COME TO THE SIDEBAR.

(BENCH CONFERENCE, OFF THE RECORD.)

THE COURT: ONE FINAL THING, AND I SAY THIS IN AN ABUNDANCE OF CAUTION, THAT I MAKE CERTAIN THAT I HAVE NOT MISSTATED ANYTHING AND I DON'T STATE IT FOR ANY PURPOSE OF REPETITION OR ANY UNDUE EMPHASIS ON THIS POINT. IF I STATED IT BEFORE AND YOU UNDERSTOOD IT AS I STATED IT BEFORE, DON'T THINK I AM TRYING TO EMPHASIZE IT, BECAUSE I MAY STATE IT AGAIN.

THE LAST SENTENCE IN INSTRUCTION NUMBER SEVEN, IS

NOT IN ANY WAY TO SUGGEST THAT YOU ARE NOT TO CONSIDER THE BELIEVABILITY OR THE CREDIBILITY OF BRENT AND BRENDA LINDSEY IN THE SAME MANNER THAT YOU CONSIDER THE CREDIBILITY OF ANY OTHER WITNESS.

YOU HAVE TO CONSIDER THAT ISSUE. YOU WILL CONSIDER THAT IN THE SAME WAY AND UNDER THE SAME INSTRUCTIONS AS YOU WOULD CONSIDER THE CREDIBILITY OF MR. SCHNOOR OR ANY OTHER WITNESS WHO TESTIFIED HERE.

DOES THAT TAKE CARE OF YOUR PROBLEM?

MR. GRINDSTAFF: MAY I APPROACH THE BENCH?

THE COURT: DOES IT OR DOES IT NOT?

MR. GRINDSTAFF: I BELIEVE IT SHOULD BE A LITTLE MORE CLEAR.

THE COURT: ALL RIGHT. FURTHER OBJECTIONS OVERRULED. ARE YOU READY FOR CLOSING?

MR. MORGAN: STATE IS, YOUR HONOR.

THE COURT: GO AHEAD, MR. MORGAN.

MR. MORGAN: MAY IT PLEASE THE COURT, MR. GRINDSTAFF, MR. SCHNOOR, LADIES AND GENTLEMEN: THIS IS CLOSING ARGUMENT.

AS MR. GRINDSTAFF STAFF INDICATED EARLIER, I WILL BE GIVING A STATEMENT OF THE STATE'S CASE, HE WILL BE GIVING HIS ARGUMENTS THE CASE, AND THEN I WILL BE BACK FOR REBUTTAL ONE LAST TIME.

I WILL TRY AND BE BRIEF IN REBUTTAL. I WOULD ASK

ADDENDUM B

CERTIFIED COPY

IN THE THIRD CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

-o0o-

STATE OF UTAH, Plaintiff,	)	Case No. 901002110FS
vs.	)	PRELIMINARY HEARING
THOMAS W. SCHNOOR, Defendant.	)	

-o0o-

BE IT REMEMBERED that on the 29th day of March, 1990, the above-entitled matter came on for hearing before the Honorable Michael L. Hutchings, sitting as Judge in the above-named Court for the purpose of this cause, and that the following proceedings were had.

-o0o-

APPEARANCES:

For the State: MR. MARTIN VERHOEF
Deputy County Attorney
231 East 400 South
Salt Lake City, Utah 84111

For the Defendant: MR. DAVID L. GRINDSTAFF
Attorney at Law
395 South 600 East
Salt Lake City, Utah 84102

DIRECT EXAMINATION

BY MR. VERHOEF:

Q Would you please state your full name and spell your last name, sir?

A Brent Lindsey, L-i-n-d-s-e-y. Lindsey.

Q And how old are you, Brent?

A I'm 16.

Q Okay. And are you aware of the meaning of the oath to tell the truth that you just took?

A Yes. I am.

Q Okay. Are you acquainted with the defendant, Thomas W. Schnoor?

A Yes. I am.

MR. GRINDSTAFF: Your Honor, there--there's one matter I might address the Court on. It's my--looking at the police report, it appears that Mr. Lindsey is identified as a suspect and there's been a juvenile referral on this particular case. And I don't think that it's appropriate that--that we--I give him legal advice, or even the Court; but if he testifies, what he says may incriminate himself.

THE COURT: Is he charged?

MR. VERHOEF: Let me ask the question to the witness, your Honor.

THE COURT: All right. Go ahead.

Q (By Mr. Verhoef) Mr. Lindsey, are you--were you

referred to Juvenile Court as a result of this offense?

A Yes.

Q And is there a matter pending in Juvenile Court currently?

A What do you mean? I don't--

Q Well, maybe that's a bad question.

Why don't you tell the Judge what the status of that is over in Juvenile Court?

A Well, the--I don't--I don't get what you're saying.

Q What happened--did you go to Court on that?

A Yes. I did go to Court.

Q Do you have anything left to do with the Court on that deal?

THE COURT: What happened in Court?

THE WITNESS: Well, they just told me to wait--wait for the main--main court day.

THE COURT: When's that?

THE WITNESS: This day, told me to wait and come back this day.

THE COURT: Are you charged out there in Juvenile Court?

THE WITNESS: Oh. No, I'm not charged out there.

THE COURT: Were you fined, out there?

THE WITNESS: No.

THE COURT: Ordered to commu--any community service?

THE WITNESS: Huh uh, no, I wasn't, sir.

THE COURT: Okay. Why did you go out there then?

THE WITNESS: They--I had to talk to some--some guy, I don't know his name and stuff, but he gave me a card of his--what--his name and stuff.

THE COURT: Do you ever have to appear out there again?

THE WITNESS: No.

THE COURT: Do you have a probation officer--

THE WITNESS: No.

THE COURT: --out at Juvenile Court?

Is there anybody out there that you have to talk to?

THE WITNESS: No.

MR. GRINDSTAFF: If I could voir dire the witness, your Honor.

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. GRINDSTAFF:

Q As a result of an alleged crime of passing some sort of forged instrument, did you have to go to Juvenile Court?

A Did I have to?

Q Right. The place out on--in South Salt Lake City?

A Yes. I went there.

Q You went there? And are you return there?

A No.

Q What happened when you went there?

A They just talked to me and told me that I was going to come up to the real--real judge and stuff like that, and said I was probably going to get a fine--fine or nothing like that, just be like a witness and stuff.

Q Have you been granted immunity--

A No.

Q --from charges? You have no written--nothing in writing or no promises made that you wouldn't be charged in the future?

A No.

THE COURT: I don't see any problem in going ahead with this witness at this point.

MR. GRINDSTAFF: Two problems, one is--obviously, we can't give him advice but--we're not his attorney, but potentially, looking at the --

THE COURT: Well, let me ask, is it the intention of the State to charge this defendant in Juvenile Court?

MR. VERHOEF: It's my understanding, Detective Mossier has just informed me that the charges were once filed in Juvenile Court but have been dismissed; isn't that right?

UNIDENTIFIED SPEAKER: That's correct.

THE COURT: Okay. And are you making a commitment now on behalf of the State that you're not going to file charges against the defendant in Juvenile Court based on this incident?

MR. VERHOEF: Yes, I will, your Honor. For the record,

the State will not charge this young man with the crime.

MR. GRINDSTAFF: Even if the State makes a statement on the record, the--the only grant of immunity that's valid under the statute's a written grant signed by the County Attorney himself, and again, I think that before--

THE COURT: Do you have any other problem, other than that?

MR. GRINDSTAFF: --we go forward, I think that he should probably has someone--if he has an attorney, I think if he doesn't, I think one should be appointed.

THE COURT: I don't see a problem at this point. I'm certainly going to hold the County Attorney to it, to the comment and commitment that's been made. I realize what you've said, under the statute, is correct, it's legally correct; but obviously, the County Attorney's Office is going to be hard-pressed to bring any action out at the Juvenile Court based on the statements that's been made by the Deputy County Attorney.

So at this point, I'll allow him to go forward with the examination of the witness. You've made your record.

MR. VERHOEF: Thank you, your Honor.

DIRECT EXAMINATION (Continuing)

BY MR. VERHOEF:

Q Brent, I think my question was, are you acquainted with the defendant, Thomas W. Schnoor?

A Yes. I am.

INSTRUCTION NO. 7

Although there is more than one person named in this action, the case against each person is separate from and independant of that of the other. In this action the only defendant on trial is Thomas W. Schnoor. You are not to concern yourselves with the status of any other person or defendant named in this case.

ORIGINAL

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE STATE OF UTAH,

PLAINTIFF, :

VS. :

: NO. 900330-CA

: CR90-574

THOMAS W. SCHNOOR, :

DEFENDANT. :

REPORTER'S TRANSCRIPT

HEARING OF MAY 1, 1990

BEFORE THE HONORABLE MICHAEL R. MURPHY

REPORTED BY GAYLE B. CAMPBELL, CSR, RPR.

ADDENDUM C

Q. ROBERT WHAT?

A. SPADE.

Q. ROBERT WHAT?

A. SPAN.

Q. SPAN?

A. I CAN'T SPELL THE LAST NAME. I DON'T KNOW. I HAVE TROUBLE -- KIND OF.

Q. WHY DON'T YOU LOOK AT THAT EXHIBIT IN FRONT OF YOU, EXHIBIT ONE. OKAY. NOW, LOOKING AT THAT EXHIBIT?

A. SPUD.

Q. WHAT?

A. SPUD.

Q. AND YOU HAVE LOOKED AT IT NOW, AND COULD YOU SPELL THAT NAME WITHOUT LOOKING AT IT AGAIN?

A. I CAN'T SPELL IT.

Q. WHAT'S DOES IT START WITH?

A. S.

Q. WHAT DOES IT END WITH?

A. E.

Q. WHAT'S THE LETTERS IN BETWEEN?

A. S. -- S. E. -- S. R. O U P. T.

Q. NOW, YOU ADMIT YOU TRIED TO FORGE A CHECK; RIGHT?

A. YES.

Q. AND YOU WERE PROMISED YOU WOULDN'T GO TO JAIL, RIGHT, IF YOU CAME AND TESTIFIED AGAINST TOM?

A. IF I WHAT? -- I DON'T GET IT.

Q. WEREN'T THERE PROMISES MADE TO YOU?

A. NO.

Q. NO? HAVE YOU BEEN CHARGED WITH THE CRIME? HAVE YOU HAD TO GO TO THE DETENTION CENTER?

A. NO. OH, YES, ONCE.

Q. THAT WAS RIGHT AFTER YOU WERE ARRESTED; RIGHT?

A. A FEW WEEKS -- ABOUT A WEEK LATER.

Q. ABOUT A WEEK LATER YOU WENT TO COURT; RIGHT?

A. YES.

A. WELL, IT'S NOT REALLY COURT. IT WAS --

Q. YOU WENT AND MET WITH POLICE OFFICERS?

A. I DON'T KNOW IF IT WAS A POLICE OFFICER.

Q. PROBATION OFFICER? FROM THE JUVENILE SYSTEM?

A. I THINK THAT'S WHAT IT WAS.

Q. DID THEY PROMISE YOU THAT IF YOU TESTIFIED AGAINST TOM, THEY WOULDN'T PRESS ANY CHARGES AGAINST YOU?

A. NO. NO, THEY DIDN'T.

Q. HAVE THEY PRESSED CHARGES AGAINST YOU?

MR. MORGAN: WE ARE PROCEEDING IN BAD FAITH. AT THIS POINT ALL OF THAT HAS BEEN ANSWERED ..

MR. GRINDSTAFF: I DON'T BELIEVE HE'S ANSWERED

THAT QUESTION.

THE COURT: HE CAN ANSWER THAT QUESTION..

THE WITNESS: WILL YOU REPEAT IT?.

Q. HAVE THERE BEEN CHARGES PRESSED AGAINST YOU?

A. UM, NO.

Q. NO. AND WHY HAVEN'T THERE BEEN CHARGES PRESSED AGAINST YOU?.

MR. MORGAN: OBJECTION. BEYOND THE PERSONAL KNOWLEDGE OF THE WITNESS. AS PHRASED.

THE COURT: YOU CAN ANSWER THE QUESTION, IF YOU KNOW.

THE WITNESS: I DON'T KNOW..

Q. YOU DON'T KNOW WHETHER OR NOT YOU HAVEN'T BE CHARGED BECAUSE OF YOUR TESTIMONY IN THIS CASE?

A. YES. I DON'T KNOW..

Q. YOU DON'T KNOW. YOUR WERE IN COURT FOR A PRELIMINARY HEARING, WEREN'T YOU? AND DIDN'T YOU HEAR THE PROSECUTOR REPRESENT TO YOU THAT THEY WOULD NOT FILE CHARGES AGAINST YOU? FOR YOUR TESTIMONY?

A. I CAN'T REMEMBER.

Q. ISN'T THAT WHAT HAPPENED?

MR. MORGAN: OBJECTION, YOUR HONOR. MAY WE APPROACH THE BENCH?

THE COURT: YOU MAY.

(BENCH CONFERENCE OFF THE

OJ = Morgan

RECORD.)..

Q. (BY MR. GRINDSTAFF) NOW, HAVE YOU BEEN TOLD THAT IF YOU DIDN'T TESTIMONY THAT YOU WOULD GO TO JAIL?

A. NO.

Q. NO? ABOUT A MONTH AND A HALF AGO, WASN'T IT TRUE THAT YOU AND YOUR SISTER SAT IN A ROOM WITH A POLICE OFFICER AND YOU TWO WERE TOLD THAT IF YOU DIDN'T COME OVER AND TESTIFY AGAINST TOM --

MR. MORGAN: OBJECTION. THIS IS GETTING ARGUMENTATIVE AND -- I MEAN, HE'S ASKED -- EACH TIME THE THE WITNESS HAS ANSWERED EACH TIME THAT HE HAS NOT BEEN OFFERED ANYTHING IN THIS CASE. NOW WE ARE GOING THROUGH TESTIMONY, I THINK, THAT IS GOING WAY COLLATERAL TO ANY ISSUES HERE.

THE COURT: WELL, I'M GOING TO OVERRULE THE OBJECTION ON THE PRESUMPTION THAT A THE QUESTION IS ASKED IN GOOD FAITH.

MEMBERS OF THE JURY, YOU REMEMBER WHEN THE JURY SELECTION PROCESS WAS GOING ON, AND I INDICATED TO YOU THAT WHAT COUNSEL SAYS IS NOT EVIDENCE. THE ONLY EVIDENCE IS WHAT WITNESSES SAY. THE MERE FACT THAT A QUESTION IS ASKED IN SUCH A WAY THAT IT MAY SOUND LIKE A STATEMENT FROM COUNSEL, IS THAT IS NOT EVIDENCE, AND I CAUTION YOU TO CONSIDER THAT AS WE PROCEED.

THE OBJECTION IS OVERRULED. YOU MAY PROCEED.

Q. (BY MR. GRINDSTAFF) DO YOU REMEMBER THE QUESTION?

A. YES, I DO?

A. NO..

Q. NO?

A. DID YOU SIT IN THE ROOM WITH YOUR SISTER AND POLICE OFFICERS?

A. NO.

Q. YOU NEVER SAT WITH ANY KIND OF POLICE INVESTIGATOR WITH YOUR SISTER?

A. NO, I DIDN'T.

Q. THIS WAS BEFORE PRELIMINARY HEARING? APPROXIMATELY ONE MONTH AGO, YOU NEVER SAT--

A. NO, I DIDN'T.

Q. SO IF YOUR SISTER CAME IN AND TESTIFIED DIFFERENTLY, THAT WOULDN'T BE TRUE?

A. NO.

Q. NOW, YOU MENTIONED THAT TOM SAID THAT YOU WEREN'T SUPPOSED TO MENTION HIS NAME.

A. YES.

Q. YOU SAID THAT HE IMMEDIATELY TOLD YOU, DON'T MENTION HIS NAME WHEN YOU CASH THE CHECK. WHEN YOU CASH A CHECK, WHY WOULD YOU MENTION HIS NAME?

A. IF YOUR GOING INTO CASH A CHECK? I DON'T GET IT.

ORIGINAL

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE STATE OF UTAH,

PLAINTIFF, :

VS. :

: NO. 900330-CA

: CR90-574

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