1993

State of Utah v. John B. Tenney : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	A10 DOCKET NO. 930778-CA
Plaintiff-Appellee,	:	Case No. 930778-CA
v.	:	
JOHN B. TENNEY,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

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DEFENDANT'S APPEAL OF CONVICTIONS FOR SELLING UNREGISTERED SECURITIES (12 COUNTS), AN UNCLASSIFIED FELONY UNDER UTAH CODE ANN § 61-1-7 (1986); SECURITIES FRAUD (12 COUNTS), AN UNCLASSIFIED FELONY UNDER UNDER UTAH CODE ANN. § 61-1-1 (1986); UNREGISTERED SECURITIES BROKER (ONE COUNT), AN UNCLASSIFIED FELONY UNDER UTAH CODE ANN. § 61-1-3 (1986); EMPLOYING UNREGISTERED AGENTS, AN UNCLASSIFIED FELONY UNDER UTAH CODE ANN. § 61-1-3(2) (1986), ENTERED UPON JURY VERDICTS IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, UTAH, THE HONORABLE TYRONE E. MEDLEY, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

Defendant John B. Tenney appeals his convictions for selling unregistered securities (12 counts), securities fraud (12 counts), being an unregistered securities broker (one count), and employing unregistered agents (two counts), all unclassified felonies under Utah Code Ann. §§ 61-1-7, 61-1-1, and 61-1-3 (1986). The convictions were entered upon jury verdicts in the Third Judicial District Court, in and for Salt Lake County, Utah, the Honorable Tyrone E. Medley, presiding. Tenney also appeals a restitution order entered upon one of the securities convictions. This Court has appellate jurisdiction under Utah Code Ann. §78-2a-3(2)(f) (Supp. 1994).

QUESTIONS PRESENTED AND STANDARDS OF APPELLATE REVIEW

The question whether Tenney was properly permitted to represent himself at trial is a threshold issue that also bears upon the resolution of the other issues on appeal. Accordingly, the State addresses the issues in the following order:

I. Whether the trial court properly granted Tenney's request to represent himself. Resolution of such a request is a decision about which of two constitutionally-guaranteed yet mutually exclusive rights will be honored. Therefore, a trial court's decision whether to permit self-representation is deferentially reviewed on appeal for "clear error." *State v. Drobel*, 815 P.2d 724, 734 (Utah App. 1991).

II. Whether the trial court properly denied Tenney's mistrial motion, made after the State had completed its case-in-chief, in which Tenney alleged prosecutor misconduct in opening statement. A trial court's ruling on a mistrial motion is reviewed with great deference. *See, e.g., State v. Hay*, 859 P.2d 1, 6 (Utah 1993); *State v. Gardner*, 789 P.2d 273, 287 (Utah 1989), *cert. denied*, 494 U.S. 1090 (1990); *State v. Speer*, 750 P.2d 186, 190 (Utah 1988); *State v. Cummins*, 839 P.2d 848, 853 (Utah App. 1992) (all stating "abuse of discretion" standard).

III. Whether there was "plain error" in permitting State's experts to testify whether Tenney's misstatements and omissions amounted to "material" misrepresentations under Utah's securities laws. "Plain error," argued on appeal when no trial-level objection preserved the legal issue in question, is a de novo determination. "Plain error" requires the appellant to prove "error," "obviousness," and "prejudice," in order to overcome the presumption that the underlying legal issue was waived by the failure to raise it at trial. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

IV. Whether there was "plain error" in the jury instructions. "Plain error" is explained under issue III, above.

V. Whether the trial court properly denied Tenney's new trial motion, based upon an out-of-court conversation about the case, during a trial recess, between a juror and one of Tenney's friends. Normally, a trial court's ruling on a new trial motion is deferentially reviewed on appeal. *State v. Pena*, 869 P.2d 932, 938 (Utah 1994); *State v. Wetzel*, 868 P.2d 64, 70 (Utah 1993). *But see Crookston v. Fire Ins. Exchange*, 860 P.2d 937, 938 (Utah 1993) (if new trial ruling turns on a legal premise, it will be reviewed nondeferentially).

VI. Whether the trial court properly ordered Tenney to pay $39,000 restitution to one of the securities fraud victims. Restitution orders are also reviewed deferentially for "abuse of discretion." *State v. Snyder*, 747 P.2d 417, 422 (Utah 1987); *State v. Twitchell*, 832 P.2d 866, 868 (Utah App. 1992).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Tenney has reproduced the following provisions in addendum A to his Brief of Appellant: U.S. CONST. amends. VI, XIV; Utah Code Ann. §§ 61-1-1, 61-1-3, 61-1-7, 61-1-13, 61-1-14, 76-3-201 (1986); Utah R. Crim. P. 17(j); Utah R. Evid. 702, 704. They will be so referenced, as appropriate, in this brief.

STATEMENT OF THE CASE

Tenney was charged with, and found guilty of, twenty-seven counts of violating Utah's securities laws: He was acquitted on two additional counts (R. 192-97). Tenney was

sentenced to prison terms of zero to three years for each of those unclassified felonies, in a combination of concurrent and consecutive sentencing that totalled fifteen years. The prison terms were suspended subject to probation conditions (*see* R. 795-99, copied in Br. of Appellant addendum C).

Following a post-trial hearing, Tenney was ordered to pay a total of $92,950 in restitution to ten of the fraud victims (R. 2503-04, copied in Br. of Appellant addendum E). Besides appealing the underlying convictions, Tenney also appeals $39,000 of the restitution order, involving one of those victims.

STATEMENT OF FACTS

Tenney does not challenge the sufficiency of the evidence supporting the guilty verdicts. The State thus recites the facts in abbreviated fashion, and in verdict-favoring light, *State v. Verde*, 770 P.2d 116, 117 (Utah 1989).

From 1986 through 1988, Tenney sold stock in a corporation called "Cellwest" (also called "ReCom") to a number of Utah investors; thirteen of those sales formed the basis for the charges in this case. Tenney, however, was not a registered securities broker or sales agent (R. 1399-1404; State's Exh. 94). In several instances, the stock sales were mediated for Tenney by Steven Rick Jensen or Steven Bowers, who also were not registered sales agents (R. 1059-60, 1064, 1119-20, 1311, 1340, 1358-60, 1399-1404 (State's 94), 1638-40). Additionally, the Cellwest (/ReCom) stock was not registered with the Utah Division of Securities, as required by law (R. 1460-67; State's Exh. 93).

The investors were persuaded to purchase Cellwest stock by a common sales pitch, with occasional variations, as follows: Cellwest was in the business of renting cellular telephones to rental car customers (R. 1119, 1139, 1158, 1226, 1236, 1255, 1266, 1295, 1312). Cellwest's stock would be "going public" or "coming out" on the open market soon (R. 1551-52), and its value would increase "substantially," to twice or more its sale price of $2.00 to $2.50 per share (R. 1120, 1140, 1159, 1202-03, 1236-37, 1361, 2110-11). This sales pitch, sometimes accompanied by a written Cellwest business plan and brochure (R. 1141, 1161-62 (State's Exhs. 36-37)), failed to disclose certain information required by law (R. 1163-64, 1204-05, 1228-30, 1238, 1475-78). However, Tenney spiced the deal by promising to buy back the Cellwest stock, six months later at the purchaser's option, at $5.00 per share (R. 1146, 1167, 1203, 1224, 1240, 1255, 1295, 1312-13, 1339, 1362).

Tenney's glittering promises about Cellwest were never honored (R. 1148, 1173, 1207, 1230, 1240, 1263, 1343, 1373-74). There was no evidence that Cellwest ever entered into any cellular telephone rental contracts with car rental agencies. Nor was Cellwest stock ever listed on any public stock exchange (R. 1208, 1173-74). Further, when asked to do so by several investors, Tenney (sometimes through spokesmen) refused to honor the buy-back agreement (R. 1173, 1207, 1240-41, 1300). In some such instances, Tenney attempted to placate investors by referring to vaguely-described delays in listing Cellwest on

stock exchanges, or by giving them additional Cellwest stock at no charge (R. 1170-73, 1209-11).[1]

Tenney's activities were eventually reported to the Utah Attorney General's Office, which successfully prosecuted him. He now appeals, raising numerous assignments of error. The facts pertinent to those alleged errors will be set forth under the appropriate argument points of this brief.

SUMMARY OF ARGUMENT

I. The trial court properly granted Tenney's request to represent himself. Tenney presented himself as well-educated, experienced in self-representation, and well-versed in securities law. He acknowledged his duty to master procedural rules, and further acknowledged the trial court's recommendation that he not proceed pro se. Under these circumstances, the trial court's ruling that Tenney knowingly and voluntarily chose self-representation should be affirmed.

II. Tenney's claim that the prosecutor committed misconduct in her opening statement also fails. Part of that claim is waived because Tenney never raised it in the trial court. The other part--whether misconduct was committed by reference to Cellwest investors not named in Tenney's criminal charges--was properly rejected by the trial court. Tenney demonstrates no abuse of discretion in the court's ruling that the reference was proper because it was made in reasonable

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[1]Investor Rocky Ulibarri was refunded his $1000.00 investment when his wife intervened on his behalf (R. 1322-23). There is a lesson in this, although not relevant to this appeal.

anticipation that supporting evidence would be admitted at trial. Nor does he demonstrate error in the court's ruling that because the State's other evidence was strong, reference to the other investors was not prejudicial.

III. Tenney's unpreserved challenged to State's expert witness testimony fails because he does not prove "plain error." He focuses only on the "error" component, without meaningfully briefing whether such alleged error was "obvious" or prejudicial. Nor could Tenney prove plain error if he briefed it: admission of the belatedly-challenged testimony was discretionary with the trial court, no case law at the time of trial squarely prohibited the testimony, and the State's other evidence was powerful.

IV. This Court should also reject Tenney's largely unpreserved challenges to various jury instructions. The only preserved challenge fails because Tenney improperly attempts to interject the common law doctrine of "agency" into instructions that defined securities "agent;" that term is statutorily defined, and therefore no common law-based modification is permissible. Tenney's six other unpreserved challenges fail because he uniformly does not prove the "prejudice" component of plain error, as settled precedent requires him to do.

V. Nor should this Court find abuse of discretion in the trial court's denial of Tenney's new trial motion, raised when Tenney discovered that during a trial recess, a trial juror had a conversation with one of Tenney's acquaintances. While the conversation was improper, it was very brief, and Tenney's

acquaintance spoke favorably of Tenney. Therefore, the conversation caused no prejudice against Tenney, who only fancifully speculates to the contrary.

VI. Finally, this Court should deny Tenney's partial challenge to the restitution order involving one of the defrauded Cellwest investors. Tenney's attempt to convert this issue into one of constitutional "due process" fails because he expressly permitted the restitution question to be tried by proffer. His claim that restitution should have been decided in a civil action also fails, because the legislature, in a statute that Tenney does not claim is unconstitutional, requires criminal courts to make restitution orders. And Tenney does not show clear error in the restitution calculation, supported by proffer plus documentary evidence.

ARGUMENT

POINT ONE

THE TRIAL COURT PROPERLY ALLOWED TENNEY TO REPRESENT HIMSELF AT HIS CRIMINAL TRIAL, AND TENNEY CANNOT EXPECT FAVORABLE TREATMENT ON APPEAL BECAUSE OF HIS PRO SE STATUS

Having expressly invoked his constitutional right to represent himself, *see Faretta v. California*, 422 U.S. 806 (1975), *State v. Bakalov*, 862 P.2d 1354 (Utah 1993) (per curiam) (*Bakalov II*), Tenney complains on appeal that the trial court erroneously allowed him to do so (Br. of Appellant at 53-61).[2] Self-representation must be allowed once a criminal defendant

[2]Tenney had backup, advisory counsel from the Salt Lake Legal Defender Association, which represents him now on appeal.

"voluntarily, knowingly, and intelligently" so chooses. *Bakalov II*, 862 P.2d at 1355. Tenney's argument, which this Court should reject, is that he did not voluntarily and knowingly choose self-representation.

A. The Standard of Review.

In *State v. Drobel*, 815 P.2d 724, 734 (Utah App. 1991), this Court held that a trial court's resolution of a self-representation request, encompassing the "knowing and voluntary" inquiry, will be reversed on appeal only if it is clearly erroneous.[3] The caveat for such deferential review is that the trial court must apply the correct legal standard in reaching its decision. *Id. See also State v. Bakalov*, 849 P.2d 629, 634 (Utah App. 1993) (*Bakalov I*). The typical legal error in such cases occurs when the trial court denies a self-representation request based upon the defendant's "best interest." *See Bakalov II*, 862 P.2d at 1355 n.1. No such error occurred in this case. Hence, the only issue is whether Tenney knowingly and voluntarily opted for self-representation.

Inquiry into this issue, which encompasses a waiver of the right to professional counsel, necessarily entails review of a unique set of circumstances. In *State v. Frampton*, 737 P.2d 183, 187-88 & n.12 (Utah 1987), the Utah Supreme Court approved a sixteen-point, federally-developed colloquy to guide this

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[3]In *Drobel*, 815 P.2d at 731-32 n.11, this Court observed that the term "intelligent" is surplusage, representing whether a defendant "knowingly," i.e., with full information and understanding, invoked self-representation. Therefore, the State's analysis in main text deletes the term "intelligent."

inquiry. In *Drobel*, 815 P.2d at 732, this Court followed suit (the *Frampton*-recommended colloquy is copied in appendix I of this brief). Because the "knowing and voluntary" standard ultimately asks whether the defendant elected self-representation "with eyes open," *Faretta*, 422 U.S. at 835, generous deference, implicit in the "clear error" standard, is appropriately due to a trial court's resolution of a self-representation request. *Cf. State v. Pena*, 869 P.2d 932, 937-39 (Utah 1994).[4]

B. No Clear Error.

Dangers of Self-Representation

Tenney argues that the trial court did not "advise [him] of the dangers and disadvantages of self-representation." Therefore, he continues, the court clearly erred in granting his self-representation request (Br. of Appellant at 54, 61). That argument cannot prevail.

In fact, the trial court's colloquy with Tenney (R. 2234-44, copied in Br. of Appellant addendum J), included proper warnings. The court observed that Tenney was not "informed and knowledgeable regarding the rules of evidence as it relates to criminal law issues, as well as the rules of criminal procedure," and inquired how Tenney would be able to "master those rules" as a pro se defendant (R. 2236). The court warned Tenney that if

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[4]Tenney oddly states that his self-representation should be reviewed for "plain error" (Br. of Appellant at 59-60). "Plain error" allows appellate review of a legal argument waived by default in the trial court. *State v. Verde*, 770 P.2d 116, 121 (Utah 1989). Plain error analysis is not needed in this case, because the question whether Tenney should have been allowed to represent himself was not waived; the trial court ruled on it.

found guilty, he could be sentenced to over a hundred years' imprisonment plus substantial fines (R. 2239-41). Given "the serious nature of the charges," the court advised Tenney against self-representation (R. 2244).

The foregoing colloquy conveyed, "in essence if not verbatim," *Drobel*, 815 P.2d at 732, at least six of the recommended points about self-representation risks, covering potential penalties for the charged offenses, the necessity that rules of evidence and procedure be followed, and a warning that self-representation is unwise (*see Frampton* inquiries (d), (e), (g), (h), (i), (j), (l) and (m), appendix I of this brief). The record shows that Tenney had no difficulty understanding those warnings. He nevertheless asserted, "with all due respect," his desire to represent himself (R. 2244).

Tenney also argues that the trial court warned him too late that he would be required to present his own testimony in question-and-answer form (Br. of Appellant at 59). The court so warned Tenney at the end of trial day four, whereupon Tenney himself acknowledged the distinction between question-and-answer testimony and the "narrative" approach he hoped to utilize (R. 1723-28, copied in appendix I). Tenney acknowledged the court's discretion, Utah R. Evid. 611, to decide how his testimony would be presented (R. 1725). That exchange makes it clear that Tenney was well aware, early in the trial, that he might not be allowed to testify in narrative form. Therefore, even if it would have been preferable to so warn Tenney before granting his self-

representation request, *see Frampton*, 737 P.2d 187-88 n.12 (admonishment (k)), that warning was unnecessary.[5]

And because the admonishments in *Frampton* are recommended, but not mandatory, no single point therein is a *sine qua non* for deciding a self-representation request. *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 224-27 (1973) (no "talismanic" factor exists for determining voluntariness of a confession or search consent). In this case, the trial court's warning that Tenney would need to master evidentiary rules (R. 2236) encompassed an expectation that Tenney would learn those rules sufficiently to properly present his own trial testimony. In sum, Tenney was adequately warned of the dangers and disadvantages of self-representation.

Other Supporting Circumstances

By other inquiries, the trial court further ascertained the Tenney knowingly and voluntarily chose self-representation. The trial court asked Tenney about his education, his experience as a pro se litigant, and his understanding about the "beyond reasonable doubt" standard for criminal guilt (*Frampton* inquiries (a), (b)). Tenney replied that he held a master's degree in business administration, and that he had represented himself in civil lawsuits related to other securities transactions (R. 2234,

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[5]Tenney's exchange with the trial court revealed a tactical reason for representing himself: "I would prefer the narrative approach simply because I want to impress the Jury with the fact that I am pro se" (R. 1724). In fact, he argued this point to the jury (R. 2180-83). This also supports the conclusion that Tenney knowingly and voluntarily invoked his self-representation right.

2235). While admitting that he was "certainly not an expert in the law," Tenney asserted that he knew the facts of the case better than the public defender whose services were offered to him, and that he was "a very quick study" regarding procedure (R. 2236-37).

Tenney further asserted, "I do understand securities laws because I have studied them extensively" (R. 2236). Under that law, Tenney expressed his intention to pursue the arguable defense that he lacked the necessary intent, or "security law scienter" to defraud his Cellwest investors (R. 2237); in fact, his defense centered on the asserted non-willfulness of his actions (R. 2183-84 ("'willfully' is the word on which I will win or lose this case, period")). *See Drobel*, 815 P.2d at 735 (defendant's recognition of legitimate defenses supported finding that he knowingly exercised self-representation right). Tenney concluded, "I believe I am not over-matched in this case because I come into court with a great deal of facts and the law on my side" (R. 2237). Under all these circumstances, the trial court properly, albeit tacitly, found that Tenney knowingly and voluntarily chose self-representation. *See id.* at 734 & n.20 ("knowing and voluntary" ruling inferred within grant of self-representation request).

Based upon its colloquy with Tenney, the trial court was probably accurate in commenting that it had "no choice" but to grant Tenney's self-representation request (R. 2244); the

request was knowingly and voluntarily made. *Bakalov II*, 862 P.2d at 1355. This Court should affirm the grant of that request.

C. No Favorable Appellate Treatment.

There is an additional consequence--more accurately, lack of consequence--that flows from the affirmance of Tenney's self-representation request. This Court should reject Tenney's implicit suggestion that because he proceeded pro se at trial, settled principles of waiver and default should be relaxed for his benefit on appeal. See, e.g., Br. of Appellant at 24 n.2 (prosecutor and trial court should have limited State's evidence on behalf of "Tenney, a pro se defendant"); *id.* at 44 (arguing plain error "in the context of this pro se case"). For two reasons, that suggestion is incorrect.

First, because Tenney cannot argue his own ineffectiveness as counsel, *Faretta*, 422 U.S. at 834-35 n.46, *Frampton*, 737 P.2d at 189, he ought not be allowed more leniency to argue "plain error." The doctrines of counsel ineffectiveness and plain error can allow appellate relief from legal errors that were waived by default at trial; however, both doctrines require the appellant to carry a heavy burden of proof. *Parsons v. Barnes*, 871 P.2d 516, 523 (Utah 1994); *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993). This Court ought not lighten Tenney's appellate burden of proving plain error: to do so would permit him an improper end run around the bar against arguing "pro se ineffectiveness."

Second, in this case Tenney affirmatively claimed that he had particular expertise in securities law, that he was a "quick study" who would easily learn trial procedure, and that he had thorough factual knowledge of the transactions that were the subject of his prosecution. In hindsight, those claims may seem unwise. *Cf. Drobel*, 815 P.2d at 734-35. However, the self-representation right is not based upon fair trial concerns; rather, it embodies the criminal defendant's "personal right to be a fool." *Id.* at 736 (quoting *State v. Hoff*, 31 Wash. App. 809, 644 P.2d 763, 764 (1982)). This Court ought not relieve Tenney of the natural consequences of voluntary choice.

Among those consequences is the waiver, on appeal, of legal arguments not raised in the trial court. That bar should be as high for Tenney as it is for a professionally-represented defendant. In the points that follow, the State asserts that bar where applicable, and addresses his "plain error" arguments no differently than if Tenney had been professionally represented at trial. We ask this Court to do the same.

POINT TWO

THE TRIAL COURT PROPERLY REJECTED TENNEY'S BELATED OBJECTION TO THE PROSECUTOR'S OPENING STATEMENT

In his opening point on appeal, Tenney argues that the prosecutor committed "misconduct" by referring, in opening statement, to Cellwest investors other than those who were the subject of the prosecution, and to the total money invested by all the investors. The reference was as follows:

> Ladies and gentlemen, good afternoon. This is a case about innocent, hard-working people who got taken in a securities scam. They got taken by a smooth-talking salesman who sold them stock that wasn't worth the paper it was written on. The defendant, John Tenney, deliberately defrauded dozens of decent people, 333 people, mostly citizens of Utah, bought Cellwest stock for somewhere between 4 million and $11 million. So the State has charged him with 29 counts of violating the Utah Blue Sky Law. That is the Utah Uniform Securities Act, and we will talk about the Blue Sky Law a little bit later. While Tenney was collecting all of that money, investors were losing their shirts.

(R. 998). Tenney also complains that the prosecutor's opening statement description of the loss suffered by one Cellwest investor, James Zieglowsky, was improper "victim impact evidence" (Br. of Appellant at 19-20).

Tenney did not object to the above statements when they were made. However, soon thereafter, during Tenney's opening statement, the trial court admonished the jury that statements and arguments of counsel are not evidence:

> Let me give you this admonition. Whether it be the State's opening statement, Mr. Tenney's opening statement, the closing statements that you are going to hear at the end of the case, as well as the closing rebuttal argument, it is important for you to understand that those statements in and of themselves are not evidence in this particular case. Those statements are solely designed to assist you in understanding and interpreting what you believe the evidence to be.

(R. 1097). That admonition was repeated during Tenney's closing argument (R. 2182), and in the jury instructions (R. 689).

Tenney did not object to the prosecutor's opening statement until three trial days after it was made, when he moved for a mistrial after the State had completed its case-in-chief

(R. 579-80, 1671-81 (copied in appendix II of this brief)). As ground for his motion, Tenney asserted the trial court's exclusion, well after opening statements, of the State's list of all Cellwest investors (R. 579-80, 1672-73). The trial court, analyzing Tenney's mistrial motion under *State v. Troy*, 688 P.2d 483 (Utah 1984) properly denied the motion (R. 1681).

A. "Victim Impact" Reference: Waiver.

Tenney's appellate challenge to the prosecutor's "victim impact" reference--i.e., the description of James Zieglowsky's financial loss--fails because Tenney never challenged that reference in the trial court. His mistrial motion assailed only the statements about the number of Cellwest investors (see appendix II). Therefore, the trial court never had an opportunity to rule on the "victim impact" reference. *See State v. Johnson*, 821 P.2d 1150, 1161 (Utah 1991). On appeal, Tenney briefs no exception to the waiver bar against this challenge; therefore, this Court should reject it. *See State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994); *U.S. Xpress, Inc. v. State Tax Comm'n*, 886 P.2d 1115, 1119 (Utah App. 1994) ("It is well settled that, absent extraordinary circumstances or plain error, issues cannot be raised for the first time on appeal").

B. "Other Investors" Reference: No Abuse of Discretion.

However, the trial court did reach the merits of Tenney's belated challenge to the prosecutor's statement about Cellwest investors not involved in this criminal case. It therefore appears that this Court should address the merits on

appeal. *See State v. Seale*, 853 P.2d 862, 870 (Utah) (when legal issues raised first raised in a new trial motion are addressed on their merits by trial court, waiver is removed), *cert. denied*, ___ U.S. ___, 114 S. Ct. 186 (1993); *State v. Lucero*, 866 P.2d 1, 2 n.3 (Utah App. 1993) (same).[6]

Review on the merits begins with identification of the standard of appellate review. As set forth in this brief's statement of issues, the law is settled that a trial court's ruling on a "prosecutor misconduct"-based mistrial motion is reviewed under the deferential "abuse of discretion" standard. *See, e.g., State v. Hay*, 859 P.2d 1, 6 (Utah 1993). There is no question that the trial court applied the governing legal standard, set forth in *Troy*, 688 P.2d at 485-86, to its discretionary decision: on appeal, Tenney himself invokes *Troy* (Br. of Appellant at 21, 23, 25).

Troy sets forth a two-step, "misconduct plus prejudice" analysis of alleged prosecutor misconduct: (1) whether the prosecutor called jurors' attention to matters that could not justifiably be considered in reaching a verdict; (2) if so, whether the jurors, under "the circumstances of the case as a whole," were probably influenced by the prosecutor's remarks. 688 P.2d at 486 (quoting *State v. Valdez*, 30 Utah 2d 54, 513 P.2d 422, 426 (1973)). The second step includes inquiry into the

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[6]*But see State v. Tillman*, 750 P.2d 546, 561 (Utah 1987) ("[I]t is the rule that if improper statements are made by counsel during a trial, it is the duty of opposing counsel to register a *contemporaneous* objection thereto . . ." (emphasis added)).

strength of the State's case: the stronger the evidence, the less likely it is that the jurors were influenced by the prosecutor's remarks. *Id.* Applying *Troy*, the trial court properly denied Tenney's mistrial motion.

No Misconduct

First, the court legitimately determined that the prosecutor's remarks about the number of Cellwest investors and the total money invested did not involve matters that could not be considered by the jury (R. 1679-80). "Other acts" evidence is relevant to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Utah R. Evid. 404(b); *State v. O'Neil*, 848 P.2d 694, 699-701 (Utah App.), *cert. denied*, 859 P.2d 585 (Utah 1993). In this case, Tenney raised a "no intent" defense (R. 2183-85, 2237), making evidence of his other Cellwest securities transactions relevant, and thus presumptively admissible.[7]

Unfortunately, the trial court excluded State's exhibits 88 and 89, which listed over 300 Cellwest investors, and were offered to prove Tenney's scheme and intent to defraud (R. 1434-40, copied in appendix III). The court did not deny the State's argument that the investor list was relevant for that purpose. However, the court excluded the list upon determining, under Utah R. Evid. 403, that its relevance was substantially

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[7]Tenney also placed his other acts into issue when, during his opening statement, he described an allegedly similar, successful business venture: "That company was extremely successful. We had 3,700 shareholders. The stock went from 10 cents a share to $25 a share. Went up 250 times in 14 months" (R. 1006).

outweighed by the danger of unfair prejudice: "[T]his Court is of the opinion that while the evidence may, in fact, be relevant, Ms. Barlow, that the prejudicial effect of this evidence far outweighs its probative value" (R. 1439).[8]

Under these circumstances, the prosecutor did not commit misconduct in her opening statement that there were over three hundred Cellwest investors. Having reason to believe that the investor list would be admitted because it was relevant, the prosecutor appropriately stated the facts that the list would prove. *State v. Williams*, 656 P.2d 450, 452 (Utah 1982). She had neither the ability nor the duty of clairvoyance to predict the trial court's subsequent discretionary exclusion of that evidence under rule 403. The trial court recognized this:

> Despite the fact that at this stage, anyway, the Court did not allow into evidence State's proposed Exhibits 88 and 89, which I believe are alleged to be Stockholders Lists, the statements made by the Prosecutor in this particular case, in this Court's opinion, was [sic] made on reasonable reliance that the evidence regarding those lists would come into evidence.
>
> And hindsight is always 20/20, obviously. And despite the fact that that evidence was not received, the Court is not of the opinion that the Prosecutor was attempting to call to the attention

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[8]Tenney never denied that the list, which had been maintained by his own office staff, reasonably reflected the number of Cellwest investors; he argued instead that it was not known to be perfectly accurate because "we have had some problems with our stockholder's list," and that there were "at least three or four versions of the list" (R. 1435, 1436-37).

> of the Jury matters that were clearly outside of the evidence.

(R. 1679-80).[9]

The trial court also distinguished *Troy*, in which the prosecutor committed misconduct by repeatedly making irrelevant, prejudicial statements to the jury (R. 1680). In this case, the challenged prosecutorial statement occurred one time, and dealt with relevant evidence. The court therefore did not abuse its discretion in finding no prosecutor misconduct.[10]

Attempting to prove an abuse of discretion, Tenney briefs at length the question whether "bad faith" is an element of prosecutor misconduct (Br. of Appellant at 24-26). Because Tenney's mistrial motion never mentioned this question, and because he raises no exception to the rule of waiver, this Court ought not reach it. *U.S. Xpress,*, 886 P.2d at 1119. And as follows, the question need not be reached because Tenney fails to show prejudice caused by the challenged statement. *See State v. Lafferty*, 749 P.2d 1239, 1255 n.13 (Utah 1988), *vacated on other grounds*, 949 F.2d 1546 (10th Cir. 1991).

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[9]Thus Tenney incorrectly asserts that "the State apparently knew at the time it made its opening statement that the list was not admissible" (Br. of Appellant at 20 n.1). The trial court found to the contrary.

[10]In *Troy*, 688 P.2d at 485-86, the prosecutor insinuated that the defendant operated under an aliase, when in fact he had obtained a legal name change. The prosecutor also improperly alluded to the defendant's placement in a witness protection program, as well as to an apparent past criminal accusation against him. In closing argument, the prosecutor analogized the defendant to John Hinckley (attempted presidential assassin), and invited jurors to apply their own experiences in deciding the case.

No Prejudice

The trial court also properly applied the *Troy* "prejudice" inquiry, finding no reasonable likelihood that the challenged prosecutor statement would sway the jury. Reviewing all the circumstances, the court found the State's admitted evidence to be strong, and observed that the jury had been admonished to not treat counsel statements as evidence:

> *Troy* basically says that when the evidence is thin and it's more likely that the jury is going to be swayed by improper remarks, then the threshold of prejudice is a little easier met.
>
> On the other hand, where the evidence is sufficiently compelling--and this Court is of the opinion that the evidence is sufficiently compelling. This Court is not convinced that the statements will have any prejudicial effect, considering the other compelling evidence that has been received consistent with the elements of the counts charged in the information.
>
> Also taking into consideration that the Court did give an admonition to the Jury instructing them, the fact that the opening statements made by the parties were, in fact, not evidence and should not be construed as evidence by the Jury.

(R. 1681).

On appeal, Tenney does not squarely challenge the foregoing ruling. Instead, he asserts in conclusory fashion that the allegedly improper opening statement "set the tone for the entire trial" (Br. of Appellant at 28-29). He overlooks the testimony of thirteen investors who bought Cellwest stock in reliance upon Tenney's misrepresentations of information that was significant to the purchase decisions (e.g., R. 1177, 1231, 1242, 1268); the State's experts similarly opined that Tenney made

significant mispresentations in his Cellwest sales pitch (R. 1468-78, 1596-1603.

The trial court found that evidence compelling, and Tenney does not demonstrate error in that finding. *Compare State v. Emmett*, 839 P.2d 781, 785-86 (Utah 1992) (prosecutor improperly used the defendant's forgery conviction for purpose beyond impeaching his testimony; other evidence of guilt, in prosecution alleging sodomy upon defendant's child, was "not compelling"). Nor does Tenney question the presumption that the jurors obeyed their admonition to decide the case solely upon the evidence. *State v. Menzies*, 889 P.2d 393, 401 (Utah 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 910 (1995). *Accord State v. Span*, 819 P.2d 329, 334-35 (Utah 1991) (prejudice insufficient to require reversal, even though misconduct involved knowing violation of order to not pursue certain line of questioning); *State v. Erwin*, 120 P.2d 285, 313 (Utah 1941) (improper opening statement cured by repeated admonition that counsel statements are not evidence).[11]

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[11]*See also Lafferty*, 749 P.2d at 1254-55 (inaccurate comment about manner of murder did not warrant reversal because the other evidence of guilt was "overwhelming"); *State v. Williams*, 656 P.2d 450 (Utah 1982) (improper argument did not warrant reversal because of defendant's testimony admitting that he committed the robbery in question).

The non-Utah, non-controlling authority cited by Tenney is also distinguishable. *E.g.*, *State v. Echevarria*, 860 P.2d 420 (Wash. App. 1993) (repeated references to "war on drugs," and "battlefield of our own streets" improperly "set the tone for the entire trial"); *United States v. Stahl*, 616 F.2d 30, 32-33 (2nd Cir. 1980) (prosecutor made "persistent appeal to class prejudice" based upon the defendant's wealth). And *State v. West*, 617 P.2d 1298 (Mont. 1980), appears flawed (prosecutor referred to expected hearsay evidence under "unavailable witness" rule, after the

To borrow his own adjective (Br. of Appellant at 23), Tenney's appellate effort to prove error in the trial court's ruling is "feeble." He alleges prejudicial error, but does not prove it. Therefore, this Court should affirm the denial of Tenney's "prosecutor misconduct"-based mistrial motion.

POINT THREE

THERE WAS NO "PLAIN ERROR" IN STATE'S EXPERT TESTIMONY ABOUT THE "MATERIALITY" OF TENNEY'S MISREPRESENTATIONS UNDER THE UTAH UNIFORM SECURITIES ACT

Tenney next argues that two State's expert witnesses were improperly allowed to give their opinions whether Tenney's Cellwest sales pitch violated the Utah Uniform Securities Act. Admitting that he did not object to the testimony at trial, Tenney concedes that his appellate challenge must be briefed as "plain error" under *State v. Dunn*, 850 P.2d 1201 (Utah 1993) (Br. of Appellant at 3, 5, 35). Plain error has three components: (1) error; (2) obviousness; (3) prejudice, i.e., a reasonable likelihood of a more favorable verdict absent the error. The appellant must prove all three components. *Dunn*, 850 P.2d at 1208-09. Tenney has not carried his burden of proof.

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defendant's in limine motion to exclude same had been *denied*; appellate court ruled, after-the-fact, that prosecutor should not have referred to that evidence). In *United States v. Johnson*, 767 F.2d 1259 (8th Cir. 1985), the court disapproved an opening statement that characterized the defendant as "a thief," but found no "plain error," given that objection was not made until seven days later. Finally, in *State v. Kenny*, 319 A.2d 232 (N.J. App. 1974), the appellate court condemned, in dictum, prosecutor opening statement and closing argument that "went beyond the evidence and the indictment," *id.* at 241; the conviction was reversed on another ground, *id.* at 240 (the defendant had been granted immunity in exchange for his testimony in a related federal case).

A. Waiver of Appellate Argument.

Most fundamentally, Tenney fails to brief plain error. He focuses on the alleged impropriety of the State's expert testimony--i.e., the "error" component of *Dunn* (Br. of Appellant at 30-35), and mentions obviousness and prejudice only as afterthoughts, in two brief sentences (Br. of Appellant at 35). His failure to adequately brief prejudice is especially surprising, because even errors preserved by timely objection do not warrant appellate reversal unless they cause prejudice. *State v. Verde*, 770 P.2d 116, 120 (Utah 1989).[12]

In short, Tenney fails to support this point of his appeal with the "argument" required by Utah R. App. P. 24(a)(9). Utah's appellate courts do not entertain such bare allegations of prejudicial error. *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988) (appellate court is "not simply a dumping ground in which the appealing party may dump the burden of argument and research" (quotation and citation omitted)); *State v. Amicone*, 689 P.2d 1341, 1344 (Utah 1984) ("Since the defendant fails to support this argument by any legal analysis or authority, we decline to rule on it"); *State v. Yates*, 834 P.2d 599, 602 (Utah App. 1992) ("This court has routinely declined to consider arguments which are not adequately briefed on appeal"). Upon this settled

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[12]Tenney's one-sentence "prejudice" claim asserts that the expert testimony "was prejudicial in that the expert witness instructed the jury that certain elements were established" (Br. of Appellant at 35). That sentence simply substitutes the term "prejudicial" for "error."

principle alone, this Court should reject Tenney's "plain error" challenge to the State's expert testimony.

B. No Plain Error.

Tenney could not prove plain error even if he properly attempted to do so. He complains that State's experts Krendl and Nielsen should not have been allowed to opine that Tenney's misrepresentations about Cellwest were "material" under the Utah Uniform Securities Act--specifically, Utah Code Ann. § 61-1-1(2) (1986) (Br. of Appellant addendum A). He argues that although the experts could have testified that the misrepresentations were "important or significant to an investor," they should not have been allowed to use the statutory term "material" to describe them (Br. of Appellant at 30, 34-35).

No Error

This assertion of error fails because the admissibility of expert testimony is a matter of "wide" trial court discretion. *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993) ("*Larsen II*"). Such discretion is allowed because there is no "bright line" between admissible expert testimony that "embraces an ultimate issue," Utah R. Evid. 704, and inadmissible testimony that "tell[s] the jury what result to reach." *Davidson v. Prince*, 813 P.2d 1225, 1231 (Utah App.), *cert. denied*, 826 P.2d 651 (Utah 1991). *Accord Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983) ("[t]he task of separating impermissible questions which call for overbroad or legal responses from permissible questions is not a facile one"). In this case, the trial court

could have reasonably ruled that the experts' use of the term "material" did not tell the jury what verdict to reach; under the "abuse of discretion" standard, such ruling would not clearly be held erroneous on appeal.

No Obviousness

Nor could Tenney prove obviousness. Absent bright-line standards, improper expert testimony will rarely, if ever, be "obviously" so. *Davidson v. Prince*, relied upon by Tenney, stating that an expert cannot opine that a personal injury defendant was negligent, does not set "obvious" limits on expert testimony in a securities case, based upon a distinctive body of law. This Court's *Larsen I* opinion, *State v. Larsen*, 828 P.2d 487, 493 (Utah App. 1992), held that "use of the term 'material' may be admitted as permissible fact-oriented [expert] testimony," and thus permitted the testimony in this case. Finally, *Larsen II*, which discourages use of the term "material" by experts in a securities case, 865 P.2d at 1361 & n.10, was not decided until December 1993--six months after Tenney's trial ended.[13] Therefore, even if experts might have erroneously testified about

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[13]Tenney's single-sentence "obviousness" assertion states: "This error was obvious under *Larsen I*, *Larsen II*, and *Davidson*" (Br. of Appellant at 35).

In *Larsen II*, the Utah Supreme Court stated that the State's expert "certainly should have avoided employing the specific term 'material.'" But the court then held that the expert's use of the term did "not mandate the conclusion that he was improperly instructing the jury on the law," and that the defendant's complaint about the use of the word "material" was "unduly formalistic." 865 P.2d at 1362. Thus the court did not squarely answer the question whether the experts could use the term "material," as held by this Court in *Larsen I*.

"materiality" in this case, such error could not have been obvious at the time of trial. *See Dunn*, 850 P.2d at 1208.

No Prejudice

Finally, Tenney could not prove prejudice caused by the State's expert testimony. The gist of the challenged testimony was that Tenney's misrepresentations were "material" because they "could have been important or significant to an investor," *Larsen II*, 865 P.2d at 1361. See R. 1471 (stating that "material information is the information that a reasonable investor would want to know in making an investment decision"); R. 1597 (opining that information is "material" when it carries "a substantial likelihood that a reasonable investor would find it important"). However, the Cellwest investors who testified at Tenney's trial also powerfully conveyed that information: each testified that Tenney's sales pitch, with its misrepresentations, had influenced the investment decision (e.g., R. 1177, 1231, 1242, 1268). That testimony gave the jury ample basis to find that Tenney's misrepresentations were, in fact, "material." Accordingly, had expert testimony been limited along the lines now urged by Tenney, there is no likelihood of a better verdict for him. Thus no component of "plain error" exists on this point.[14]

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[14]The non-Utah cases cited by Tenney are off-point because each involves contemporaneous, trial-level objections, and thus "plain error" is not implicated. *United States v. Scop*, 846 F.2d 135, 142 (2nd Cir. 1988), a securities fraud case, condemned an expert's "repeated use of statutory and regulatory language indicating guilt" (expert used the term "fraudulent manipulative practices" to describe the defendant's conduct, *id.* at 138). *United States v. Leuben*, 816 F.2d 1032 (5th Cir. 1987), as modified, is academically interesting in that the Fifth Circuit therein held that the

POINT FOUR

THERE WAS NO REVERSIBLE ERROR IN ANY OF THE JURY INSTRUCTIONS CHALLENGED BY TENNEY, MOST OF WHICH HE CHALLENGES FOR THE FIRST TIME ON APPEAL

Tenney next raises five challenges to the jury instructions given at his trial. Conceding that all but part of his first such challenge were never made in the trial court, Tenney admits that they must be briefed for "plain error" under *Dunn*, 850 P.2d at 1208-09 (Br. of Appellant at 38, 42, 44, 49, 51, 53) (the *Dunn* three-part test for plain error is set forth in Point Three of this brief). Once again, Tenney has not proven prejudicial error--plain or otherwise.

A. There Was Neither Error Nor Plain Error in the Jury Instructions that Defined "Employing an Unregistered Agent."

1. "Employed as his Agent" (preserved challenge).

Tenney's first instructional challenge asserts that the trial court inadequately instructed the jury on the elements of the crime of employing unregistered securities agents. As framed by Tenney, this challenge encompasses two subissues--one preserved, one not. In the preserved subissue, Tenney challenges instructions No. 41 and 42, pertaining to his employment of Steven Rick Jensen and Steven Bowers to sell Cellwest stock. In pertinent part, those instructions stated:

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question of "materiality" is decided by the judge, not the jury; so modified, the opinion upheld the prior judgment, 812 F.2d 179, that *defense* testimony about "materiality," in a false loan application prosecution, was properly *excluded*. *Owen v. Kerr-McGee Corp.*, 698 F.2d 236 (5th Cir. 1983), involved testimony about contributory negligence, well off-point from a securities case.

> In order for you to find the defendant, John B. Tenney, guilty of the crime of **"EMPLOYING AN UNREGISTERED AGENT"**, as alleged in Count Twenty-eight (28) [/ 29] of the Amended Information, you must find from the evidence all of the following elements of the crime:
>
> 1. Sometime subsequent to April 17, 1987, in the State of Utah, John B. Tenney, a broker-dealer or issuer:
>
> 2. Willfully;
>
> 3. Employed Steven Rick Jensen [/Steven Bowers];
>
> 4. To offer or sell any security;
>
> 5. To [the specified Cellwest stock purchasers];
>
> 6. When Steven Rick Jensen [/Steven Bowers] was not licensed as an agent with the Utah Division of Securities.

(R. 741-42, boldface caps in original, copied in Br. of Appellant addendum K). Tenney preserved this part of his instructional challenge by asking the trial court to modify element number 3 of instructions 41 and 42, to state that he "Employed Steven Rick Jensen [/Steven Bowers] *as his agent*" (R. 374-75, emphasis in original). The trial court denied that request, evidently accepting the State's argument that the phrase "as his agent" would improperly import common law "agency" doctrine into the law that governs this case (R. 668).

That decision was correct. Utah Code Ann. § 61-1-13 (1986) (Br. of Appellant addendum A) defines "agent" for purposes of the Utah Uniform Securities Act, under which Tenney was prosecuted:

> (2) "Agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" does not include an individual who represents an issuer, who receives no commission or other remuneration, directly or indirectly, for effecting or attempting to effect purchases or sales of securities in the state, and who:
>
> (a) effects transactions in securities exempted by Subsection 61-1-14(1)(a), (b), (c), (i), or (j);
> (b) effects transactions exempted by Subsection 61-1-14(2); or
> (c) effects transactions with existing employees, partners, officers, or directors of the issuer. . . ..

It is a black-letter rule that specific statutory provisions control over general ones. *State v. Moore*, 802 P.2d 732, 737 (Utah App. 1990). Additionally, because Utah does not recognize common law crimes, *see* Utah Code Ann. § 76-1-105 (1995), it appears that trial courts have no authority to import common law elements into statutorily-defined crimes.

Therefore, in this case, it would have been improper to add the phrase "as his agent" to jury instructions 41 and 42. All that the law required was that Tenney employed Jensen and Bowers to sell Cellwest stock, and that Jensen and Bowers, although not duly licensed, were "agents" as defined in Utah securities law. Tenney's proposed instructional modification would have confused the case by interjecting an inapplicable common law term; at best, the phrase "as his agent" would have been redundant. The trial court therefore correctly denied Tenney's request to add that phrase to the instructions.

2. Definition of Agent (unpreserved).

In the second part of this instructional challenge, Tenney argues that jury instruction 45 did not fully define "agent" as set forth in section 61-1-13(2), above. Instruction 45 defined "agent" as "any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities" (R. 746, copied in Br. of Appellant addendum K). The instruction did not include the statute's exclusion of certain non-compensated persons, acting under the circumstances delineated in subsections (2)(a), -(b), and -(c), from the "agent" category. Because he did not challenge instruction 45 in the trial court, Tenney again invokes "plain error" (Br. of Appellant at 38-40).

No Prejudice: Tenney's Appellate Mistake

Like his claim discussed in Point Three of this brief, Tenney again gives only single-sentence treatment to the "obviousness" and "prejudice" components of plain error under this point (Br. of Appellant at 39-40). Tenney's treatment of the especially-critical "prejudice" component deserves special mention, because it reflects a fundamentally mistaken view of plain error. Tenney's mistake defeats this plain error point, and all of his subsequent plain error arguments.

Tenney mistakenly believes that he need not prove the prejudice component of plain error. That mistake is reflected in his assertion of prejudice under this point:

> [T]he error was prejudicial because the jury could have convicted Tenney of "Employing Unregistered

> Agents" without making a finding that Tenney employed Bowers or Jensen "as an agent" as required and defined by the Act. *See Dunn*, 850 P.2d at 1209 ("error was prejudicial because [the Court] cannot be sure that the jury did not convict Dunn on the basis of a reckless mental state alone").

Br. of Appellant at 40. As his parenthetical quotation of *Dunn* indicates, Tenney espouses a "cannot be sure" standard for plain error prejudice; i.e., if this Court "cannot be sure" that the belatedly-alleged error *did not* affect the verdict, it should find reversal-justifying prejudice.

That standard is incorrect. The "cannot be sure" standard, utilized by Tenney with no reference to the evidence in this case, is really equivalent to the standard for finding that *preserved, constitutional* error is harmless. Under such circumstances, the appellant benefits from a presumption that the error was harmful. To uphold the judgment, the appellee must prove that the error was harmless beyond reasonable doubt. *See, e.g., Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Verde*, 770 P.2d 116, 121 n.8 (Utah 1989).

But the correct standard for prejudice under "plain error," whether constitutional or non-constitutional in nature, is the "reasonable likelihood" or "confidence undermining" standard actually stated in *Dunn*, 850 P.2d at 1208-09. *State v. Powell*, 872 P.2d 1027, 1031 (Utah 1994); *State v. Archambeau*, 820 P.2d 920, 922-26 & nn. 2-10 (Utah App. 1991). As explained in Point Three of this brief, even *preserved* non-constitutional error requires the appellant to prove prejudice under the

"reasonable likelihood" standard in order to win appellate relief. Tenney, who never alerted the trial court to the errors of which he now complains, cannot lay claim to an easier showing of prejudice than defendants who obey the contemporaneous objection rule. *See Dunn*, 850 P.2d at 1220.

An understanding of "reasonable likelihood" comes from "counsel ineffectiveness" analysis, which (except for unusual situations not applicable to this case) utilizes this same standard for prejudice. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984); *State v. Verde*, 770 P.2d 116, 124 & n.15 (Utah 1989); *State v. Ellifritz*, 835 P.2d 170, 174 (Utah App. 1992). The standard requires that prejudice be a "demonstrable reality," and not mere speculation. *Parsons v. Barnes*, 871 P.2d 516, 526 (Utah 1994). Like a defendant who claims trial counsel ineffectiveness, the plain error claimant must demonstrate how, in his or her particular case, the unpreserved error affected the trial court outcome. *See, e.g., State v. Templin*, 805 P.2d 182, 187 (Utah 1990) (prejudice proven by demonstration that counsel mistake "affected the entire evidentiary picture").

Tenney apparently relies upon *State v. Jones*, 823 P.2d 1059 (Utah 1991) to excuse his failure to brief plain error prejudice (Br. of Appellant at 4, 39). *Jones* is unavailing to him. *Jones* held that "the complete absence of an elements instruction on a crime charged" "can never be harmless error," and therefore requires reversal as a matter of law, even absent an objection in the trial court. *Id.* at 1061.

But Tenney's unpreserved instructional challenges do not involve a "complete absence" of elements instructions. Rather, he complains of the lack of instructions pertaining to a defense that does not apply to his case (this point), or of allegedly incomplete definitions of certain terms in other instructions. These are far lesser problems than existed in *Jones*, 823 P.2d at 1061, in which only an "information instruction" was given, causing per se prejudice. Tenney's "plain error" arguments therefore require the case-specific, "reasonable likelihood" showing of prejudice, stated in *Dunn*.

Returning to his challenge to jury instruction 45, defining "agent," Tenney's plain error argument fails because he makes no case-specific showing of prejudice.[15] He makes no effort to prove that had instruction 45 included the statutory exclusions from the definition of "agent," a better verdict would have been returned on any of the charges against him. To put it differently, he proves no reasonable likelihood that the jury would have found Bowers and Jensen to fall within any of the statutory exclusions. For this reason alone, Tenney's plain error-based argument on this point fails.

No Error, Nor Obviousness

Were it proper to reach the question, this Court would find no error in the instruction's definition of "agent." It is

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[15]Additionally, Tenney's citations to non-Utah authority (Br. of Appellant at 39) cannot prove plain error as defined in *Dunn*. However other jurisdictions may define "plain" or "fundamental" error, they do not provide Tenney an end-run around Utah's three-element *Dunn* "plain error" analysis.

proper to deny a lesser-included offense instruction when no evidence supports it. *State v. Baker*, 671 P.2d 152, 157-59 (Utah 1983). It is also proper to delete other types of instructional language that is unsupported by evidence in the case. *See, e.g.*, *Anderson v. Toone*, 671 P.2d 170, 174 (Utah 1983) (error to give "assumption of risk" language in a negligence case, when there was no evidence plaintiff knew about risks of activity in question), *overruled on other grounds*, *Randle v. Allen*, 862 P.2d 1329, 1334-36 (Utah 1993). In this case, Tenney identifies no evidence that either Jensen or Bowers might have come within the section 61-1-13(2) exclusions from the definition of "agent;" instead, he simply recites that he asserted such a defense (Br. of Appellant at 38; R. 757).

That failure is particularly fatal to Tenney's cursory "obviousness" assertion on this point (Br. of Appellant at 39-40). The exclusions from the "agent" definition in section 61-1-13(2) refer the reader to securities transactions falling within Utah Code Ann. § 61-1-14(1)(a), -(b), -(c), -(i), and -(j); or within section 61-1-14(2) (1986); or to "transactions with existing employees, partners, officers, or directors of the [security] issuer" (statutes copied in Br. of Appellant addendum A). These various statutory exclusions from "agent" are extraordinarily voluminous and complex. Even if Tenney might now isolate one such exclusion, and show that it is arguably supportable by the evidence, the trial court's failure to do so

sua sponte cannot be labelled "obvious" error.[16] Therefore, besides failing to show prejudice, Tenney's plain error challenge to instruction 45 fails because he shows no obvious error.

B. There Was No Plain Error in the Jury Instructions Defining Tenney's Responsibility for the Actions of his Agents.

Tenney's second instructional challenge asserts that the jury was inadequately instructed how to find him criminally liable for the conduct of Jensen and Bowers in making several of the Cellwest stock sales.[17] He makes an unavailing "plain error" argument on this unpreserved challenge.

No Prejudice

This instructional challenge fails because Tenney again fails to apply the correct "reasonable likelihood" standard for plain error prejudice, as just explained. Tenney simply states that it is "impossible to determine" whether the alleged error had any effect on the verdicts in question (Br. of Appellant at 43). This again, by itself, defeats his plain error claim.

No Error, Nor Obviousness

Were it appropriate to address error or obviousness, Tenney proves neither. He directs his challenge against instruction 52, which stated:

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[16]All Tenney does is assert, without reference to the applicable statutes or the evidence, that Cellwest stock was exempt from the registration requirements of the Securities Act (Br. of Appellant at 38; R. 757).

[17]In his brief, Tenney refers to his responsibility "for the actions of Bowers, Jensen *and others*" (Br. of Appellant at 40, emphasis added). He does not identify the "others."

> You are instructed that the Defendant is responsible for any statements made on his behalf by his authorized salesmen or agents in connection with any offer or sale of securities. In other words, if you find from the evidence that such a salesman or agent made statements to potential investors and that the Defendant authorized those statements, then under the law the Defendant is responsible for the making of those statements as if he had made them himself.
>
> Similarly, if any authorized agent omitted to state a material fact, in connection with the offer or sale of a security, and the Defendant or agent had a duty to disclose the fact, and you find that the Defendant did not inform the agent of the omitted fact, or did not take sufficient steps to ensure that investors would be informed of the material fact, the Defendant is responsible for the omission of the fact as if he himself had omitted it.

(R. 753, copied in Br. of Appellant addendum L).

Instruction 52 correctly states that Tenney was liable for Jensen's and Bowers' misrepresentations, so long as Tenney authorized them to speak for him. Additionally, Tenney does not acknowledge instruction 53, which stated:

> You are instructed that under the laws of the State of Utah a person is criminally liable for conduct constituting an offense which he performs *or causes to be performed* in the name of or on behalf of a corporation or association to the same extent as if such conduct were performed in his own name or behalf.

(Emphasis added). Instructions 52 and 53 thus accurately conveyed the principles of criminal liability for the conduct of others, as set forth by statute:

> Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which

> constitutes an offense shall be criminally liable as a party for such conduct.

Utah Code Ann. § 76-2-202 (1995).[18]

> A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or on behalf of a corporation or association to the same extent as if such conduct were performed in his own name or behalf.

Utah Code Ann. § 76-2-205 (1995). Tenney's effort to prove "error" in instructions 52 and 53 consists of an attempt to incorporate common law "agency" doctrine into the instructions. As already explained, it would have been improper to interject that doctrine into this criminal case.[19] Obviously, then, it was not error to leave it out.

C. There Was No Plain Error in Any of the Jury Instructions Defining Securities Fraud.

Tenney next mounts a two-part, unpreserved attack on the instructions defining securities fraud. He first claims error in the absence of a jury unanimity requirement for deciding among alternative elements for that offense (Br. of Appellant at 43-44). Next, he argues that the instructions failed to

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[18]The mental state required for securities violations ("willfully"), alluded to in section 76-2-202, was defined in instruction 54 (R. 755).

[19]In fact, Utah's criminal code has its own definition of "agent," apart from the securities law definition: "'Agent' means any director, officer, employee, or other person authorized to act in behalf of a corporation or association." Utah Code Ann. § 76-2-201(1) (1995). Neither this statute nor the securities code definition of "agent" support Tenney's effort to interject the common law rule of "*apparent* authority" (Br. of Appellant at 40-42) into this case.

adequately define the phrase "employed a device, scheme, or artifice to defraud" (Br. of Appellant at 48).

No Prejudice

Both of those "plain error" arguments fail because Tenney again fails to brief "reasonable likelihood" prejudice. Br. of Appellant at 48 ("no assurance" that the verdicts were unaffected by absence of "alternative elements unanimity" instruction); *id.* at 50 ("cannot be sure" that allegedly flawed definitions influenced the verdicts). Once again, this Court need not consider the questions of error or obviousness.

No Error, Nor Obviousness

Were this Court to address error or obviousness on this point, it would find neither. The State addresses Tenney's two instructional subchallenges in turn.

1. Unanimity Not Needed for Alternative Elements.

Tenney sets forth an exemplar of the thirteen securities fraud instructions (one for each named Cellwest investor) (Br. of Appellant at 43). Element 5 of that instruction set forth several alternative ways in which the requisite "fraud" might be found:

> 5. [That Tenney] either
>
> a). employed a device, scheme, or artifice to defraud, OR
> b). made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, OR
> c). engaged in an act, practice, or course of business which operated or would

> operate as a fraud or deceit upon any person.

(R. 713, also copied in Br. of Appellant addendum I).

Tenney cites *State v. Tillman*, 750 P.2d 546 (Utah 1987) ("*Tillman I*"), and *Tillman v. Cook*, 855 P.2d 211 (Utah 1993) ("*Tillman II*"), to claim that the trial court erroneously failed to instruct the jury to unanimously agree on which of the fraud alternatives in element 5 were proven. But the bitterly divided opinions in *Tillman*, a capital case, do not prove error on this point. Repeatedly, the *Tillman* opinions tied the jury unanimity question to legal concerns that are unique to capital penalty jurisprudence.[20] In neither *Tillman* opinion did the Utah Supreme Court overturn its longstanding rule that in a noncapital case, jurors may be nonunanimous on alternative crime elements, so long as their ultimate verdict is unanimous. *See Tillman I*, 750 P.2d at at 567 & n.74 (citing Utah precedent).

Admittedly, in a subsequent case, the Utah Supreme Court, citing *Tillman I*, stated: "A majority of this Court has stated that a jury must be unanimous on all elements of a criminal charge for the conviction to stand." *State v. Johnson*, 821 P.2d 1150, 1159 (Utah 1991) (attempted capital murder:

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[20]*E.g.*, *Tillman I*, 750 P.2d at 566 (plurality opinion on this issue, citing and discussing *Furman v. Georgia*, 408 U.S. 238 (1972), and related cases); *id.* at 578-79 (Stewart, J., concurring in result on this issue, and rejecting non-unanimity rule "in connection with aggravating circumstances *in capital homicide cases*" (emphasis added)); *Tillman II*, 855 P.2d at 216 (stating *Tillman I* court's majority view that "jurors are constitutionally required to agree unanimously on each element of a criminal offense, including at least one aggravating circumstance *in a capital offense*" (emphasis added)).

"poison" aggravator not proven; court could not uphold verdict on alternative "pecuniary gain" aggravator absent special verdict showing that jury found it to be present). Even so, the court has not expressly overruled its pre-*Tillman* cases, *e.g.*, *State v. Russell*, 733 P.2d 162 (Utah 1987), holding that unanimity among alternative crime elements is not required. Indeed, in *State v. Goddard*, 871 P.2d 540, 546-47 (Utah 1994), the supreme court invoked *Russell* to uphold a second degree murder conviction against an "alternative elements unanimity" challenge. Finally, one supreme court member (the swing vote on the issue in *Tillman I*), has criticized special verdicts in criminal cases, which would be needed to assure juror unanimity among alternative crime elements. *See State v. Bell*, 770 P.2d 100, 111-13 (Utah 1988) (Stewart, J., concurring in part and dissenting in part) (special verdicts may deprive jury of its "mercy" function).[21]

Given this unsettled case law, even if it might have been error to omit an "alternative elements unanimity" instruction, such error could not have been "obvious" to the trial court. Quite the contrary, to the extent that the unanimity requirement, in its several contexts, has caused the Utah Supreme Court to "struggle," *State v. Saunders*, 893 P.2d

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[21]*Russell* contains an excellent explanation why juror unanimity on alternative crime elements is unnecessary: such a requirement would cause overlong deliberations and hung juries in instances when all jurors agree that the accused committed the charged crime. 733 P.2d at 167-68 (citing cases). And in *Schad v. Arizona*, 501 U.S. 624, 630-45 (1991), a United States Supreme Court plurality saw no useful purpose to an "alternative elements unanimity" requirement in a capital murder prosecution.

584, 589 (Utah App. 1995), no "obvious" error exists on this point. Absent settled, well-known, controlling precedent, there can be no obvious error.

2. "Device, Scheme, or Artifice to Defraud."

Nor could this Court find obvious error in the absence of instructions defining "device, scheme, or artifice to defraud," one of the alternative ways of committing fraud under element 5 of the securities fraud instruction.[22] Tenney asserts, without explanation, that "device," "scheme," and "artifice," taken directly from Utah Code Ann. § 61-1-1 (1986), are not self-defining (Br. of Appellant at 49). However, instructions given in statutory language are generally deemed sufficient. *State v. Swan*, 31 Utah 336, 88 P. 12, 15 (1906).

Further, even on appeal, Tenney offers no guidance on how "device," "scheme," and "artifice" should have been defined. *See Swan*, 88 P. at 14 ("Counsel do not state, nor would it be an easy matter to define, just what should be stated . . ."). Just as failure to proffer an alternative instruction can waive an instructional challenge at the trial level, *State v. Schoenfeld*, 545 P.2d 193, 196 (Utah 1976), such failure should also doom an unpreserved, "plain error" challenge. And as Tenney admits (Br. of Appellant at 49), Utah case law has never addressed the point. Thus even if error might be found, Tenney has not proven the "obviousness" component of plain error. *Saunders*, 893 P.2d at

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[22]Under Tenney's "alternative element unanimity" theory, the jury would be required to identify whether Tenney employed a "device," or a "scheme," or an "artifice."

589 (lack of clear Utah case law defeats "obviousness" showing for plain error).

D. There Was No Plain Error in the Instructions Defining "Unregistered Broker or Agent."

Tenney's next unpreserved complaint is that jury instruction 40, defining the crime of being an unregistered securities broker, fails to adequately define "agent" or "broker-dealer." Tenney again fails to apply the correct prejudice standard for this contention of "plain error." Br. of Appellant at 51 ("This Court cannot be sure that the jury convicted Tenney based on a correct definition of these terms"). Therefore, this "plain error" point fails.

No Error, Nor Obviousness

Tenney's claim of obvious error on this point would fail for the reasons outlined earlier (Point IV-A), addressing his challenge to the instructions on "employing unregistered agents." That is, Tenney identifies no evidence to support a possible finding that he fell within the statutory exclusions to the definitions of "agent" or "broker-dealer," under Utah Code Ann. § 61-1-13(2) and -(3) (1993). Therefore, there was no basis to instruct the jury on those exceptions. Without supporting evidence, it would have more likely been error to give such instructions. Therefore, the "obviousness" element of plain error also could not be satisfied on this point.

E. Tenney's Redundant "Alternative Element Unanimity" Argument Does Not Prove Plain Error on Appeal.

Tenney's final "plain error" challenge to the jury instructions repeats his argument that the jury should have been told to unanimously state which of several possible theories it applied to find him guilty of securities fraud. Once more, Tenney fails to prove the necessary prejudice in his desultory statement that there is "no assurance" that the belatedly-alleged errors did not affect the verdicts (Br. of Appellant at 52, 53). Once more, this defeats the plain error claim.

No Error, Nor Obviousness

Tenney's final "elements unanimity" argument (Br. of Appellant at 52) does not only repeat his prior focus on the elements of security fraud (discussed in Point IV-C-1 of this brief); he apparently also attacks instructions related to the other criminal counts. However, he does not specify which other instructions are "obviously erroneous" for lack of unanimity requirements. *See* Utah R. App. P. 24(a)(9) (appellate argument must contain "citations to the authorities, statutes, and *parts of the record* relied on" (emphasis added)). The State cannot respond to this "invisible plain error" assertion; nor should this Court address it.

Be that as it may, Tenney's argument on this point repeats his questionable premise (as explained in Point IV-C-1), that jury unanimity is required among alternative crime elements, and that failure to so instruct a jury amounts to obvious error. "Saying the same thing twice gives it no more weight." *Hammer v.*

Gross, 932 F.2d 842, 852 (9th Cir. 1991) (en banc) (Kozinski, J., concurring). Therefore, this Court should reject this final, unpreserved instructional challenge.[23]

POINT FIVE

THE TRIAL COURT PROPERLY DENIED TENNEY'S "JUROR MISCONDUCT"-BASED NEW TRIAL MOTION

In his penultimate point on appeal, Tenney argues that the trial court should have granted his post-verdict motion for a new trial. Tenney moved for mistrial upon learning that one of the jurors, Dr. Barnett, had briefly discussed the case with Dr. Christensen, who was acquainted with Tenney, during a recess following trial day five. See affidavits of Barnett, Christensen, and Margaret Wallace (R. 791-94, 804-06, copied in Br. of Appellant addendum D).

In that conversation, juror Barnett remarked that Tenney appeared to be "really a bad guy," or "a slick operator" (R. 792, 805). Christensen responded that "my experiences with John Tenney had all been good" (R. 792). Juror Barnett then acknowledged that "I shouldn't talk about it at all" (Christensen affid. at R. 792), or that "I would have to wait until after hearing all the evidence before I decided" (Barnett affid. at R. 805). By stipulation, Tenney's new trial motion was decided on the affidavits and memoranda (R. 807-11, copied in appendix IV of this brief).

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[23]Tenney's argument on this point also repeats his previous argument that common law "agency" doctrine belonged in the jury instructions, addressed in Point IV-B of this brief.

A. The Standard of Review.

As Tenney indicates (Br. of Appellant at 61, point heading), the trial court's denial of his new trial motion should be deferentially reviewed for "abuse of discretion." *See State v. Pena*, 869 P.2d 932, 938 (Utah 1994); *State v. Wetzel*, 868 P.2d 64, 70 (Utah 1993). Deference is appropriate because the trial court's ruling required application of "juror misconduct" principles to unique circumstances, including the likely impact of the alleged misconduct on the verdicts. *See Pena*, 869 P.2d at 939. *Compare Crookston v. Fire Ins. Exchange*, 860 P.2d 937, 938 (Utah 1993) (new trial ruling is reviewed nondeferentially if it turns on a narrow legal premise).

B. No Presumption of Prejudice.

The condition for deferential review, of course, is that the trial court apply the correct legal analysis. In this case, the court applied a two-part test for prejudicial juror misconduct, from *Arellano v. Western Pac. R. Co.*, 5 Utah 2d 146, 298 P.2d 527, 529-30 (1956): First, did juror Barnett violate the Utah R. Crim. P. 17(j) admonition "not . . . to converse with . . . any other person on any subject of the trial, and that it is [the jurors'] duty not to form or express an opinion thereon until the case is finally submitted to them"? Second, if Barnett disobeyed that admonition, was there prejudice; i.e., did the misconduct affect the verdict?[24]

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[24]The *Arellano* analysis was offered by the State, opposing Tenney's new trial motion on this point, and was accepted by the trial court, as indicated in its minute entry denying the new trial

That analysis is appropriate in light of the fact that the problem in this case did not involve an "improper contact[] between jurors and witnesses, attorneys, or court personnel," *State v. Pike*, 712 P.2d 277, 279 (Utah 1985), which would give rise to a rebuttable presumption of prejudice, *id.* at 280. *Accord State v. Erickson*, 749 P.2d 620 (Utah 1987); *State v. Swain*, 835 P.2d 1009 (Utah App. 1992); *Logan City v. Carlsen*, 799 P.2d 224 (Utah App. 1990). Juror Barnett's conversation was with a person unrelated to the case under trial.

Admittedly, a presumption of prejudice has been said to exist in cases involving juror conversations with persons who were not witnesses, attorneys, or court personnel. *See, e.g., Remmer v. United States*, 347 U.S. 227 (1954) (rebuttable presumption of prejudice arose from juror's approach by stranger who remarked that juror could profit from a verdict of acquittal; remand hearing ordered to determine actual prejudice); *State v. Thorne*, 39 Utah 208, 117 P. 58, 66-67 (1911) (conviction reversed because of phone call made by juror, in violation of admonition and without permission, and of unknown nature). But more recently, in *Smith v. Phillips*, 455 U.S. 209 (1982), the United States Supreme Court has disavowed presumed prejudice, or "implied bias," from questionable outside-of-trial juror conversations. Instead, the Court held that the right to an impartial jury is adequately protected when the litigant has

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motion (R. 801, 809).

opportunity to explore allegations of juror misconduct, and to demonstrate prejudice caused thereby. *Id.* at 215-18.

In this case, involving a brief conversation with a person having no part in the trial, and with the content of the conversation revealed, the *Pike* presumption of prejudice ought not apply. Tenney had the opportunity, in accord with *Smith v. Phillips*, for an evidentiary hearing to explore whether the alleged misconduct was prejudicial. He opted instead to submit the issue for decision on the affidavits of Barnett, Christensen, and Wallace (R. 807). Under these circumstances, the trial court was not required to apply a presumption of prejudice. Instead, the court properly applied the *Arellano* analysis, so that deferential appellate review is appropriate.

C. No Abuse of Discretion Occurred.

1. Juror "May Have" Violated Admonition.

The trial court equivocally found that juror Barnett "may have violated rule 17(j), Utah Rules of Criminal Procedure, by briefly conversing with another doctor about defendant's business practices" (R. 810-11, copied in appendix IV of this brief). Because rule 17(j) does not allow jurors to discuss their pending case at all, the trial court properly found that Barnett violated that part of the admonition.

However, the trial court also found that "Dr. Barnett's actions did not indicate that he had formed an opinion or bias against defendant" (R. 811). That finding, supported by the submitted affidavits, indicates that Barnett had not violated the

admonition "not to form or express an opinion" until the case was submitted. That finding is not clearly erroneous.

Additionally, the trial court's "possible violation" ruling reflects a legitimate judgment that juror Barnett's violation was not extreme. The involved persons agreed that the Barnett-Christensen conversation was brief, and included Barnett's acknowledgment of his duty not to discuss the case (Christensen affid. at R. 792; Barnett affid. at R. 805). Juror Barnett's comments did not show "a state of mind . . . with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights" of Tenney, the standard for juror bias under Utah R. Crim. P. 18(e)(14): after all, he acknowledged that he "would have to wait until after hearing all of the evidence before I decided" Tenney's case (Barnett affid. at R. 805).

2. No Resulting Prejudice.

Given the brief nature of the Barnett-Christensen conversation, the trial court did not abuse its discretion by finding no "indication that the actions [of Barnett] would impact on the juror's deliberation in the case" (R. 811). Indeed, it is self-evident that any prejudice wrought by that conversation worked against the State, rather than Tenney, because Christensen volunteered his view that Tenney was of good character, telling

juror Barnett, "[M]y experiences with John Tenney had all been good" (Christensen affid. at R. 792).[25]

Tenney therefore struggles, by longshot speculation, to demonstrate prejudice. See Br. of Appellant at 66 ("Juror Barnett may well have disliked his office mate or had some ongoing dispute which left him with no respect for the other dentist. Knowledge that the other dentist knew and admired Tenney may well have impacted negatively on Juror Barnett"). This is an especially dubious speculation given that Barnett and Christensen shared office space for their dental practices (Wallace affid., R. 793). And having waived an evidentiary hearing to more thoroughly explore the prejudice question (R. 807), Tenney cannot now demonstrate that the trial court abused its discretion in finding that no prejudice arose from juror Barnett's improper conversation.

D. "Incidental and Brief Contact."

Finally, this Court can affirm the trial court's judgment on this point under the familiar principle that valid alternative grounds also support it. *See, e.g., State v. Gallegos*, 712 P.2d 207, 208-09 (Utah 1985); *State v. Elder*, 815 P.2d 1341, 1344 n.4 (Utah App. 1991). The trial court's denial of Tenney's juror misconduct-based new trial motion can be

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[25]In *Logan City v. Carlsen*, 799 P.2d at 226, this Court stated that reversal would be required if the improper juror-bailiff conversation "benefitted either the defendant or the City[.]" The notion that defendant-benefitting prejudice warrants a new trial, however, is not supported by any citation to authority, and lacks any apparent logical basis.

alternatively affirmed on the ground that the conversation between juror Barnett and Dr. Christensen was merely a brief, "incidental contact" that could not have had any impact upon Barnett's deliberations. *See Pike*, 712 P.2d at 279-80; *Carlsen*, 799 P.2d at 226.

The submitted affidavits readily support such a conclusion. Again, Dr. Christensen's affidavit--submitted by Tenney--reflects that the conversation consisted of but five or six sentences, ending with juror Barnett's statement that he could not discuss the case (R. 791-92). The affidavit of Margarent Wallace (R. 793-94), who overheard the conversation, similarly recounts a very brief exchange. These affidavits corroborate juror Barnett's own account of a brief conversation, centered on the coincidence that Dr. Christensen happened to know defendant Tenney (R. 804-05). In sum, on the grounds identified by the trial court, or on this alternative ground, the trial court's denial of Tenney's "juror misconduct"-based new trial motion should be affirmed.

POINT SIX

THE TRIAL COURT PROPERLY ORDERED TENNEY TO PAY $39,000 RESTITUTION TO CELLWEST INVESTOR ZIEGLOWSKY

Tenney's final appellate contention is that the trial court erroneously ordered him to pay $39,000 restitution to defrauded Cellwest investor James Zieglowsky. At a post-verdict restitution hearing (R. 2365-84, copied in appendix V) Tenney, then represented by professional counsel, stipulated to $53,950

restitution owed to nine other investors (R. 2366). Tenney also agreed to try the restitution issue by proffer with respect to Zieglowsky (R. 2365).

The Zieglowsky dispute exists because Zieglowsky purchased his Cellwest stock via real property and mortgage transactions, rather than by cash. Under those contracts, Tenney was to assume rent collection and mortgage payment responsibility for the real property. He defaulted those obligations, forcing Zieglowsky to pay arrearages on one parcel, and to suffer foreclosure on another (R. 2367-2374). Although Tenney contested the nature of his obligations toward the subject property, the State introduced supporting documentation in the form of quitclaim deeds, mortgage agreements, and the like (R. 2386).

By proffer, Tenney acknowledged that he owed Zieglowsky $20,000 (R. 2375). The trial court expressed an inclination to order double restitution, as permitted by statute (R. 2384). In the end, upon review of the parties' memoranda, the trial court accepted the State's proffer and documentary evidence, finding Zieglowsky's loss to be $39,000, and ordered restitution in that amount (R. 2501-04 Order, copied in Br. of Appellant addendum E).[26] Due to his trial court acknowledgment, Tenney really only disputes $19,000 of the restitution order to Zieglowsky.

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[26]The parties' restitution memoranda were not included in the record on appeal.

A. The Standard of Review.

Tenney properly identifies the standard of review (Br. of Appellant at 4-5): restitution orders are reviewed deferentially for "abuse of discretion." *State v. Snyder*, 747 P.2d 417, 422 (Utah 1987); *State v. Robinson*, 860 P.2d 979, 980-81 (Utah App. 1993); *State v. Twitchell*, 832 P.2d 866, 868 (Utah App. 1992). Disregarding this standard in his argument, Tenney attempts to convert this issue to one of constitutional due process. He contends, "As can be seen from the proffers, Appellant did not have an opportunity to be fully heard and the trial judge did not receive sufficient evidence to accurately calculate the damages in this case" (Br. of Appellant at 68-69).

That contention is meritless. As already recited, Tenney expressly (and with assistance of counsel) agreed to try the restitution issue by proffer (R. 2365). In other words, Tenney voluntarily relinquished his right to be "fully heard" and to offer "sufficient evidence" about the amount of restitution. To now entertain Tenney's "due process" argument would encourage invited error, contrary to sound, settled principle. *See Dunn*, 850 P.2d at 1220; *Tillman I*, 750 P.2d at 553 n.20, 560-61 & nn. 40-41. This Court should reject Tenney's due process challenge to the restitution order.

This Court should also reject Tenney's argument that "the amount of damages which James Zieglowsky sustained involves a complex question which would be better left to civil

litigation" (Br. of Appellant at 69). The Utah legislature has decided that restitution can be ordered in criminal cases:

> When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court *shall order* that the defendant make restitution up to double the amount of pecuniary damages to the victim or victims of the offense of which the defendant has been convicted, or to the victim of any other criminal conduct admitted by the defendant to the sentencing court.

Utah Code Ann. § 76-3-201(4)(a)(i) (1995) (emphasis added). Tenney does not argue that this statute is unconstitutional beyond reasonable doubt, *State v. Bell*, 785 P.2d 390, 398 (Utah 1989). That, however, is the showing he would have to make in order to prove that the trial court was required to relegate Zieglowsky's restitution to civil litigation. Because the court acted as the valid, governing criminal statute requires, the standard for reviewing the Zieglowsky restitution order remains highly deferential.

B. No Abuse of Discretion in Restitution Order.

The trial court did not abuse its section 76-3-201 discretion in the restitution order. As already recited, most of the disputed $19,000 was related to one parcel of property. While Tenney disputed the nature of the agreement between him and Zieglowsky with respect to that parcel (R. 2379-80), the State produced documentary evidence tending to show that the agreement existed, and was breached by Tenney, therefore causing the financial loss (R. 2386).

Additionally, analogous to its prerogative to decide which opposing testimony to believe, *e.g.*, *State v. Walker*, 743 P.2d 191, 192-93 (Utah 1987), the trial court surely had discretion to choose between the State's and Tenney's proffers about the total amount of Zieglowsky's loss. That being the case, Tenney must show "clear error" in the trial court's acceptance of the State's $39,000 proffer, as opposed to the $20,000 proffered by Tenney. This is especially true given that the State presented documentary evidence on the $19,000 disputed balance. But Tenney attempts no such showing. That being the case, this Court should hold that the trial court did not abuse its discretion in ordering Tenney to pay $39,000 restitution for the loss suffered by Mr. Zieglowsky.

CONCLUSION

For the foregoing reasons, Tenney's convictions, sentences, and restitution order should be AFFIRMED. Given the length of the parties' briefs and the novelty of the subject matter, the State is inclined to agree with Tenney's request for oral argument.

RESPECTFULLY SUBMITTED this 20 day of September, 1995.

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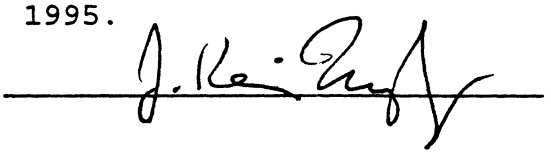
CERTIFICATE OF MAILING

I certify that an accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to JOAN C. WATT of SALT LAKE LEGAL DEFENDER ASSOCIATION, attorneys for defendant-appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 20 day of September, 1995.



APPENDICES

APPENDIX I

Recommended Colloquy for

Self-Representation Requests

Discussion re: Manner of Testimony

(R. 1723-28)

RECOMMENDED COLLOQUY WITH PROSPECTIVE PRO SE DEFENDANTS

from

State v. Frampton, 737 P.2d 183, 187-88 n.12 (Utah 1987), quoting Bench Book for United States District Court Judges, vol. 1 §§ 1.02-2 to -5 (Federal Judicial Center, 3d ed. 1986):

An accused has a constitutional right to represent himself if he chooses to do so. A defendant's waiver of counsel must, however, be knowing and voluntary. This means that you must make clear on the record that the defendant is fully aware of the hazards that he faces and the disadvantages of self-representation.

When a defendant states that he wishes to represent himself, you should therefore ask questions similar to the following:

(a) Have you ever studied law?

(b) Have you ever represented yourself or any other defendant in a criminal action?

(c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)

(d) You realize, do you not, that if you are found guilty of the crime charged in Count I, the court . . . could sentence you to as much as ___ years in prison and fine you as much as $_____? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.)

(e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?

(f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.

(g) Are you familiar with the . . . Rules of Evidence?

(h) You realize, do you not, that the . . . Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?

(i) Are you familiar with the . . . Rules of Criminal Procedure?

(j) You realize, do you not, that those rules govern the way in which a criminal action is tried in . . . court?

(k) You realize, do you not, that if you decide to take the witness stand, you must present your questions by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

(l) (Then say to the defendant something to this effect): I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the Rules of Evidence. I would strongly urge you not to try to represent yourself.

(m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

(n) Is your decision entirely voluntary on your part?

(o) If the answers to the two preceding questions are in the affirmative, you should then say something to the following effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."

(p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself.

attention immediately when we reconvene on this particular matter.

Now, if you recall what I explained to you earlier this week, it's impossible for me to continue this trial on Mondays because I have a full calendar on Mondays already, so we will be reconvening this case on Tuesday.

THE CLERK: 9:00.

THE COURT: It will be 9:00 o'clock.

Apparently we don't have any other matters scheduled on Tuesday except for this case. I'll ask, as well, that you gather your note pads and exhibit books. I will have Rod collect all of those. They will be redistributed on Tuesday.

I hope you have a nice weekend. I'm going to excuse you at this time, and I will expect to see you Tuesday promptly at 9:00 o'clock.

(Jury Excused for the day.)

THE COURT: The record may reflect -- you may be seated.

By the way, all parties are present; the Jury is not present at this time.

Mr. Tenney, I want to take care of a procedural issue which will also serve the purpose of giving you some advance notice, as well, and that is

this: If you have made the decision, Mr. Tenney, that you are going to testify in this particular case, of course, as you are aware, the law gives you the constitutional right not to testify in this particular case. I think I ought to give you some advance notice regarding how we are going to handle that procedurally.

Do you understand the issue that I am raising?

MR. TENNEY: I do. I am glad you brought it up. I was going to bring up the same issue.

THE COURT: Tell me what you want to bring up about that issue?

MR. TENNEY: As I understand, there are a couple of possibilities as to just how we might do this: One is to have someone read questions that I formulated, and I give answers. And I thought about having Patrick Anderson do that.

However, another procedure would be to simply use a narrative approach. I would prefer the narrative approach simply because I want to impress the Jury with the fact that I am pro se. I've conducted my case pro se from the very beginning. And the Court has, at this point, not allowed Patrick

Anderson, really, to express himself orally. So that would be my preference. But I'm certainly at the discretion of the Court as to how this should be done. But that would be the way I would prefer to do it.

THE COURT: Thank you.

Ms. Barlow.

MS. BARLOW: Your Honor, the State would prefer the other fashion. It's very difficult in a narrative fashion to cull out the things that are inadmissible and to allow us to object every two seconds when he gets into something that might be considered closing argument, as it were.

I think if questions can be formulated and it can be conducted in a professional fashion, which is, I think, the way that it is usually conducted, when you have both sides asking questions, I think that that would be preferable.

In a narrative fashion, you get into all sorts of things that may or may not be relevant to what we are doing here. And, frankly, it might put us in a bad light to be objecting every so often when he says things.

THE COURT: You then have no objection with Mr. Tenney's first alternative, with having him

draft his own questions and having Mr. Anderson simply read the questions drafted by Mr. Tenney?

MS. BARLOW: We may object to the form of a question.

THE COURT: But the proper -- we are talking about procedure.

MS. BARLOW: The procedure, we have no problem with.

THE COURT: Okay. Let's do it this way.

MR. TENNEY: If we did that, would Patrick Anderson -- Mr. Anderson have any leeway to expand on the questions? In other words, do I need to give a copy of questions to the State, or would he be able to ask the questions the way that he sees fit?

THE COURT: No. This is what I am going to require --

MR. TENNEY: Okay.

THE COURT: -- assuming Mr. Tenney were to testify -- and we don't know that as of yet -- but assuming he were to testify, what I'm going to require, Mr. Tenney, is that you, in fact, draft the questions. I am not going to require at this point that you disclose those questions to the State. But I am going to require you to have those questions

drafted in written form.

I am going to allow Mr. Anderson to put those questions to you, but he will be required to put those questions to you exactly as you have prepared them in written form.

Additionally, what I am going to require, Mr. Tenney, is that, prior to your testimony, if you testify, I am going to require that you submit to this Court a copy of those instructions that Mr. Anderson will be reading to you.

And the sole purpose of that is: At this point, I am not going to disclose those questions to the State, but I must have some way of showing that Mr. Anderson is simply reading the questions that you have -- reading the questions verbatim that you have prepared in written form.

And the reason why I am going to do it that way versus just a outright narrative is that I think it's more -- more appropriate for the State to have the opportunity to interpose timely objections to the questions, and it's extremely difficult to do that in a narrative form in a proper manner. So we will proceed in that manner.

Mr. Anderson, did you have a question?

MR. ANDERSON: Well, your Honor, if I

may: Who will be handling the objections when the State interposes those? Mr. Tenney or myself.

THE COURT: Mr. Tenney will be required to handle the objections. I don't see where that procedure will be any problem at all.

MR. ANDERSON: And Mr. Tenney has expressed the concern to me many times that he wants to preserve -- as he expressed to you -- his pro se status. I just request that -- the Court has informed the Jury of that. I'm just basically the mouthpiece for the questions.

THE COURT: I will inform the Jury of the procedure, that you are not posing these questions on your own, that these are the questions drafted by Mr. Tenney.

And to avoid a situation where Mr. Tenney asks himself the question and repeats his own answers, this seems to be a more efficient, realistic manner of handling it by allowing Mr. Anderson simply to read the question.

So I will give the Jury those instructions.

Okay, we will recess at this time.

MS. BARLOW: Your Honor, if I may just put something on the record?

APPENDIX II

"Prosecutor Misconduct"-based Mistrial Motion

and Trial Court's Ruling Denying Motion

(R. 579-80, 1671-81)

JOHN B. TENNEY
Pro Se
8415 Kings Hill Drive
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Telephone: (801) 942-8144

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION FOR A MISTRIAL
Plaintiff,	:	
v.	:	
JOHN B. TENNEY,	:	Case No. 921901056FS JUDGE TYRONE E. MEDLEY
Defendant.	:	

The prosecutor stated in her opening statement that, this case is about people being taken by a smooth talking salesman who "defrauded" three hundred and thirty-three people out of their money. This statement as well as the theme of the prosecutor's opening statement is not supported by any evidence in the record. Since the prosecution has rested and since the burden is on the state to come forth with all evidence necessary to support their allegations, Mr. Tenney herein moves for a mistrial based on the prejudicial and unsupported statements made during the prosecutor's opening statement.

Court's follow the general rule that, "the assertion of facts in an opening statement which are not proved during trial may constitute grounds for a mistrial if there is a reasonable possibility that the admissible evidence contributed to the conviction." State v. West, 617 P.2d 1298, 1300 (Mont. 1980). See

also State v. Troy, 688 P.2d 483 (Utah 1984) (counsel is obligated to avoid reference to those matters the jury is not justified in considering, and where there was no compelling proof of defendant's guilt, court concluded reversal was required because jurors probably were influenced by the improper remarks).

The Court has already ruled that the prejudicial affect of the shareholder list outweighed the probative value of its admission. In suppressing the introduction of the shareholder list, the Court expressed its concern over the impact such a list would have upon the jury. This concern is magnified when applied to the opening statement declaration that Mr. Tenney had "defrauded" three hundred and thirty-three people. This evidence has not been solicited through the state's factual witnesses and the mere numbers is highly inflammatory and prejudicial to Mr. Tenney.

Approximately, the first sentence out of the prosecutor's mouth referred to Mr. Tenney "defrauding" three hundred and thirty-three people. The primacy of this statement and the inability of the state to bring forward any evidence of any shareholder being defrauded, beyond the thirteen listed in the information, establishes a reasonable possibility that the inadmissible evidence would contribute to a conviction. State v. West, 617 P.d at 1300. Therefore, this court should grant Mr. Tenney's motion for a mistrial.

DATED this 21st day of May, 1993.

John B. Tenney

JOHN B. TENNEY
Pro Se

(Jury leaves.)

THE COURT: The record may reflect that the Jury has been excused from the the courtroom. The parties are present, however.

Mr. Tenney, you have a motion which you'd like to make?

MR. TENNEY: Yes, I do, your Honor. The motion I'd like to make, I've just handed to you in written form. I'd like to just orally make this motion and argue it very briefly.

This is a motion for a mistrial. And the basis for this motion is that the Prosecutor, Lynn Nicholas, stated in her opening statement that this case is a case about people being taken by a smooth-talking salesman who, quote, defrauded 333 people out of their money.

This statement, as well as the theme of the Prosecutor's opening statement, is not supported by evidence in the record. And since the Prosecution has rested and since the burden is on the State to come forward with all the evidence that's necessary to support their allegations, I move for a mistrial based on the very serious prejudicial and unsupported statement made during the opening statement by the State.

The Court, of course, follows the general rule that, quote, the assertion of facts in an opening statement which are not proved during trial may constitute grounds for a mistrial if there is a reasonable possibility that the admissible evidence contributed to the conviction, end of quote. That's quoting from State v. West 617 -- quoted in 617 P.2d at 1298. It's a Montana 1980 case.

THE COURT: Do you have a copy of that case?

MR. TENNEY: I don't have it. I am sorry, yes, I do.

THE COURT: Go ahead. Are you through, Mr. Tenney?

MR. TENNEY: Not quite. The -- counsel is obligated to avoid any reference to any matters that the jury is not justified in considering. And as I've argued forcefully earlier today, this is, I think, a very serious prejudicial error. And where there is no compelling proof of my guilt, the court in this case concluded that reversal was required because the jurors probably were influenced by the improper remarks.

I think it is unquestionable that the Jurors believe that there are 333 stockholders in the

company based upon the statements made by the statements made by the State in the opening statement.

The Court has already ruled that the prejudicial effect of this Stockholder List or Shareholder List has outweighed probative value. So, in suppressing the introduction of the Shareholders List, the Court also expressed its concern over the impact that this list would have on the Jury. And it's magnified when we apply it to the opening statement that Mr. Tenney, quote, defrauded 333 people. The evidence has not been solicited through the State's factual witnesses, and the mere numbers are highly inflammatory and prejudicial to me, Mr. Tenney.

Nearly the very first heard sentence out of the Prosecutor's mouth referred to me as, quote, defrauding 333 people. This statement and the fact of the inability of the State to bring forward any evidence of any such claim of any shareholder being defrauded, other than those they've brought into the court here as witnesses, establishes, clearly, a reasonable possibility that the inadmissible evidence would, in fact, contribute to a conviction.

As I stated earlier, I'm greatly

concerned about the effect it would have on the minds and hearts of the Jurors. And, again, we are quoting here from State v. West, at 617 P.2d at 1300.

For this reason, the Court should grant my motion for a mistrial at this time. Thank you.

THE COURT: Thank you, Mr. Tenney.

Miss Barlow?

MS. BARLOW: Your Honor, I would like to first correct -- the statement that Ms. Nicholas made was that John Tenney deliberately defrauded dozens of innocent -- excuse me, decent people, 333 people, mostly citizens of Utah, were taken by that man for a lot of money. So maybe to get correctly what was said. She never did say he defrauded 333 people.

But that's -- the significant point is that -- and I believe it's State v. Troy. I can't remember if that's the actual case name. But there is a case -- I believe it's State v. Troy -- that says there are certain matters -- well, when the Court is looking at prosecutorial misconduct, which is what the claim is here, the Court has a two-prong test: One, did the person -- did the prosecutor say something that the jury was not supposed to be privy to, and then, number two, did it prejudice the case?

Granted, we mentioned 333 people because

we thought at that time we'd get the Shareholder List in. I am not at all sure that we still won't get it in by the end of this trial. I don't know.

But more significantly, this Court directed -- as I recall, directed the Jury that they were not to take anything that was said in opening statements as evidence. And if we have not proven up this 333 people statement, then Mr. Tenney can argue that in closing argument.

But I submit this Jury is a very attentive jury. And I don't think they are a jury that sat there listening Ms. Nicholas in opening statement and thought, "Oh, there must be 333 people" if we don't present that evidence. There is no basis for believing that this jury has already convicted Mr. Tenney of defrauding 333 people.

And since there is no basis for believing that, although the statement, perhaps -- well, in hindsight, now, since we have not yet got that Stockholders List in, in hindsight, perhaps might not -- perhaps should not have been said, and perhaps is something that the Jury should not have been privy to, but there is no prejudice. It was opening statement.

I submit that, while this Montana Case

is interesting, it is Montana rather than Utah. I notice, on Page 1,300, that they seem to follow this prejudice prong just as Utah follows it. But more importantly, the Utah case law is that you have to establish, number one, something was said that perhaps shouldn't have been said; number two, that there's prejudice. And I submit there has just not been a showing of prejudice at this point.

The Jury has not been shown to have already decided this case.

THE COURT: Thank you, Ms. Barlow.

It is your motion, Mr. Tenney. I will give you a brief opportunity to respond, if you wish to, sir.

MR. TENNEY: Thank you, your Honor. I am not arguing prosecutorial misconduct. I am arguing prejudice. In the opening statements, the statement was made that the people were taken for a lot of money. And the standard that I've cited, simply says that --

THE COURT: Well, can I ask you a question, Mr. Tenney?

THE TENNEY: Sure.

THE COURT: You threw me a curve here, and I want to make sure I understood what you said.

MR. TENNEY: Okay.

THE COURT: Now, is it the statement that 300 and some people were defrauded, or is it the statement that some -- that people were taken for a lot of money that you are objecting to, or is it both?

MR. TENNEY: It is both. But it is specifically the statement of 333 stockholders, which is -- that is considered in the light of the statement that goes with it that they were taken for a lot of money. My objection is to both statements, but specifically as to the 333 stockholders.

And the standard is simply if there is a reasonable possibility. And Ms. Barlow is right, this is, in fact, a very attentive jury. I don't see how all of the members of the jury could have missed that statement. There's no possible way that they could have missed it. And I do believe it has inflamed their minds and their feelings in regard to this case. There's certainly that reasonable possibility. That's why I'm arguing prejudice.

MS. BARLOW: Your Honor, may I respond to the dollar figure? Since he didn't mention that the first time, I didn't respond to it.

THE COURT: Go ahead.

MS. BARLOW: I think his own Exhibits, 12 and 13 -- and in those exhibits dealing with Cellwest and Cellwest Communications, he -- in Item 6 in each one of these exhibits -- well, in the first exhibit for Cellwest -- I'm sorry. I don't have the number. It is either 12 or 13 -- he indicates that the number of shares outstanding are seven point six million shares. In the other exhibit, for Cellwest Communcations, the number outstanding is eight point five million shares. At a dollar a share, which is what most people bought, we are talking 15 million dollars. So I don't think that the figure she threw out there is something that the Jury has not had some evidence might be there. That's all I have.

MR. TENNEY: Your Honor, may I just -- the number of shares, your Honor, has nothing to do with the dollar value. One or two or three people could own that number of shares. That has virtually no relationship to the value of the money raised at all.

THE COURT: We'll recess just long enough to give me the opportunity to the read the case, and then I'm going to rule on the motion.

(Recess)

THE COURT: The record may reflect that

all parties are present. The Jury is not present at this time.

Mr. Tenney, Miss Barlow, Ms. Nicholas, I have had an opportunity to the read the cases submitted to me in support of Mr. Tenney's motion for a mistrial.

That motion is going to be denied at this time for the following reasons: First of all -- and the record ought to reflect that the Court is relying on the case of State v. Troy, cited at 688 P.2d 483, a 1984 Utah case, as the authority in this State.

On this particular issue, that case sets forth a two-prong test: The first step or test is whether or not the remarks made by the prosecutor clearly called to the attention of the jury matters outside of the evidence.

When making reference to the Defendant in this particular case, the Court is of the opinion that that prong has not been met for the following reasons: Despite the fact that at this stage, anyway, the Court did not allow into evidence State's Proposed Exhibits 88 and 89, which I believe are alleged to be Stockholders Lists, the statements made by the Prosecutor in this particular case, in this Court's

opinion, was made on reasonable reliance that the evidence regarding those lists would come into evidence.

And hindsight is always 20/20, obviously. And despite the fact that that evidence was not received, the Court is not of the opinion that the Prosecutor was attempting to call to the attention of the Jury matters that were clearly outside of the evidence.

In the Troy Case, for example, is a situation where the Prosecutor intentionally made reference to the defendant's aliases, asked the jury to compare the defendant to a Mr. Hinckly, matters so far outside the evidence in that particular case -- the Court is satisfied that that threshold has simply not been met in this particular case.

This is a case about -- at least from the State's perspective -- and keeping in mind I have only heard the State's case, at this point, but certainly the Court is satisfied that at this stage of the proceedings there is sufficiently compelling evidence to support the State's allegations in this particular case, that the likelihood that the statements made by the Prosecutor, that they were prejudicial, is highly unlikely.

The second prong of the Troy analysis deals with the issue of prejudice. And Troy basically says that when the evidence is thin and it's more likely that the jury is going to be swayed by improper remarks, then the threshold of prejudice is a little easier met.

On the other hand, where the evidence is sufficiently compelling -- and this Court is of the opinion that the evidence is sufficiently compelling. This Court is not convinced that the statements will have any prejudicial effect, considering the other compelling evidence that has been received consistent with the elements of the counts charged in the information.

Also taking into consideration that the Court did give an admonition to the Jury instructing them, the fact that the opening statements made by the parties were, in fact, not evidence and should not be construed as evidence by the Jury.

For those reasons, Mr. Tenney, your motion for a mistrial is denied.

Mr. Tenney, are you ready to call your first witness?

MR. TENNEY: I have one other motion to make, your Honor.

APPENDIX III

Ruling Excluding Cellwest Investor List

(R. 1434-40)

MR. TENNEY: Your Honor, it may or may not be premature to making motion. I don't know the procedure, but the State intends to introduce or have Debra Browning give evidence regarding a stockholders' list from Cellwest. I have two or three problems with that and I will make this in the form of a motion if you instruct. I don't know the procedures, as I said.

The problem, No. 1, that I have with this is that the prejudicial effect of introducing a stockholders' list of Cellwest far outweighs the probative values. It is very inflammatory. Simply because it implies, depending on which list we use, that all of these people might also have been victims and that they didn't get their dollars back as some of the witnesses have testified. There is no evidence in on the people on this stockholders' list. That is my second point, is that it is simply not relevant for at least three reasons. First of all, the information on the stockholders' list is not related to the charges in this case. There has been adequate testimony, No. 1, from the people in connection with this case who I am charged with having violated securities laws, both fraud and selling unregistered securities. And No. 3, there is no one present that can authenticate these documents. I haven't put on my case yet, but one of my major issues for which

I will be calling government witnesses, is to show that we have had some problems with our stockholders' list and as a result, we have at least three or four versions of the list. There is not a certified list.

Nearly a year ago, Ms. Nicholas asked me to stipulate to this and I said no. And she said how she could get a copy of a certified list, and I instructed her that she needed to contact Mr. Bruce Rogers, Trans-international stock transfer, our last stock transfer agent, to get a certified list from him. And it seems to me that we should have at least had a Motion in Limine or some kind of a hearing and not be caught at this stage of the proceedings with trying to introduce evidence, which I have clearly opposed for well over one year. And I think it is very, very important that this not be -- that we look at this because I think it is extremely inflammatory.

THE COURT: So you are making specific reference to State's Proposed Exhibit 88; is that correct?

MR. TENNEY: I believe it is No. 88, Your Honor.

MS. BARLOW: Yes, it is.

MR. TENNEY: It is No. 88. I have in my hand here at least seven stockholders' lists, with four

different stock transfer agents. None of them certified. I don't believe that Debra Browning, she is not a stock transfer agent. She was simply a secretary at Cellwest. That is the basis of my objection. I would make that if you prefer in the form of a motion or however you would like me to do it.

THE COURT: Thank you, Mr. Tenney.

MS. BARLOW: Your Honor, as far as the issue of prejudicial outweighs the probative, Mr. Tenney has indicated it implies that these victims, quote, unquote, did not get their money back. We are not presenting it to show that anyone got their money back. In fact, getting their money back has nothing to do with securities fraud. Some people did get their money back. That doesn't make it not securities fraud. It is the misrepresentations and the failure to present relevant facts that makes it securities fraud. It has nothing to do with whether anybody got their money back or not. We are not trying to claim that these investigators did or did not get their money back.

As far as relevant, it shows that there was a scheme and we indicate that it is to defraud. We have over 300 investors listed on this list and well over 4 million shares, and I think that goes to whether there was a scheme or an artifice occurring here.

As far as authentication, this list does not need to be certified. What Ms. Lyman would testify to is that she had a list, if not this very one, then a similar list that she kept in her desk, that she would be told to add names to or delete names from as information came in. She will testify how this list came into being.

As far as Bruce Rogers and Trans-national, Ms. Nicholas did check on these people. She can't find either that business or that person. But the underlying issue is whether there has to be some kind of a certified list from a transfer agent, and I submit that that is not what we are submitting this for. Ms. Lyman can testify as a person who was in the office and using a list similar to this. She can testify that the names are the same. That the list is similar to the ones she was using on a daily basis under Mr. Tenney's direction.

MR. TENNEY: Your Honor, may I respond to that?

THE COURT: Just very briefly.

MR. TENNEY: Just very briefly. The problem is, if the State wants to use this to show that there was a scheme to defraud, then we have to have some foundation for admitting any of the lists. The lists that I have, all but one -- two of the lists have stock transfer names on there that are not signed. We have no authentication whatsoever as to where they came from. The only

stockholders' list that is authenticated is one in connection with one of these companies and it is -- it has a notary public and it was part of a merger agreement. That is the only stockholders' list that I have here. I have seven lists. I think we have a major problem and I believe it is going to hurt me much more than it will help me, and I do not believe that there is any foundation for bringing in a stockholders' list that is not certified.

THE COURT: I am going to rule as follows, Ms. Barlow and Mr. Tenney. At this point I am going to sustain Mr. Tenney's objection and preclude the State from introducing proposed exhibit No. 88. We will state that as part of the record. The reason why the Court is going to preclude the State from introducing that exhibit and the testimony of Ms. Lyman --

MS. BARLOW: Is that in reference to the exhibit?

THE COURT: She has other purposes?

MS. BARLOW: Yes.

THE COURT: As it relates to exhibit 88, the Court is of the opinion that the probative value of this document is outweighed by its prejudicial effect for the reason that it does contain what appears to be over 300 names of other individuals alleged to have invested in

Cellwest. It includes, looks like it includes data, alleged data, purchase of shares. The Court is of the opinion that taking into consideration the number that appears on that list, also the total amount of dollars, looks like in the millions of dollars, that the jury in this case, there is a high likelihood that they may use this particular list and construe that these individuals on this list were also the victims of fraud.

There is also some danger obviously that when we first began this case and explained to the members of the jury those individuals who were the subject of the various counts of the Information, we identified those individuals and if I recall the jurors' responses, they were not familiar with, nor did they have any relationship whatsoever with the individuals who are the subject of the counts contained in the Information. There, of course, the danger that the list is so long that there may be a relationship with the jurors and those individuals listed on the stockholders' list. And this Court is of the opinion that while the evidence may, in fact, be relevant, Ms. Barlow, that the prejudicial effect of this evidence far outweighs its probative value.

So as to proposed exhibit 88, the Court is going to preclude admission of that document, as well as

Ms. Lyman's testimony regarding State's Exhibit 88.

Ms. Barlow, you indicated that the witness had some other purposes for which the witness is expected to testify.

MS. BARLOW: Yes, Your Honor. Ms. Nicholas informs me that there is case law that allows in these kinds of cases entry of a similar document. May we renew our attempt to introduce this at a later time if we present to the Court with case law that would support its admission?

THE COURT: Let's put it this way, I am going to read any authority you submit to me; but identify for me the purposes that the witness is going to testify to other than State's Exhibit 88.

MS. BARLOW: She was a secretary and we are going to ask her about her familiarity with Rick Jensen, Steve Bowers, Ron Jeppson, Glen Kimball, names that have been given here and what association, if any, they had with Cellwest and also she was familiar with Mr. Tenney's signature that appears on some of these documents.

MR. TENNEY: I do have a problem with that. I was already -- Where my signature is involved either -- we'll stay out of it. I just don't know what I am trying to say.

THE COURT: In that case, let's get the jury

APPENDIX IV

"Juror Misconduct"-based New Trial Motion

Stipulation to Submit Motion on Affidavits

Ruling Denying Motion

(R. 807-12)

PATRICK L. ANDERSON, (#4787)
Attorney for Defendant
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Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	STIPULATION TO SUBMIT FOR DECISION
Plaintiff,	:	
v.	:	
JOHN B. TENNEY,	:	Case No. 921901056FS JUDGE TYRONE E. MEDLEY
Defendant.	:	

STIPULATION

On July 26, 1993 John B. Tenney, Pro Se, filed a Motion for a New Trial and supporting memorandum. Also, on July 26, 1993 the Salt Lake Legal Defender Association was appointed to represent Mr. Tenney in any subsequent proceedings. On August 4, 1993, the State of Utah filed a response to Tenney's Motion for a New Trial.

The undersigned herein stipulate and waive a hearing on Tenney's Motion for a New Trial and request that the Court decide Tenney's Motion for a New Trial based upon the memorandum and Affidavits filed in the above-referenced case.

DATED this 11th day of August, 1993.

John B. Tenney
JOHN B. TENNEY
Defendant

00807

DATED this 11 day of August, 1993.

PATRICK E. ANDERSON
Attorney for John B. Tenney

CHARLENE BARLOW
Attorney for State of Utah

MAILED/DELIVERED a copy of the foregoing to the Office of Charlene Barlow, Attorney Generals Office, 236 State Capitol, Salt Lake City, Utah 84114, this _____ day of August, 1993.

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
STATE OF UTAH	:	
PLAINTIFF	:	CASE NUMBER 921901056 FS
	:	DATE 10/06/93
VS	:	HONORABLE TYRONE E. MEDLEY
	:	COURT REPORTER
TENNEY, JOHN B	:	COURT CLERK STH
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

DEFENDANT'S MOTION FOR A NEW TRIAL IS SUBMITTED TO THE COURT FOR DECISION WITHOUT HEARING BASED UPON THE STIPULATION OF THE PARTIES. THE COURT HAVING RECEIVED ALL MEMORANDA IN SUPPORT OF AND IN OPPOSITION TO DEFENDANT'S MOTION FOR A NEW TRIAL, COMES NOW AND RULES AS FOLLOWS:

1. DEFENDANT'S MOTION FOR A NEW TRIAL IS DENIED FOR THE REASONS SET FORTH IN PLAINTIFF'S MEMORANDUM IN OPPOSITION THEROF.
2. PLAINTIFF TO PREPARE ORDER.

CC: CHARLENE. BARLOW
PATRICK ANDERSON

Judge Tyrone E. Medley

JAN GRAHAM (1231)
Attorney General
CHARLENE BARLOW (0212)
LYNN NICHOLAS (6008)
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236 State Capitol
Salt Lake City, Utah 84114
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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff,	:	ORDER
v.	:	
		Case No. 921901056
JOHN B. TENNEY,	:	
		Judge Tyrone Medley
Defendant.	:	

This matter came before the Court on defendant's motion for new trial. The parties submitted memoranda in support of and in opposition to the motion and stipulated that the matter should be decided on the memoranda.

THE COURT, having been fully advised in the premises, IT IS HEREBY ORDERED:

Defendant's motion for a new trial is denied for the following reasons:

1. The juror, Dr. Richard Barnett, may have violated rule 17(j), Utah Rules of Criminal Procedure, by briefly

conversing with another doctor about defendant's business practices; however, that action does not justify a mistrial.

2. Dr. Barnett's actions did not indicate that he had formed an opinion or bias against defendant; neither was there any indication that the actions would impact on the juror's deliberation in the case.

Defendant is hereby notified pursuant to rule 22, Utah Rules of Criminal Procedure, that he has thirty days from the date this order is signed to take an appeal in this matter.

DATED this 3 day of ~~October~~ November, 1993.

BY THE COURT:

Tyrone E. Medley

TYRONE MEDLEY
District Judge

APPROVED AS TO FORM:

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of October, 1993, I caused a true and correct copy of the foregoing to be hand-delivered to the following:

Patrick Anderson, Esq.
Richard G. Uday, Esq.
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

with a copy sent by U.S. Mail, postage pre-paid, and addressed as follows:

John B. Tenney, defendant pro se
Salt Lake County Jail
437 South 200 East
Salt Lake City, Utah 84111

APPENDIX V

Restitution Hearing

(R. 2365-84)

TUESDAY, SEPTEMBER 6, 1994

PROCEEDINGS

THE COURT: This is case No. 921901056. The matter of State of Utah vs. John B. Tenney. Counsel, would you identify yourselves.

MS. BARLOW: Charlene Barlow and Lynn Nicholas on behalf of the state, Your Honor.

MR. UDAY: And, Your Honor, on behalf of Mr. Tenney, Rich Uday and Rob Heineman from our appellate division.

THE COURT: Where are we on this matter, Mr. Uday?

MR. UDAY: Your Honor, I believe we are prepared to stipulate to the majority of the restitution that is owed in this issue. The remaining issue comes down to restitution owed one individual, Mr. Zieglowsky, and I believe how we would prefer to proceed this morning is have the state proffer what their evidence would be. We would proffer what ours would be and we have a legal issue to a disputed perhaps $19,000 and we would ask the Court to resolve that legal issue based on stipulated testimony rather than taking evidence.

THE COURT: Why don't we go ahead then and place the issues on the record that are stipulated to that don't call for a decision on my part.

MR. UDAY: If you will, I am going to defer to counsel to do that, Your Honor.

MS. BARLOW: Your Honor, we have prepared a Schedule of Restitution. There were nine people who testified as to checks that they handed over to Mr. Tenney and did not receive any money in return. There are other people who testified that they had handed over money but they got their money back, and we have not included those, but I have a Schedule of Restitution I will present to the Court. This is the names, the address and amounts owing to these nine people which total up to $53,950. I believe there is no dispute as to that because those were cancelled checks that were introduced into evidence of money that was paid over to Mr. Tenney and never recovered.

THE COURT: Mr. Uday, is it an accurate statement that the victims listed on this Schedule of Restitution, handed to me by Ms. Barlow, is the stipulation that you and Mr. Tenney are agreeing should encompass at least the substantial portion of the restitution order which would total $53,950?

MR. UDAY: That is correct, Your Honor.

THE COURT: Let's move forward then and let me ask Mr. Tenney. Mr. Tenney, this is the stipulation you are entering into as well, sir?

MR. TENNEY: Yes, it is, Your Honor.

THE COURT: Let's move forward with Mr. Zieglowsky's case.

MS. BARLOW: Your Honor, I have here a Memorandum in Support of Restitution that has been prepared by Lynn Nicholas, my co-counsel for the state in this matter, which will help perhaps in laying out Mr. Zieglowsky's situation.

As the Court may recall from trial, Mr. Zieglowsky testified that he and Mr. Tenney entered into an Exchange Agreement. There were three tracts of land, three parcels of land property that Mr. Zieglowsky had, and he turned over these three tracts of land to Mr. Tenney, minus the indebtedness, for purposes of obtaining stock, and approximately 33,000 shares of stock. And this is the issue that is before this Court today and we'll proffer what Mr. Zieglowsky's testimony would be about what had happened to these three tracts of land, and then make our argument about the amount that we feel is still owing on these tracts of land.

The first tract of land was a piece of property that in the Exchange Agreement signed by Mr. Tenney and Mr. Zieglowsky in January of 1988, they agreed, and Mr. Zieglowsky will testify, that that agreement is based upon appraisals that were done at the time. All of the

figures we are talking about here as values of the land were based on appraisals at the time. And this agreement is that tract one had the value of $75,000. At the time there was $27,000 owing to another party on this tract of land. This piece of property, tract No. 1, has a long and varied history and I will get into that a little bit later.

The second tract of land, the agreement based on appraisals, was the value of the property was $42,800, with an amount owing to First Security Financial of $29,400.

The third tract of land is a piece of property that was given over to Mr. Tenney but then in a subsequent agreement the property was given back, was deeded back or however it was transferred back and there was no loss at all on tract No. 3. So really we are not talking about tract No. 3 here. It is a piece of land that Mr. Zieglowsky handed over. He obtained it back. Handed the stock back in return for this third tract of land. So tract 3 is really not at issue.

The first tract of land, Mr. Zieglowsky will testify and we have documents that are attached to the memorandum that has been handed to you that will support this, the Exchange Agreement is attached to the memorandum. In that Exchange Agreement Mr. Zieglowsky

handed over this piece of property. The agreement was that Mr. Tenney would refinance this piece of property which is valued at $75,000, would pay the Lautens, the other people who held a mortgage on this piece of land, would pay them $20,000 and give them 1400 shares of Cellwest for the other 7,000 that was owing to them. The Lautens then agreed to accept 20,000 cash and $7,000 worth of Cellwest stock.

When Mr. Tenney went to refinance that land and get that money, he asked for $48,000. That is what he asked the bank for. He was then going to pay $20,000 to the Lautens and the other 28,000 would be used for Cellwest, for his own personal use. We don't know. There is an agreement that is also attached to the memorandum that states that the agreement was dated as of January 29, 1988. And in this agreement Mr. Tenney and Mr. Zieglowsky agreed that Ogden First Federal, which is the bank that Mr. Tenney was trying to get the money from, would not give him money. Would not refinance his property because Tenney had filed a Chapter 7 Bankruptcy. The bank did agree to refinance the property if Tenney had a co-signer and Mr. Zieglowsky agreed to be a co-signer. That would be his testimony.

It would also be his testimony that although he agreed to be the co-signer, he ended up being the only

person who signed the note. Mr. Tenney never did sign it, so it left Mr. Zieglowsky responsible for the note which was approximately $48,000.

In this agreement it states that Tenney would be the beneficiary of 100 percent of the proceeds from the refinancing and agreed to make every payment due under the refinancing. Mr. Zieglowsky agreed to become the co-signer only on the basis that Tenney accepted full responsibility for all payments, since Zieglowsky would not receive any cash consideration for co-signing. Tenney agreed to give Zieglowsky certain shares of stock in Cellwest and New Generation. Zieglowsky agreed to collect the rents. There was a rental property. I believe it was a three-unit rental property. Zieglowsky agreed to collect the rents and make the payments for one year and his testimony would be that that is what he did. For one year after the signing of this agreement, he collects the rents, he made the payments to the bank. The agreement was that thereafter Tenney would assume the responsibility to collect the rents and make the payments. I think those are the most significant agreement terms that are in this agreement that was January 29, 1988.

Mr. Zieglowsky will testify that he co-signed the note, although it turned out that Mr. Tenney never

signed it. Subsequently, he ended up the only signature on the note. He collected the rents for one year and paid the payments for one year, and Tenney was to assume that responsibility. Mr. Zieglowsky walked away from it at that point. His testimony would be that he was then informed subsequently, I am not sure of the date, that the bank was going to foreclose on his property because payments had not been made after Mr. Zieglowsky made the last payments. He said he went to the property, one of the units was vacant. He walked in and there found the letter from the bank indicating that future payments, rent payments, were to be made directly to the bank.

It is Mr. Zieglowsky's testimony that he checked with people who were living there and found that they were not making rental payments. Were basically living there rent-free. The bank was not getting paid and the bank informed Mr. Zieglowsky the property was in foreclosure. In order to redeem the property from foreclosure, Mr. Zieglowsky paid the bank approximately $6,000 and I believe this was in 1991. So he paid $6,000 to redeem it from foreclosure. A foreclosure caused by the fact that Mr. Tenney did not assume the responsibility he had agreed to assume.

He also then owed instead of $27,000 on the property, at the time of the assumption he owed $46,691

and some-odd cents. So our contention on that first piece of property is that Mr. Tenney as restitution owes the $6,000 that Mr. Zieglowsky had to pay because of the redeeming from foreclosure. And also Mr. Tenney ought to pay the balance or the difference between the 27,000 that was originally owing and the $46,700 approximately that was owing at the time he took over the property, which is a total of $19,700. $19,700.

I believe in our memorandum we put 19,600. We rounded down that $91, instead of rounding up that $91. The Court can determine whether it is 600 or 700.

THE COURT: Where in the memorandum is that located, Ms. Barlow?

MS. BARLOW: It is page three, I believe.

THE COURT: Okay, go ahead.

MS. BARLOW: So our argument is on tract No. 1. Mr. Tenney owes Mr. Zieglowsky 25,000 and either 6 or $700, depending on whether you round it up or round it down. That is based on, Ms. Nicholas has gone about it one way and subtracting it and getting the equity and I have arrived at the same figure from a different direction. The way I arrived at it is the $6,000 that Mr. Zieglowsky had to pay to redeem the property and the difference between the indebtedness at the time he handed the property over, before the refinancing, and the

indebtedness at the time he received the property back, the difference being the $19,600. You add those together it is 25,600, and that is the state's argument on the first property.

The second piece of property, tract No. 2, at the time it was handed over, the value of the property was $42,800. There was a balance owing to First Security Financial of 29,400. That meant there was an equity of about $13,400 in Mr. Zieglowsky's behalf. That property was lost. Mr. Zieglowsky did not know it went into foreclosure. We have a Quitclaim Deed in which the property was turned over, a copy of the Quitclaim Deed that turned the property over to Mr. Tennev. Mr. Zieglowsky had nothing further to do with that property after he turned it over.

The bank was not paid. The bank foreclosed and the property was lost. Mr. Zieglowsky did not know about it in time. He was not given any notice of the foreclosure. He was not able to redeem the property.

I think that the state can make an argument that there is one of two ways of looking at what Mr. Zieglowsky lost there. He either lost, at the very least, he lost $13,400 because that is his equity at the time he turned the property over. The property was gone and he never received his equity. He received Cellwest

stock which was and is worthless.

The other argument that I think could be made, although this calls for speculation to a certain extent, is that had he not turned that property over to Mr. Tenney, had it not been foreclosed, he would have the opportunity of making the payments on this and eventually owning the full amount of the property. So that the argument could be made, although I agree that this is a tenuous argument, that the full 42,800 is what he lost; but that is asking for speculation that he would have made the payments and that eventually he would have owned it free and clear and sold it for that amount. The very least, Mr. Tenney owes Mr. Zieglowsky $13,400 for the second tract of property.

Based on that proffer of evidence, which is mixed in, I recognize with my arguments on the values, the state feels that the restitution owing to Mr. Zieglowsky from Mr. Tenney is $25,600 for the first tract of property; 13,400 for the second tract of property, making a total of 39,000 that is owing to Mr. Zieglowsky. And that added to the amount owing to the other individuals, that is over $92,000. That is the amount of restitution that we would ask the Court assess in this matter. That is not taking into account the payments that Mr. Zieglowsky had to make on the property that he

was able to redeem since 1991. We have not figured that in at all.

Unless the Court has any further question, that's it.

THE COURT: I may have a question after Mr. Uday finishes. Thank you, Ms. Barlow.

MR. UDAY: Thank you, Your Honor. Basically, our proffer to the Court will be that if Mr. Tenney were to take the stand and testify today, that he would clarify for the Court that both of these tracts of properties we are talking about, tract 1 and 2, are in fact rental properties. I believe both are tri-plexes. Mr. Tenney would indicate that he, in fact, received from Mr. Zieglowsky $20,000 from a loan that Mr. Zieglowsky originated with the bank for the purpose of paying off the original creditor, I believe, in tract 1. That $20.000 is restitution he owes, in fact, to Mr. Zieglowsky.

He would further testify that he did not receive, to his knowledge at any time, any title to either of those two properties. He certainly did not receive the keys to the apartments or any rental information from Mr. Zieglowsky and neither did he receive any Notice of Foreclosure from the bank in either case. He never collected a rent payment, he never had a

key to the apartment. And, in fact, when Mr. Zieglowsky walked away from the apartment, as counsel indicated, he was not given notice that he was to then assume those responsibilities, nor did he receive the wherewithal to assume those responsibilities.

He would further indicate for purposes of a payment schedule for restitution that he is presently employed at Advantage Mortgage making a gross amount of $1500 a month. That turns out to be a net of $1350 a month. The probation department and he have figured out a $200 a month restitution payment is owed, leaving for Mr. Tenney and the family of five, $1150 a month income.

The only assets that he has are an '86 Cadillac that they are sharing between the four licensed drivers.

MR. TENNEY: That is correct.

MR. UDAY: And the second car, that is not working. Presently needs about $650 worth of transmission work. That would be Mr. Tenney's testimony if he were to testify today.

If the Court would like, I could indicate our dispute with the 19,000 to Mr. Zieglowsky.

THE COURT: Go ahead, sir.

MR. UDAY: Thank you, Your Honor. Basically, the other $19,000 that has been talked about by counsel today, we would argue is not appropriate restitution. In

essence, our position would be, Judge, that that amount of money would fall into the province of civil litigation, if anything at all, and that Mr. Zieglowsky should not have the benefit of the Attorney General's Office to pursue this claim on his behalf.

The support we would have for that argument, Your Honor, flows from a fairly recent case called "State vs. Burton," from the Utah Appellate Court, if I may approach. I have handed counsel this case as well.

In this case briefly, Judge, what occurred was a real estate transaction, not unlike the one that occurred here. In essence, an individual who could not obtain a loan to purchase a property bought the property on a Contract of Sale. Where he agreed to pay "A," "A" agreed to pay "B," and "B" would in theory pay the mortgage company. What happened is "A" paid "B." Everything was fine for a while. "B" then did not at one point continue in his payment to the mortgage company. The mortgage company foreclosed on who was "A" living in the home or having possession of the home. "A" then sought the services of the County Attorney's Office who prosecuted a theft case against "B," and the Court at page 819 of that opinion indicated that they are slow to give approval to the broad construction of theft that was urged by the state in that particular case. Basically

holding that that, in fact, is a civil matter: that the contractor that was involved in that situation between those parties had obligations that were civil in nature. If someone defaulted in that obligation, that the claim should have been pursued civilly as a civil remedy, rather than a criminal. Clarifying the subsequent case, that it is not a question of whether there is another remedy, civil versus criminal, you can't have both in a particular case. But that this type of contract dispute over real estate property is a civil matter and did not include criminal considerations.

I think closely related to this Burton case is the case I recall from, I believe it is the Court of Appeals as well, State vs. Robinson, which was an individual in Circuit Court, pled guilty to a traffic offense, maybe two traffic offenses and relating to an automobile accident. One was maybe a speeding or failure to make the lane change properly, or something, and no driver's license. As part of the guilty plea in that case, the Judge ordered 13,000-some-odd dollars restitution for the injuries that were suffered by the car who was hit by virtue of the traffic violation. The Court, after answering some other issues that were presented before it, indicated that due process did not allow the Court to order restitution in that collateral

kind of a question primarily because it did not give the offender in that situation a forum in which he could dispute perhaps the causation factor or a combination of co-negligence. Comparative negligence is what we call it. I'm not working in that area of the law, and because of that due process, prohibited the Court from ordering that amount of restitution.

I would say that the combination of those two cases in this incident ought to clarify for us that Mr. Tenney is not responsible for the $19,000. He did not have any title or any physical possession of that property in any way. He never collected rents, but perhaps when Mr. Zieglowsky walked away, that that is really what happened. He walked away and rents were not collected by anyone as the state suggested. If that is the case, there may be a comparative negligence kind of a claim that Mr. Tenney could raise at some point, which would then violate due process in this Court for the Court to impose that additional amount of restitution here.

Additionally, because there is a contract that was signed by these parties and because these are collateral issues to the sale of securities which he was found guilty for by the jury, I believe that these are collateral questions and the Court should not impose that

additional $19,000 worth of restitution, and order 20,000 to Mr. Zieglowsky. Thank you, Your Honor.

THE COURT: I have a question for you, Mr. Uday. First of all, do you have a cite for the Robinson case?

MR. UDAY: I do. It is 860 P2d 979. If I may approach. Co-counsel is provided that a copy of that as well, Your Honor.

THE COURT: The other issue I want to raise with you, Mr. Uday, and I will give Ms. Barlow a chance to respond to that, the jury in this case found Mr. Tenney guilty of what amounts to a fraud case for the most part. I mean, I recognize the other differences, but my concern is this, and I recognize this matter is on appeal.

The restitution statute allows the Court under appropriate circumstances to award restitution up to, I think, double the amount. That is probably not a verbatim quote, but I am wondering if you are aware of any cases in the State of Utah that may have cited the provision in the restitution statute allowing a trial court to award up to double the amount of restitution? And if you are aware of such a statute, do you know what criteria ought to be met before a Court imposes up to double the amount?

My concerns are the broad aspects of this particular case and it may in fact be that if double the amount is appropriate, it may in fact be appropriate under facts and circumstances where fraud is established, so to speak.

MR. UDAY: Your Honor, I am not aware of a case that further defines or broadens the statute itself. However, in 77-18-1, I believe it is Subsection 3, there is a Subsection 3-B. I believe the qualifying paragraph indicates what the Court is to consider in imposing double, if you desire to do that. In fact, in imposing restitution at all, the Court may consider factors. That is why we indicated what Mr. Tenney's testimony would be regarding the nature of his ability to pay. I think that paints a picture there is precious little ability to pay based on his current situation.

THE COURT: This is the thing that frustrates me to no end and not just with Mr. Tenney. This is not particularly to Mr. Tenney, but what frustrates me to no end with criminal defendants who end up convicted and then they get employed, I recognize Mr. Tenney has a family to support, and those are the factors which I am obligated to take into consideration. I understand that, but we have victims out there who are out large sums of money, but yet everybody, it seems every defendant, wants

to pay it back in very small sums.

Let me ask you a question about one point. How many hours a week does Mr. Tenney work?

MR. UDAY: My understanding, he works full time.

THE COURT: Is that 40 hours a week?

MR. TENNEY: That is correct, Your Honor.

THE COURT: Now, tell me why Mr. Tenney should not be held to a standard of working more than 40 hours a week just for a limited duration for the sole purpose of paying restitution in this case so it won't take a lifetime to get these victims paid off?

MR. UDAY: I think the Court's position is well taken and, in fact, the Court should know that Mr. Tenney does not disagree with that position. But one of the subsequent issues we want to present to the Court today circles around his probation.

He is now on ISP, intensive supervised provision, which requires a curfew. He has desired to have that changed, but wanted me to talk to the Court a little bit later. His probation officer is present. Part of his concern is that the curfew is doing two things that limit his ability to make things right in this case. No. 1, it limits his ability to do some community service hours the Court has imposed because he

has to be home by 9:00. I believe it is. The other is, it has prohibited him from getting a second part-time job.

Now I have talked with his probation officer today who is not prepared to recommend that he be removed from ISP. He has some concerns and I think we can address that later: but in short, the ISP probation officer, he can correct me if I am wrong, has indicated a willingness to allow both community service and a part-time job to be done by adjusting the curfew once Mr. Tenney is able to show him verification of the community service hours and location he intends to work and of the part-time job he would intend to engage in. Is that correct?

VOICE: That is correct.

THE COURT: Let me make a suggestion so you will know where I am headed on this point. My No. 1 priority is going to be on restitution. I am not persuaded at all to release Mr. Tenney from the ISP requirements for the purpose to complete community service. Community service, while important, don't get me wrong, is a little bit lower down on the pecking order compared to restitution. So I am much more likely to go along with relaxing of curfew requirements for the sole purpose of maintaining second employment.

Assuming Mr. Tenney has no health problems that would interfere with a second job. I am trying to think of things that could reasonably interfere with a second job that this Court would find acceptable. Maybe health concerns is one point. Other than that, I think I mentioned this at the time of sentencing. I don't think this is new. Forty hours to me is not enough, to be honest with you. I just don't see it that way.

Furthermore, Mr. Uday, and I recognize I am changing gears here and I am going to ask Ms. Barlow the same thing, I want you to take a look at -- I want you to research the point to determine whether or not there are cases in other jurisdictions, if none exist in the State of Utah, that possibly have similar restitution statutes that allow for imposing up to double the amount. I do want that issue researched. So I am going to ask that you locate some cases in that regard so I can have some guidance on that point.

MR. UDAY: We would be happy to do that.

THE COURT: Again, I am going to consider that under the circumstances of this case because of the nature of this case, basically. And if I were to so find, I would commit those findings to writing and spell it out.

MR. UDAY: Perhaps while we are on the record,