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IN THE FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

DEFENDANT'S PRELIMINARY
HEARING MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS

Case No. 061500526

Judge James L. Shumate

INTRODUCTION

Under Utah law, an individual who solicits, requests, commands, encourages or intentionally aids another to commit a criminal act is criminally liable if that person acts with the mental state required for the crime. See Utah Code Ann. § 76-2-202 (2005). Moreover, "[a]s with any other crime, the State must prove the elements of accomplice liability beyond a reasonable doubt." *State ex rel. V.T.*, 5 P.3d 1234, 1236 (Utah Ct. App. 2000). In this case, the Defendant Warren Jeffs is not liable under Utah's accomplice liability statute because, first, the State misread the accomplice liability statute to mean that the Defendant and the principal are interchangeable, when

actually, the principal must be initially culpable in order for the accomplice to be charged. Specifically, in this case, there is no evidence that the principal was on notice that he was committing rape, and thus there is no underlying crime. Second, the Defendant is not an accomplice because he did not act with the requisite intent to command, encourage or intentionally aid the principal in committing the alleged offense. Finally, the State has not shown that the Defendant had any knowledge or notice that the principal was engaging in non-consensual sexual intercourse with the alleged victim, if such is the case.

I. AN ACCOMPLICE AND PRINCIPAL ARE NOT INTERCHANGEABLE IN A RAPE CHARGE AND BEFORE ESTABLISHING THAT THE DEFENDANT IS AN ACCOMPLICE, THE STATE MUST SHOW THAT THE PRINCIPAL WAS PUT ON NOTICE THAT THE ALLEGED VICTIM DID NOT CONSENT, AND IT THE STATE HAS NOT DONE SO.

A. The Accomplice And The Principal Are Not Interchangeable.

Utah law makes a distinction between the perpetrator of an offense and an accomplice, and the State does not recognize that distinction, instead alleging that the Defendant acted as the perpetrator. Under Utah's accomplice liability statute, a defendant is liable as an accomplice if he, "acting with the mental state required for the commission of an offense. . .solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense." Utah Code Ann. § 76-2-202 (2005). In *State v. Holgate*, 10 P.3d 346 (Utah 2000), the Utah Supreme Court made the distinction between an actor and an accomplice in the commission of a crime. In *Holgate*, the issue was whether the defendant was an accomplice when he knocked on a friend's door and then stepped back to allow the principal to enter and kill the victim. The Court made the distinction between the

principal and the defendant, noting that although the principal committed the offense, "the State had to prove beyond a reasonable doubt that Holgate intentionally aided . . . [the principal] in entering the . . . apartment and intended that . . . [the principal] commit a felony or assault inside the apartment." *Id.* Thus, the commission of the crime must occur by the hands of the actor, and, once that is proven, the elements of proving accomplice liability may be addressed; however, the State cannot merely substitute the accomplice's actions or scienter for that of the principal to make its case that the underlying offense occurred.

Moreover, in *State ex rel. V.T.*, the court noted that in order to convict a defendant of accomplice liability, "there must be evidence that the defendant engaged in some active behavior, or at least speech or other expression, that served to assist or encourage the *primary perpetrators* in committing the crime." 5 P.3d 1234, 1238 (Utah Ct. App. 2000)(emphasis added). In *V.T.*, the court rejected the lower court's conclusion that the defendant was liable as an accomplice for the theft of a camcorder because he "remained in the company of [the thieves] before, during, and immediately after the theft. . . this 'guilt by association' theory is not a basis on which accomplice liability can be premised under Utah law." *Id.* at 1239. Similar to *V.T.*, the State cannot, in this case, allege that the Defendant is an accomplice to rape merely because he was in close proximity to the alleged actor before, during and after the alleged rape. In other words, before reaching the issue of whether the Defendant is guilty as an accomplice, the State must prove that the principal was the "primary perpetrator."

In this case, the State alleges that the victim did not consent to sexual intercourse with the principal and bases its allegations on the actions of the Defendant,

i.e., that he used psychological manipulation and his position as a religious leader to gain her consent. However, this confuses the culpability of the principal with the culpability of the Defendant and is based on the mistaken assumption that the underlying offense can be proven with the same evidence that the State has introduced to prove accomplice liability. For the following reasons, the State has not proven that the underlying offense was committed and therefore, the Defendant cannot be held liable as an accomplice.

B. The State Has Not Proven That The Principal Committed The Underlying Crime Because It Interchanges The Defendant's Actions With The Principal's And Does Not Address Whether Either the Principal or the Accomplice had Notice That The Alleged Victim had not Consented To Sexual Intercourse With The Principal.

The State proffers four reasons why the alleged victim had sexual intercourse with her spiritual husband without her consent: (1) she did not legally consent because she was coerced or enticed under Utah Code Ann. § 76-5-406(11); (2) she expressed her opposition to the sexual intercourse through her words and conduct; (3) she was under the undue influence of a religious leader (the Defendant); and (4) she erroneously believed that the principal was her spouse under Utah Code Ann. § 76-5-406(7). See State's Preliminary Hearing Memorandum at 10-15. However, these four allegations of non-consent confuse the Defendant with the principal, and in each, do not address the critical issue of the underlying offense, to-wit: whether the principal was on notice that the alleged victim did not consent.

First, the State avers that the alleged victim did not consent because she was coerced or enticed under Utah Code Ann. § 76-5-406(11). Under this section, if the "victim is 14 years of age or older but younger than 18 years of age and the actor is

more than three years older than the victim and entices or coerces the victim to submit or participate," the victim does not consent to the sexual intercourse. Utah Code Ann § 76-5-406(11)(2005). The State relies on *State v. Scieszka*, 897 P.2d 1224 (Utah Ct. App. 1995), and *State v. Gibson*, 908 P. 2d 352 (Utah Ct. App. 1995), for the proposition that the alleged victim did not consent because the Defendant enticed, or coerced her to have sexual intercourse with the principal. However, both cases focused on whether the principal coerced or enticed the victims, and the State's reliance on these cases misses a fundamental element of the alleged crime; that is, whether the principal, not an accomplice, engaged in coercion or enticement that negated the alleged victim's consent.

The instant case presents a similar issue to that explored in *State v. Foust*, 588 P.2d 170 (Utah 1978), in which the defendant was charged with raping his sixteen year old stepdaughter. The issue before the court was whether the alleged victim was an accomplice to the incestuous act, but before the court could reach that question, it had to determine whether she consented. *Id.* at 172. Thus, the court first noted that the issue of whether she "participated in an incestuous act raises a . . . question of fact, viz., whether she consented thereto and thus became an accomplice or whether she engaged in the act against her will and thus became a victim." *Id.* at 173. Moreover, the court noted that although it was "legislatively determined that it is not legally possible for anyone under the age of fourteen to consent to sexual intercourse. . . because the prosecutrix was over the age of sixteen. . . [she was] therefore capable of consenting." *Id.*

The instant case presents the same problem. Until it is determined that the alleged victim, who is of the legal age of consent, did not consent and was enticed or coerced by the *principal*, the issue of accomplice liability cannot be raised. The Utah Supreme Court also noted that the issue of consent is a factual one, and should be scrutinized with great care in order to "protect . . . one who engages in intimate relations with another under the impression that all is proceeding by mutual consent, only to be faced later by a claim of rape." *State v. Herzog*, 610 P.2d 1281, 1283 (Utah 1980).

The State misguidedly relies on *Gibson* and *Scieszka* for the principle that the Defendant used his position of authority within the community to psychologically manipulate the alleged victim and offer her the reward of God's approval in exchange for nonconsensual sexual intercourse. However, the State misapplied these two cases by alleging that the Defendant assisted in the alleged rape without ever exploring whether the principal was put on notice of the alleged victim's non-consent and without determining whether the principal, and not the accomplice, enticed or coerced the alleged victim to have intercourse without her consent.

Second, the State asserts that under Utah Code Ann. § 76-5-406(1), the alleged victim did not consent as a matter of law because she "expressed lack of consent through words or conduct." Utah Code Ann. § 76-5-406(1)(2005). However, again, the State confuses principal liability and accomplice liability, stating that because the alleged victim "expressed her lack of consent to the defendant" she did not consent to sexual intercourse as a matter of law. State's Preliminary Hearing Memorandum at 13. Like the issue of whether the alleged victim consented as a matter of law under Utah Code Ann. § 76-5-406(11), before the State can reach the issue of whether the

Defendant acted as an accomplice, the State must meet the preliminary hearing probable cause standard that the alleged victim did not consent to the *principal*.

In a similar case, the Utah Court of Appeals considered whether the defendant was required to pay restitution to the victim in a case in which she alleged he raped her, but the trial court jury acquitted him of rape and convicted him of lesser-included offenses. *State v. Houston*, 9 P.3d 188, 189 (Utah Ct. App. 2000). The case was based on an incident in which the defendant and the victim slept next to each other, and late in the night, the defendant "believed Lowder [the victim] consented to the sexual activity because she 'nudged' him and did not resist or say anything when he kissed and fondled her." *Id.* at 189. Thus, because the defendant successfully asserted that he was not put on notice that the victim did not consent, the court declined to award restitution, holding that "nothing in the jury's verdict establishes a lack of consent, whether beyond a reasonable doubt or by a preponderance of the evidence." *Id.* at 190-91. The instant case presents the same factual problem: there is no evidence that the principal was put on notice, before or during sexual intercourse, that the alleged victim did not consent. Thus, because this evidence cannot be established, the State cannot allege that the Defendant was an accomplice to rape merely because he was the alleged victim's spiritual advisor who may have listened to the alleged victim's concerns about her relationship with the principal. Moreover, even if the principal actor was on notice of lack of consent through the alleged victim's words or conduct, this does not establish that the accomplice, who must be acting with the same mental state as the principal, was put on notice that the alleged victim expressed a lack of consent by words or conduct.

Third, the State contends that the alleged victim did not consent because the Defendant was in a position of undue influence as a religious leader under Utah Code Ann. § 76-5-406(1). Under this section, sexual intercourse is without consent when "the victim is younger than 18 years of age and at the time of the offense *the actor* occupied a position of special trust in relation to the victim." Utah Code Ann. § 76-50406(10)(2005)(emphasis added). In addition, the State relies on *Scieszka* for the notion that the alleged victim "submitted to sex with her purported husband because of the undue influence and religious authority of the defendant. . . [and] even though the defendant did not have sex with [her], he was the actor who made it possible." State's Preliminary Hearing Memorandum at 14. This misconstrues the plain language of the statute and *Scieszka*, which both clearly address situations in which the principal actor who committed the rape was a spiritual advisor to the victim.

In *Scieszka*, the principal was a thirty-five year old man who "held himself out to be a man of God." *Scieszka*, 897 P.2d at 1224. He spent two years befriending the fourteen year old victim and "at defendant's insistence, their relationship became physical," telling her that "God had answered his prayers and that their sexual activity was all right." *Id.* at 1225. The instant case differs from *Scieszka* in that the principal was not the religious leader using his influence to have nonconsensual intercourse with the alleged victim; to the contrary, the principal was a nineteen year old male who was not in a position of special influence or trust. Moreover, although the Defendant in this case was the alleged victim's religious leader, when the alleged victim voiced her concerns about her relationship, he merely advised her within the parameters of their religion, counseling obedience, loyalty and faithfulness to her partner. This advice did

not negate the alleged victim's ability to determine whether or not she wanted to consent to have intercourse with the principal, and as a result, the Defendant's position as a religious leader did not negate her consent by law. Finally, a plain reading of Utah Code Ann. § 76-5-406(10) defines a circumstance of no-consent when the actor, the person engaging in the intercourse is the religious leader and occupies the position of special trust. The statute does not apply to an accomplice. The base offense of Rape must be committed by principal actor before examining accomplice liability.

Moreover, the State relies on *State v. Gonzalez*, 56 P.3d 969 (Utah Ct. App. 2002), for the proposition that a principal and an accomplice are interchangeable. See State's Preliminary Hearing Memorandum at 14. However, the State's reliance on *Gonzalez* is misguided because in that case, the defendant was charged with murder as a principal, and chose not to introduce certain evidence of his participation in the offense, for fear it would open the door to accomplice liability. *Gonzalez*, 56 P.3d at 971. The defendant argued that the trial court denied him due process by not requiring that the State provide notice on the information of its intent to pursue the accomplice liability theory at trial. *Id.* In this context, the court held that "conviction of accomplice liability does not require proof of different elements or proof of different quality." *Id.* at 972. Thus, the issue in *Gonzalez* is very different than the issue presented in this case, because the defendant in *Gonzalez* was being charged as a principle, and in the alternative, as an accomplice for a murder that he actively participated in. In this case, there is no way the Defendant could be charged as a principal for rape when he has never had sexual intercourse with the alleged victim. Thus, in a case where the defendant could be charged as either the principal or the accomplice, the *Gonzalez*

standard applies; however, in this case, where the Defendant could only possibly be charged as an accomplice, the underlying offense commissioned by the actor must be established.

Finally, the State argues that the alleged victim did not legally consent to sexual intercourse because she erroneously believed the principal to be her spouse. The State relies on Utah Code Ann. § 76-5-406(7), which states the victim has not consented if "the actor knows that the victim submits or participates because the victim erroneously believes that the actor is the victim's spouse." Utah Code Ann. § 76-6-406(7)(2005). The State relies on section 76-6-406(7) for the proposition the alleged victim "believed herself to be married and submitted to intercourse" with the principal, but she did not consent by law because "her purported marriage was void under Utah statutory and common law." State's Preliminary Hearing Memorandum at 15. However, the State misconstrues the purpose of section 76-5-406(7). This variation of the nonconsent statute is meant to protect individuals who consent to sexual intercourse with a person who they believe to be their spouse, but who turns out to be an entirely different individual.

Although no Utah court has addressed this kind of situation, other jurisdictions have, labeling it "rape by deception." For instance, Arizona had a similar statute that defined the crime of rape to include the situation "where a female submits under a belief that the person committing the act is her husband and this belief is induced by any artifice, pretense or concealment practiced by the accused with intent to induce such belief." *State v. Navarro*, 90 P.2d 227, 228 (Ariz. 1961) (citing A.R.S. § 13-611 (1956)). In *Navarro*, the victim fell asleep while her husband and her friends were drinking in the

living room, and awoke from a sound sleep to the defendant, who was not her husband, attempting to have intercourse with her. *Id.* Based on this attempted rape by deception, the defendant was convicted under Arizona law. See also *State v. Williams*, 128 S.E. 952 (N.C. 1901) (convicting the defendant of rape under a North Carolina law prohibiting "carnal knowledge of a married woman by fraud for impersonating her husband"). Like the fact pattern in *Navarro*, the Utah rape by deception statute¹ is aimed to protect individuals who consent to sexual intercourse on the mistaken belief that they are having sex with a spouse, and who would rescind that consent upon the discovery that the principal is someone other than their spouse.

Thus, the State's application of the statute, that it should be used in cases in which the marriage is mistakenly or wrongly carried out, is erroneous. Instead, the statute is meant to protect individuals who are deceived into having sexual intercourse with a person they believe to be their spouse; it is not meant to establish per se rape liability any time two otherwise consenting individuals discover that their marriage ceremony was for some reason invalid or void.

Therefore, for the above reasons, the State has mistakenly confused the principal with the Defendant and has not adequately proven the underlying offense. Establishing that the base offense—rape—was committed by the principal actor is an analytic condition precedent to accomplice liability.

¹ Although the Defendant has not been able to review the legislative history for section 76-5-406(7), the analogous language between the Arizona statute and the Utah statute indicates that the Utah statute serves the same purpose, to establish non-consent in "rape by deception" situations.

III. THE DEFENDANT WAS NOT ON NOTICE OF THE UNDERLYING OFFENSE AND THEREFORE DID NOT ACT WITH THE REQUISITE INTENT TO COMMAND, ENCOURAGE OR INTENTIONALLY AID THE PRINCIPAL IN COMMITTING THE ALLEGED OFFENSE.

In order to hold the Defendant criminally liable "for an act committed by another, . . . the degree of his responsibility is determined by his own mental state in the acts that subject him to such responsibility, not by the mental state of the actor." *State v. Crick*, 675 P.2d 527, 534 (Utah, 1983)(emphasis in original). In other words, "accomplice liability adheres only when the accused acts with the mens rea to commit the principal offense. Utah's accomplice liability statute specifically requires that the person act intentionally." *State v. Calliham*, 55 P.3d 573, 594 (Utah 2002). In this case, the Defendant did not act with the requisite intent to help the principal commit the alleged rape because he was not on notice that non-consensual intercourse was occurring.

In *Calliham*, the Utah Supreme Court addressed the question of whether the defendant was liable under Utah's accomplice liability statute for criminal homicide. The court noted that "mere presence at the scene of a crime is not enough to impose accomplice liability. One must take some action to solicit, request, command, encourage, or intentionally aid in commission of the offense." *Id.* Further, the Court agreed with the prosecution's statement that "an aider and abettor may be found guilty of the principal crime if that person intends it to be committed." *Id.* Thus, because the defendant in *Calliham* helped the principal commit the homicide, provided him a gun and helped him get away, the Court affirmed his conviction under the accomplice liability statute. Unlike the defendant in *Calliham*, the Defendant did not intend that the principal engage in nonconsensual sexual intercourse with the alleged victim and had

no notice that non-consensual intercourse was occurring, if such was occurring. The alleged victim was legally of age to consent, and, as noted above, the State has not provided evidence that the principal enticed or coerced her to submit against her will to sexual intercourse. Moreover, merely by acting as the community's religious leader, the Defendant did not affirmatively act to request, command, encourage or intentionally aid the principal in enticing or coercing the alleged victim, and therefore, the Defendant, unlike the defendant in *Calliham*, was not an accomplice in commission of rape.

The State inaccurately relies on *State v. Chaney*, 989 P.2d 1091 (Utah Ct. App. 1999), for the proposition that the Defendant's physical presence is not necessary for accomplice liability because a "person whose conduct makes it possible for another to commit the crime of rape of a child' may be held liable even though he was not present during the commission of the rape." State's Preliminary Hearing Memorandum at 7 (quoting *Chaney*, 989 P.2d at 1098). In *Chaney*, the defendant performed a spiritual marriage between his daughter and a forty-eight year old man. *Chaney*, 989 P.2d at 1094. The court held, considering the facts of the case, that the "defendant knew and intended that his conduct would result in [the principal] having intercourse with [the daughter] when she was only thirteen." *Id.* at 1097. However, the State's reliance on *Chaney* is erroneous for the following plethora of reasons:

- i. The crime at issue in *Chaney* was rape of a child, which has two elements: (1) sexual intercourse (2) with a child who is under the age of fourteen. See Utah Code Ann. § 76-5-402.1(1) (1995). The court noted that "the age element of child rape imposes strict liability." *Id.* at 1101. Thus, in order to hold the defendant liable in *Chaney*, the State only had to prove that the principal engaged in intercourse with the victim. In this case, alleged offense is not a strict liability crime and the State cannot prove that the intercourse was nonconsensual.

- ii. The defendant in *Chaney* actively encouraged, commanded and intentionally aided the principal in engaging in sexual intercourse with the thirteen year old victim, including making explicit references to sexual intercourse, including instructing "her regarding her duties in the 'marriage bed'" and giving her "copies of *The Kama Sutra* and the *Sensuous Woman* [and telling] her 'to practice' and try to learn how to enjoy the feeling more—the feelings of sexual stimulation." *Id.* at 1094-95. As the Utah Court of Appeals noted, "it is the *quality* of one's actions, not their *quantity*, that might make one an accomplice. No amount of passive presence will render one an accomplice." *State ex rel. V.T.*, 5 P.3d 1234, 1237(Utah Ct. App. 2000)(*emphasis in original*). In this case, the Defendant, may have counseled or advised the alleged victim about her relationship, but this amounts only to passive presence in her life. Unlike the defendants' instructions and explicit commands in *Chaney*, the Defendant in this case did not explicitly or implicitly command, encourage, or intentionally aid the principal into coercing or enticing the alleged victim into having sexual intercourse.
- iii. The State relies on *Chaney* for the notion that the Defendant is liable as an accomplice despite not being present for the commission of the alleged rape. However, this holding in *Chaney* is based on the strict liability of rape of a child, since the "[d]efendant instructed [his daughter] on her sexual obligations in the relationship, telling her that she must submit to [the principal] and not always refuse to engage in sexual relations with him." *Id.* at 1098. Based on this, the court concluded that "this conduct made it possible for [the principal] to conduct the crime of rape of a child." *Id.* Thus, the issue of "presence" at the commission of the crime actually dealt with whether, under the strict liability statute, the defendant made it possible for sexual intercourse, whether consensual or not, to occur. Unlike *Chaney*, the Defendant in this case is charged with being an accomplice to an offense that is only a crime if it is nonconsensual, so the issue has never been his presence during the intercourse. The Defendant's authority as a religious leader and community leader do not, by themselves, eliminate the alleged victim's consent.

IV. PRELIMINARY HEARING STANDARD

In *State v. Virgin*, 137 P.3d 787 (Utah 2006), the court revisited the appropriate legal standard to be applied to the preliminary hearing. In order to establish probable cause, the prosecution must produce evidence sufficient to support the reasonable belief that the Defendant committed the charged crime. *Id.* at 791. Properly construed

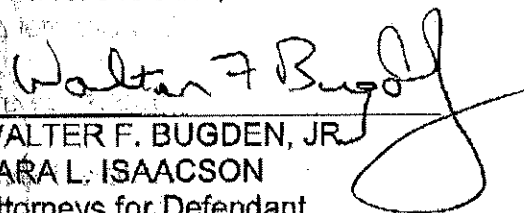
and applied, the probable cause standard at a preliminary hearing does not constitute a rubber stamp for the prosecution, but rather provides a meaningful opportunity for magistrate to ferret out groundless and improvident prosecutions. Under the probable cause standard, the prosecution has the burden of producing "believable evidence of all of the elements of the crime charged." *State v. Clark*, 20 P.3d 300. Ferreting out groundless and improvident prosecutions "relieves the accused from the substantial degradation and expense incident to a modern criminal trial when the charges against him are unwarranted or the evidence insufficient." *State v. Anderson*, 612 P.2d 778, 784 (Utah 1980).

CONCLUSION

In the instant matter for the reasons identified in this memorandum, and those further discussed during the oral argument which will follow the presentation of the State's evidence, the Defendant submits that the State has failed to establish various elements of both principal and accomplice liability. The Defendant should not be bound over on any non-consent theory where the State has failed to adduce believable evidence of the elements of Rape. The Defendant submits the State has failed to present evidence that would support a reasonable belief that the offense of a Rape has been committed by this Defendant on either Count 1 or 2.

DATED this 20th day of November, 2006.

BUGDEN & ISAACSON, L.L.C.


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CERTIFICATE OF SERVICE

I hereby certify that, on the 20 day of November, 2006, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Brock R. Belnap
Washington County Attorney
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- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE: