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FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WARREN STEED JEFFS, Defendant.	REPLY MEMORANDUM IN SUPPORT OF MOTION IN LIMINE REGARDING CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER **FILED UNDER SEAL PER COURT ORDER** Criminal No. 061500526 Judge James L. Shumate

Utah Code Annoated § 76-203(2) plainly states that "it is no defense" that Allen Steed "has not been prosecuted..." Nevertheless, the defense argues that the "fact that the State has not charged Allen Steed with rape weighs against the probability that the rape of Elissa Wall ever occurred." Defense Memorandum Opposing State's Motion in Limine Regarding Criminal Responsibility for Conduct of Another ("*Defense Memo*"), p. 4. This argument is speculative and violates the fundamental precept that opinions of counsel are not evidence. More fundamentally, it is irrelevant to the defendant's culpability.

I. Whether the State Has Charged Allen Steed Is Irrelevant Because Opinions of Counsel Are Not Evidence

The Court routinely instructs the jury that opinions of counsel are not evidence. *See State v. Hovater*, 914 P.2d 37, 44-45 (Utah 1996) (citing numerous cases for the proposition that that "attorneys' remarks are not evidence") (*abrogated on other grounds, State v. Litherland*, 12 P.3d 92 (Utah 2000)); *State v. Dunn*, 850 P.2d 1201, 1225 (Utah 1993) (finding that trial court properly "instructed the jury not to consider the statements of counsel as evidence."). Yet, the supposed relevance of the alleged "failure" to charge Allen Steed rests upon the assumption that the State must not believe that a rape occurred.

The defense argument is entirely speculative and misleading. There are numerous possible reasons why Allen Steed may not have been charged: perhaps he will be charged later; perhaps there are tactical reasons for waiting; perhaps the State believes he is not the primarily responsible party. Whatever the reason, the defense is guessing when it seeks to infer that no rape occurred because the State has not charged Allen Steed. The fallacy of the defense position is revealed by considering its mirror image: If Allen Steed *were* charged with rape, would the Court permit the State to argue that fact as evidence of the defendant's guilt?

II. Evidence of Allen Steed's Intent is Irrelevant

The defense further argues that lack of criminal charges against Allen Steed "is probative of whether Allen Steed, *with the requisite mental culpability*, committed the crime upon which the charges against the Defendant are predicated." *Defense Memo*, p. 5 (emphasis added). Aside from the reasons set forth above, evidence of Allen Steed's mental culpability is irrelevant

because **the State need not prove Allen Steed's mental state in order to convict the defendant**. The defense is simply wrong when it argues, "the Defendant is in no way criminally liable if Allen Steed did not have the requisite mental state." *Defense Memo*, p. 5. This issue was resolved against the defendant by the Utah Supreme Court in *State v. Crick,* 675 P.2d 527 (1983), which held:

> A defendant can be criminally responsible for an *act* committed by another, but 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. This is clear from the language of 76-2-202... Otherwise, a designing person could use a madman to kill another and mitigate his own responsibility by reference to the derangements of the person he had used to accomplish his purposes. The law is otherwise.

Id. at 534 (emphasis in original) (rejecting a murder defendant's contention that she should be convicted of manslaughter because a co-perpetrator lacked criminal intent for murder).

The *Crick* opinion is consistent with the principle that a crime "may be performed through an innocent dupe." *United States v. Bryan*, 483 F.2d 88, 92 (3rd Cir. 1973). The basis for "this well accepted principle" was "aptly explained" as follows:

> It is but to quote the hornbook to say that in every crime there must exist a union or joint operation of act, or failure to act, and intent. However, this is far from suggesting that the essential element of criminal intent must always reside in the person who does the forbidden act. Indeed, the latter may act without any criminal intent whatever, while the *mens rea* – 'willfulness' – may reside in a person wholly incapable of committing the forbidden act .... And in such a case, of course, only the person who willfully causes the forbidden act to be done is guilty of the crime.

Id. (citing *United States v. Lester*, 363 F.2d 68, 73 (6th Cir. 1966) (emphasis and omissions in original)).

In *State v. Telford,* 2005 UT 51, the defendant argued that because he "was merely an accomplice," it violated the Eighth Amendment to impose the same punishment on him as on his co-perpetrator. *Id.* at ¶ 2. The Utah Supreme Court disagreed, noting that "the accomplice liability provision requires the fact finder to determine that the accomplice *had the same mental state as the person who directly committed the crime.*" *Id.* at ¶ 4 (citing Utah Code Ann. § 76-2-202) (emphasis added).

According to the defense, this language from *Telford* requires the State to prove Allen Steed's underlying mental state. However, the Supreme Court was responding to the specific argument that an accomplice constitutionally could not be punished the same as a co-perpetrator. In rejecting the argument, the Court merely noted the well-established premise that criminal liability is determined by each individual's own mental state. *Id.* Rather than imposing a burden of proof regarding another actor's mental state, the Supreme Court found no Constitutional infirmity because "the statute requires that accomplices bear a comparable degree of culpability to be convicted of the same level of offense" *Id.*

The defense' assertion that the State must prove Allen Steed's culpable mental state is a hold-over of the now-rejected common law rule that "an accessory to a crime could not be convicted unless and until the principal whom he had assisted had been convicted of committing the substantive offense." *U.S. v. Standerfer,* 610 F.2d 1076, 1081 (3rd Cir. 1979). Under that rule, "if the principal were to escape, or to die, or never brought to trial, or tried and acquitted, no charges could be brought against any accessories charged with assisting him." *Id.*

This common law rule was abolished by statutes that did away with any distinction between "accomplices" and "principals" in terms of criminal responsibility. For example, the United States Congress passed the following:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.

18 U.S.C. § 2(a). According to the Ninth Circuit, the effect of this section is "to abolish the distinction between principals and accessories .... [T]he old distinction between principals and accessories which pertained to felonies is generally abrogated, and that a charge against one formerly known as an accessory is good against him as principal." *Rooney v. United States*, 203 F. 928, 932 (9th Cir. 1913). "This view has been adopted by a majority of the courts of appeals. It is also the view taken by the Model Penal Code." *Standerfer*, 610 F.2d at 1082, n. 19.

Utah similarly statutorily rejected any distinction between accomplices and principals when it adopted Utah Code Ann. § 76-2-202:

> 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.

Id. (emphasis added). Utah's statute is structurally almost identical to the federal statute. Thus, Utah also eliminates the former distinction between accomplices and principals by designating any person who acts with the required mental state as a "***party***." "[W]hether an individual is characterized as an 'accomplice' or as a 'conspirator,' that individual may be properly called,

and prosecuted as, a 'party' to the crime." *State v. Peterson*, 881 P.2d 965, 971, n. 7 (Utah App. 1994).

As a result of section 76-2-202, the distinctions between "principal" and "accomplice" are legally irrelevant because anyone acting with the required mental state is a "party." Hence, each party's criminal responsibility rises or falls depending on upon his or her own actions and intent. *State v. Hansen*, 734 P.2d 421, 429 (Utah 1986) ("while Hansen may be criminally responsible for an act committed by Rocco, the degree of Hansen's responsibility is determined by his own mental state, not by the mental state of Rocco.").

Because Allen Steed's criminal intent is irrelevant to the defendant's criminal responsibility, evidence that Allen Steed lacked criminal intent is likewise irrelevant. "Lack of criminal intent by [one party] neither negates commission of the crime, nor immunizes [another party] from criminal liability." *United States v. Bryan*, 483 F.2d 88, 92 (3rd Cir. 1973). Hence, the Court should prohibit argument and evidence regarding whether the State has charged Allen Steed.

CONCLUSION

The Court should instruct the jury regarding Utah Code Ann. § 76-2-203(2) and prohibit evidence whether Allen Steed has been charged or prosecuted.

Respectfully submitted this 18th day of July 2007.

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