


FILED DISTRICT COURT
Third Judicial District

JAN 28 2013

SALT LAKE COUNTY

By  Deputy Clerk

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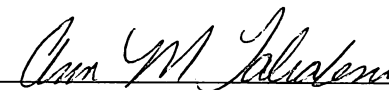
IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

<p>STATE OF UTAH, Plaintiff, v. SHAWN H. MOORE, Defendant.</p>	<p>DEFENDANT'S PROPOSED JURY INSTRUCTIONS Case No. 081908861 (Judge Katie Bernards-Goodman)</p>
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The defendant, SHAWN H. MOORE, by his attorney, hereby requests that the attached jury instructions be given at the trial of this action in addition to the usual and customary instructions given in all criminal cases.

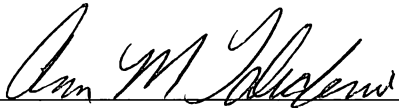
DATED this 28 day of January 2013.



ANN MARIE TALIAFERRO
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DEFENDANT'S PROPOSED JURY INSTRUCTIONS was hand delivered and/or mailed, postage pre-paid, to Che Arguello, Assistant Attorney General, 5272 South College Drive, #200, Salt Lake City, Utah 84123, on this 28th day of January 2013



INSTRUCTION NO. _____

You are instructed that the mere fact that Mr. Moore has been charged with the described offenses is not any evidence of guilt and is not even a circumstance which should be considered by you in determining guilt or innocence.

INSTRUCTION NO. _____

You are instructed that Mr. Moore is a competent witness in his own behalf and has the right to go upon the witness stand and testify if he chooses to do so. However, the law expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand. If he is satisfied with the evidence which has been given, there is no occasion to add thereto.

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the prosecution to prove every essential element of the charge against him. So, in this case the mere fact that Mr. Moore has not availed himself of the privilege which the law gives him may not prejudice him in any way. It may not be considered as any indication of either guilt or innocence. The choice of Mr. Moore as to whether to testify is not a circumstance against him which you may consider, and no presumption of guilt can be indulged in the minds of the jury by reason of such a decision on his part.

INSTRUCTION NO. _____

You are instructed that Mr. Moore is a competent witness in his own behalf and his testimony should be received and given the same consideration as you give to that of any other witness. The fact that he stands accused of a crime is not evidence of guilt and is no reason for rejecting his testimony. You should weigh his testimony the same as you weigh the testimony of any other witness.

INSTRUCTION _____

You are instructed that a person is not guilty of a criminal offense unless:

- (1) his conduct or action is prohibited by law, and
- (2) such conduct or action is accompanied by the requisite criminal intent.

INSTRUCTION NO. _____

A separate crime or offense is charged in each count of the Information. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

INSTRUCTION _____

You have been previously instructed that a person is not guilty of a criminal offense unless the State proves beyond a reasonable doubt the requisite criminal intent. In this case, the requisite criminal intent for the charges of “Securities Fraud” and “Sale by an Unlicensed Agent” as set forth in Counts 1 through 8 is “willfulness.”

A person acts “willfully” when it is his or her conscious objective or desire to engage in the conduct or cause the result. For the counts of securities fraud, “willfully” implies a willingness or desire to misstate or omit a material fact. For the counts of “sale by an unlicensed agent,” the term “willfully” implies a willingness or desire to offer or sell a security while not being licensed. To act willfully in this context means to act deliberately and purposefully, as distinguished from merely accidentally or inadvertently. The State does not have to show, however, that the defendant held the intent to deceive, manipulate, or defraud.

Utah Code Ann. §76-2-101, §76-2-103; *State v. Larsen*, 865 P.2d 1355, 1358 (Utah 1993) (“willfully” does not require “scienter,” the intent to deceive, manipulate, or defraud) (a “no scienter” reading of the statute will affect only those professionals who willfully omit or misstate material facts); *State v. Wallace*, 2005 UT App 434, ¶13 (To act “willfully” in the securities fraud context means to act deliberately and purposefully, as distinguished from merely accidentally or inadvertently).

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INSTRUCTION _____

Under the law, the mental intent of “willfulness” does not hold one liable for a “good faith oversight” or failure “to discover and disclose a material fact.”

State v. Larsen, 865 P.2d 1355, 1360 (Utah 1993) (defendant argued that professionals will be held liable for “good faith oversight” or failure “to discover and disclose a material fact.” ...This argument completely ignores the willfulness requirement ...An individual must act willfully to be criminally liable under the statute. This means that the prosecution must prove beyond a reasonable doubt that the accused “desire[d] to engage in the conduct or cause the result.” Utah Code Ann. § 76-2-103. This highly culpable mental state is not consistent with “strict liability,” as that term is traditionally used”).

State v. Wallace, 2005 UT App 434, ¶13 (not reach the issue as to question whether, to convict defendant of willfully committing securities fraud, the State was required to prove that defendant knew of the information that he failed to disclose and that he knew that such information was material);

Utah Code Ann. § 61-1-22 (3) (A person who offers or sells a security in violation of Subsection 61-1-1(2) is not liable under Subsection (1)(a) [CIVIL PROVISION] if the purchaser knew of the untruth or omission, *or the seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.* Utah Code Ann. § 61-1-22 (West)

INSTRUCTION _____

Under the law, the mental intent of “willfulness” does not hold one liable for a “good faith oversight” or failure “to discover and disclose a material fact.”

INSTRUCTION NO. _____

One of the allegations against the Defendant, Shawn Moore, in each of the charges of Securities fraud, as alleged in Counts 1, 2, 3, and 4, is that he, directly or indirectly, 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.

Under these allegations, it is not necessary for the State to prove that the individual investor believed the statements to be true, nor that he relied upon the statements in his decision-making process, so long as the statements made were such that a reasonable person in similar circumstances would have relied upon the statements in making an investment decision.

On the other hand, Utah law also does not render a person liable to an investor who blindly invests without concern for truth or reasonableness of representation made and who then later asserts a claim of falsity of a representation about which he previously had no concern and upon which he placed no reliance.

You must make the decision whether a reasonable person would have relied upon the statements under similar circumstances as presented by the facts of this case.

State's Instruction; addition to;

State v. Johnson, 2009 UT App 382, 224 P.3d 720, 731-32 (it is not necessary for State to prove that individual investor believed statements to be true, nor that he relied upon the statements in his decision-making process, so long as the statements made were such that a reasonable person in similar circumstances would have relied upon the statements in making an investment

decision. [jury] must make decision whether a reasonable person would have relied upon the statements under similar circumstances as presented by the facts of this case).

Addition from: *S & F Supply Co. v. Hunter*, 527 P.2d 217, 221 (Utah 1974) (noting that it has also been said that this [civil provision of the] statute does not require the buyer to prove the element of his own reliance on the false representation. It is true that the statute does not expressly so state. But all of the law cannot be written in one sentence or one statute. **This, and any other statutes, must be considered in its relationship to the total fabric of the law and be so interpreted and applied as to be consistent with common sense, and with elemental principles of justice.** It follows that the statute cannot fairly be understood as meaning that a buyer can naively or blindly purchase stocks without concern for the truth or reasonableness of representations made, then if it later develops that it would serve his interest, assert a claim of falsity of a representation about which he previously had no concern, and upon which he placed no reliance,. ...)

INSTRUCTION NO. _____

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You must make the decision whether a reasonable person would have relied upon the statements under similar circumstances as presented by the facts of this case.

INSTRUCTION NO. _____

The law does not impose an affirmative duty on applicable persons to disclose all material facts. Instead, the law requires proof of a material omission that renders a predicate statement misleading, in light of the circumstances in which it is made.

INSTRUCTION NO. _____

The law does not impose an affirmative duty on applicable persons to disclose all material facts. Instead, the law requires proof of a material omission that renders a predicate statement misleading, in light of the circumstances in which it is made.

INSTRUCTION NO. _____

You have been instructed in Instruction _____ that it is unlawful for any person, “in connection” with the offer, sale, or purchase of a security, directly or indirectly, to make any untrue statement of material fact or omit to state a material fact necessary in order to make predicate statements made not misleading. Thus, you must determine those persons and those roles who you find fall within the scope of acting “in connection” with the offer or sale of a security for which this law applies.

You are instructed that the law does not criminalize actions or inactions of those who do not effect or do not take an active part in attempting to effect the purchase or sale of a security. A person is said to be acting sufficiently “in connection” with the offer, sale, or purchase of a security to be held liable only where the person actually and directly participates in soliciting an investor’s purchase to the extent that they are a substantial factor in the actual offer or sale. A person is not acting sufficiently “in connection” with the offer, sale, or purchase of a security when the person’s actions are mostly ministerial or unnecessary to the consummation of the transaction.

Court’s Ruling, dated December 23, 2010 at 4, 5 (“The statute does not criminalize those who do not effect or attempt to effect the purchase or sale of a security. Defendant is free to argue to the jury that he does not meet the elements of the statute, that he was simply a document-collector; Section 61-1, when read in conjunction with Section 61-1-21, only punishes those who willfully mislead investors in connection with the offer or sale of a security. It does not punish mere paper pushers); *Federal Savings & Loans Ins. Corp v. Provo Excelsior Ltd*, 664 F. Supp 1405, 1411 (D.Utah 1987)(“we rule that “seller” status ...will exist as to the person who transfers title to the stock and such additional persons who actually and directly participate in soliciting a plaintiff’s purchase to the extent that they are a substantial factor in the actual offer or sale to that plaintiff); *Willis v. Spring Canyon Copper Co.*, 291 P.2d 878, 879 (Utah 1956) (defendant’s “participation” in the sale of the stock not sufficient to hold him liable where his acts were not necessary to consummate the sale already made); *Also, Id.* (concurring opinion) (“Since such acts were only ministerial, they do not show that the secretary was a participant in the sale...”).

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INSTRUCTION NO. _____

You have heard testimony from expert witnesses in this case. If an expert witness has expressed an opinion of the law which is in conflict with these instructions, you are to disregard that opinion of the expert witness.

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INSTRUCTION NO _____

In weighing the opinions of experts, you may look at their qualifications, the reasoning process the experts used, and the overall credibility of their testimony. You may also look at things like bias, consistency, and reputation.

Use your common sense in evaluating all witnesses, including expert witnesses. You do not have to accept an expert's opinion. You may accept it all, reject it all, or accept part and reject part. Give it whatever weight you think it deserves.

Utah R. Evid. 702.

Adapted from Utah Model Jury Instruction

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Limiting Instruction No. ____

IF “OTHER ACTS” EVIDENCE IS ALLOWED:

You (are about to hear) (have heard) evidence that the defendant [insert 404(b) evidence] (before) (after) the act(s) charged in this case. You may consider this evidence, if at all, for the limited purpose of [-----]. This evidence (is) (was) not admitted to show that (he) (she) acted in a manner consistent with these other acts. Keep in mind that the defendant is on trial for the crime(s) charged in this case, and for (that) (those) crime(s) only. You may not convict a person simply because you believe (he) (she) may have committed some other act(s) at another time.

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INSTRUCTION NO. _____

As to Counts 1, 2, 3, and 4, alleging Securities Fraud, it is a defense that the Defendant acted in “good faith.”

You are instructed that it is a defense to these charges that the Defendant held a “good faith” belief in the plan or business and held a good faith intention to carry out any promises and/or representations. This “good faith” belief of the Defendant, if found by you, negates the necessary intent requirement that the Defendant acted “willfully.”

The fact that the business, viewed in retrospect, would be regarded as impractical and impossible by reasonable persons of ordinary judgment and prudence does not defeat this defense of good faith, if the defendant asserting the defense actually believed that the business was practical and would succeed. However, no matter how firmly the defendant may believe in the plan, his belief will not justify baseless, false, or reckless representations or promises.

Here, Mr. Moore maintains that he acted in good faith. Accordingly, if there is sufficient evidence produced by either the prosecution or the defense to provide some reasonable basis for you to conclude that Mr. Moore acted in “good faith,” then the prosecution has the burden to prove to you, beyond a reasonable doubt, that he did not. Therefore, you are instructed that it is the State’s burden to disprove, beyond a reasonable doubt, the defense raised by Mr. Moore that he acted in good faith. If the State fails to meet this burden of proof, Mr. Moore is entitled to an acquittal. On the other hand, if the State proves beyond a reasonable doubt that the good faith defense does not apply, and

additionally has further proved all of the other elements of the offenses as set forth to you in these instructions, then the State is entitled to a verdict of guilty.

Sparrow v. United States, 402 F.2d 826, 828-29 (10th Cir. 1968) (“reference in the opinions is to the defendant's good faith that the entire plan or scheme which has been devised and which is the subject of the promotion is economically sound. ...it is good faith that the entire plan will be successful as a business; **the good faith of the defendant in the plan or scheme and good faith intention to carry out the promises and representations constitutes a defense** which the defendant may assert in a prosecution under ...the fraud portions of the Securities Act”).

Steiger v. United States, 373 F.2d 133 (10th Cir.) (Cited in Sparrow) (reviewed for particular consideration of the instructions given by the trial court on the issue of ‘good faith.’ We there said that the defendant had interposed the defense of good faith, and that there was evidence from which the jury could have found that the plan there promoted was practical and would succeed, and that the promises given would be kept);

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