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Criminal Procedure - The Coconspirator Exception to the Hearsay Rule - Jasch v. State

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CRIMINAL PROCEDURE—The Coconspirator Exception to the Hearsay Rule. Jasch v. State, 563 P.2d 1327 (Wyo. 1977).

Jasch and Jevne were codefendants charged with selling marijuana. The events leading to their arrest began when Jasch was introduced at a local bar to Ted Moore, an undercover agent and deputy sheriff. According to the testimony of Moore, an arrangement was made for Jasch to sell a quantity of marijuana to Moore. A short time later Moore went to a second bar where delivery was to take place. Jasch was not present; but, Jevne approached Moore and said, "I have the lid of grass from Jasch". They went into a restroom where Jevne delivered the marijuana to Moore. There was no evidence presented as to whether or not Jevne asked for payment at the time he delivered the marijuana.

The prosecutions against the two defendants were consolidated for trial over Jasch's objections. Jevne exercised his fifth amendment rights and elected not to testify at the trial. Jasch objected to the introduction of Moore's testimony relating Jevne's declaration implicating Jasch. The trial judge ruled it was hearsay as to Jasch, and instructed the jury to disregard it in determining Jasch's guilt or innocence. Jasch was found guilty by the jury of delivery of a controlled substance in violation of Section 35-347.31(a)(ii) of the Wyoming Statutes and sentenced.[1]

Jasch raised two issues on appeal: (1) He was prejudicially joined for trial with codefendant Jevne, and (2) the statement made by the codefendant implicating him was constitutionally inadmissible. The Wyoming Supreme Court held that the *Bruton* rule[2] was not applicable to this case. In *Bruton* the United States Supreme Court held:

> [B]ecause of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining the defendant's guilt, the admission of codefendant's extrajudicial confession in the joint trial violated defendant's right of cross examination secured by the confrontation clause of the sixth amendment.[3]

1. WYO. STAT. § 35-347.31(a) (Supp. 1975) provides that it is "unlawful for any person to . . . deliver, . . . a controlled substance." Marijuana is a schedule I controlled substance. § 35-347.14(d)(10) (Supp. 1975). The felony penalty of up to 10 years imprisonment is provided by WYO. STAT. § 35-347.31(a)(ii) (Supp. 1975).
2. Bruton v. United States, 391 U.S. 123 (1968), *appeal after remand*, 416 F.2d 310 (8th Cir. 1969), *cert. denied*, 397 U.S. 1014 (1970).
3. *Id.*

The Wyoming Supreme Court said that *Jasch v. State*[4] was distinguishable because the declaration of the codefendant was not a confession and the declaration was admissible because it was within the coconspirator exception to the hearsay rule.

This note discusses the reasoning that led the Wyoming Supreme Court to the correct conclusion that the *Bruton* rule was inapplicable to this case. In addition, the coconspirator exception to the hearsay rule will be discussed. The sufficiency of the independent evidence of conspiracy, necessary to invoke the coconspirator rule, will be criticized, as will the court's affirmance on these grounds since the coconspirator exception was never before the trial court.

BACKGROUND OF THE LAW

The coconspirator exception to the hearsay rule[5] is usually defined as "any act or declaration by one coconspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every coconspirator provided that a foundation for its reception is established by independent proof of the conspiracy."[6] The early history of admissions exceptions to the hearsay rule is unknown,[7] except they seem to have been around as long as the hearsay rule itself. Probably they were originally not thought to be hearsay and the rule simply was not extended to cover them.[8] One of the first articulations of the coconspirator exception occurred during the English trial of Thomas Hardy for high treason. Letters written by coconspirators in furtherance of the conspiracy were admitted into evidence against him.[9] Several American courts also made early use of this rule.[10] However, the present coconspirator rule is usually said to have originated with a United States Supreme Court decision by

4. Jasch v. State, 563 P.2d 1327, 1330 (Wyo. 1977).
5. The hearsay rule excludes out of court statements used as evidence to prove the truth of the matter asserted. Garland, *The Coconspirator's Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*, 63 J. CRIM. L.C. & P.S. 1, 3 (1972).
6. Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1161 (1954) [hereinafter cited as Levie].
7. *Id.* at 1162.
8. *Id.*
9. Trial of Thomas Hardy, 24 How. St. Tr. 200, 451-453, 473-477 (1794).
10. Levie at 1162-1163 citing Patton v. Freeman, 1 N.J.L. (Cox) 113 (1791); Broughton v. Ward, 1 Tyler 137 (Vt. 1801); Clayton v. Anthony, 6 Rand. 285 (Va. 1828); Reitenbach v. Reitenbach, 1 Rawle 361 (Pa. 1829).

Justice Story.[11] Since that time the rule has become firmly entrenched in American jurisprudence[12] and has been widely used.[13]

Several theories are advanced in justification of this rule. Because it was originally grounded in agency principles, many courts still use this theory to explain the existence of the rule.[14] Just as declarations by the agent, when acting within the scope of his authority may be imputed to the principal, so too are declarations of one coconspirator admissible against all other coconspirators.[15] Strong criticisms of the agency justification,[16] have led to the consideration of other theoretical justifications.

One such theory for the coconspirator exception is that inculpatory declarations of a coconspirator are likely to be trustworthy for the same reasons that indicate the reliability of declarations against interest.[17] The idea is that sane men do not falsely admit to participating in conspiracy and since the interest of all conspirators is identical, an admission of one coconspirator against his interest is also against the interest of the other coconspirators.[18] This theory, however, ignores the possibility that a coconspirator's aim may be to mislead the listener, the coconspirators' various aims may be different, and criminals are not particularly noted for their veracity.[19]

A third justification is simply that coconspirators' declarations are admitted out of necessity because this is an area of the law where proof is difficult.[20] It is theorized that the rules of evidence in the case of a conspiracy should be relaxed because the potential harm from concerted action by a group is potentially greater than that from a single individual and the secret nature of a conspiracy presents problems of detection and proof.[21]

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11. United States v. Gooding, 25 U.S. 281 (1827).
12. Jasch v. State, *supra* note 4, at 1330.
13. 4 WIGMORE ON EVIDENCE § 1079 (Chadbourn rev. 1972); MCCORMICK, EVIDENCE § 267 (2d ed. 1972).
14. Morgan, *Rationale of Vicarious Admissions*, 42 HARV. L. REV. 462 (1929).
15. United States v. Gooding, *supra* note 11; Van Riper v. United States, 13 F.2d 961 (2d Cir. 1926), *cert. denied*, 273 U.S. 702 (1926).
16. Levie, at 1164-1165; Note, *Developments in the Law of Conspiracy*, 72 HARV. L. REV. 920, 989 (1959).
17. 4 WIGMORE ON EVIDENCE § 1080(a) (3d ed. 1940).
18. Levie at 1165.
19. *Id.* at 1166.
20. Garland, *supra* note 5, at 2.
21. *Id.*

THE BRUTON RULE

Before the court in *Jasch* revealed why Jevne's statement implicating Jasch was admissible under the coconspirator exception to the hearsay rule, it first turned to the task of showing why the *Bruton* rule[22] was not applicable to this case.

It has long been a theory in American courts that the jury will and can follow the trial judge's instructions. "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at the verdict. Our theory of trial relies upon the ability of a jury to follow instructions."[23] It was originally thought that the risk of possible prejudice against defendants from improperly admitted evidence can be sufficiently minimized by the court's instructions to the jury.[24] In joint trials, post conspiracy declarations of one coconspirator, implicating the other coconspirators, have been admitted against the declarant only. If the jury is clearly instructed as to this limitation, courts have said there was no reversible error.[25]

Before the *Bruton* decision, the leading United States Supreme Court opinion on the subject of instructing juries to disregard hearsay evidence as to certain codefendants was *Delli Paoli v. United States*.[26] Five defendants were convicted in a joint trial of conspiring to deal unlawfully in alcohol. The trial court admitted into evidence the extrajudicial confession, which implicated other codefendants, made by one codefendant after the termination of the alleged conspiracy. The Supreme Court said this was not reversible error because the trial judge clearly instructed the jury that the confession could only be used in considering the guilt of the confessor and was to be disregarded in considering the guilt of the other codefendants. Justice Frankfurter, in his dissenting opinion, expressed misgivings that would be adopted by a majority of the courts a decade later. "The fact of the matter is that too

22. Bruton v. United States, *supra* note 2, at 126.
23. Opper v. United States, 348 U.S. 84, 95 (1954); Blumenthal v. United States, 332 U.S. 539, 559-60 (1947).
24. Cwach v. United States, 212 F.2d 520, 526-27 (8th Cir. 1954); United States v. Simone, 205 F.2d 480, 483-84 (2d Cir. 1953).
25. Blumenthal v. United States, *supra* note 23, at 559-560; Lutwak v. United States, 344 U.S. 604, 617-618 (1953); federal courts hold post conspiracy declarations are hearsay except as to declarant. Lutwak v. United States, *supra*.
26. 352 U.S. 232 (1957).

often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors."[27]

In *Jackson v. Denno*[28] a majority of the Court took cognizance of the fact that cautionary instructions by the judge cannot effectively erase from the minds of the jurors evidence which is highly prejudicial to a defendant. The question before the Court was whether the voluntariness of his confession had been properly determined. The New York method was to submit the confession, the evidence as to the voluntariness of the confession, and all the rest of the evidence to the jury. They were instructed that if they found the confession to be involuntary, they were to disregard it. The Court held that the risk was too great that the jury could not free itself from believing the truth of the confession. This would hamper their determination of the voluntariness of the confession and if the confession was found to be involuntary, it was doubtful the jury could disregard it.[29]

The Court in *Bruton v. United States*[30] relied heavily on its holding in *Jackson*. The same question was presented to the *Bruton* Court as was before the Court in *Delli Paoli.*[31] Bruton and Evans were convicted by a jury in a joint trial for armed postal robbery. A postal inspector testified that after Evans' arrest, Evans orally confessed that he and Bruton had committed the robbery. Evans did not testify at the trial. The trial judge instructed the jury that Evans' confession could not be used against Bruton because it was hearsay as far as Bruton was concerned. Relying on *Jackson*, the Supreme Court held that the risk that the jury looked to the incriminating extrajudicial statements, despite the trial courts instructions to the contrary, in finding Bruton guilty was so great that it constituted a violation of Bruton's right of cross examination secured by the confrontation clause of the sixth amendment.

Some commentators believe that the *Bruton* holding endangers the coconspirator exception to the hearsay rule.[32]

27. *Id.* at 247.
28. 378 U.S. 368 (1964).
29. *Id.* at 388-89.
30. Bruton v. United States, *supra* note 2.
31. Delli Paoli v. United States, *supra* note 26. (Delli Paoli v. United States was overruled by Bruton v. United States.)
32. Note, *Bruton v. United States: A Belated Look at the Warren Court Concept of*

However, the Wyoming Supreme Court found that the *Bruton* rule was not applicable to *Jasch*.

OVERCOMING THE BRUTON RULE

A footnote in *Jasch v. State* made the point that some infractions of the *Bruton* rule were harmless error.[33] The majority of cases hold a *Bruton* error harmless when the admissible evidence against the defendant is so overwhelming that inadmissible evidence could have made no difference to the outcome.[34] Since the strongest evidence against Jasch was the disputed declaration, if there was a *Bruton* error it could hardly be considered harmless.

One reason the court gave as to why *Bruton* was not applicable to *Jasch* was that the utterance in *Bruton* was a confession while Jevne's statement was not.[35] However, that does not distinguish the cases significantly. The major concern in *Bruton* was that the jury could not disregard the implicating statement, not the fact that the statement was a confession.[36] A *Bruton* error can come from statements other than confessions.[37]

The court's primary reason for holding the *Bruton* rule inapplicable to *Jasch* was that Jevne's statement was within the coconspirator exception to the hearsay rule, and as such was not rendered inadmissible by *Bruton*.[38] To analyze the court's reasoning it will be temporarily assumed that the court was correct in its classification of Jevne's statement.

The Wyoming Supreme Court first referred to a footnote in the *Bruton* opinion, "There is not before us, therefore, any recognized exception to the hearsay rule insofar as petition is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation

Criminal Justice, 44 ST. JOHN'S L. REV. 54, 67-68, 74 (1969); Garland, *supra* note 5, at 15-22.

33. Jasch v. State, *supra* note 4, at 1330 n. 2.
34. Brown v. United States, 411 U.S. 223 (1973); Harrington v. California, 395 U.S. 250 (1969); James v. United States, 416 F.2d 467, 475 (5th Cir. 1969), *cert. denied*, 397 U.S. 907, *cert. denied*, 397 U.S. 928.
35. Jasch v. State, *supra* note 4, at 1330.
36. "The primary focus of the court's opinion in Bruton was upon the issue of whether the jury, in the circumstances presented, could reasonably be expected to have followed the trial judge's instructions." Dutton v. Evans, 400 U.S. 74, 86 (1970).
37. United States v. Lyon, 397 F.2d 505, 510 (7th Cir. 1968), *cert. denied*, 393 U.S. 846 (1968); Shedrick v. State, 10 Md. App. 579, 271 A.2d 773, 776 (1970).
38. Jasch v. State, *supra* note 4, at 1330.

Clause."[39] Clearly the court was correct in reasoning that *Bruton* did not specifically intend to repudiate the coconspirator exception to the hearsay rule. Evan's statement was hearsay and inadmissible as to *Bruton* because it was a post-conspiracy statement. Jevne's statement was admissible against Jasch as an exception to the hearsay rule, if it could be placed within the coconspirator exception.

To further buttress its argument, the court looked to *Dutton v. Evans.*[40] In *Dutton*, the codefendant made an extra-judicial statement after his arrest for murder in which he implicated Evans.[41] The Supreme Court upheld the trial court's admission of the testimony of the witness who heard the implicating statement. They said the trial court was correct in finding the statement to be admissible under the coconspirator exception to the hearsay rule.[42] As was correctly ascertained by the Wyoming Court, *Dutton* shows that the coconspirator exception lives on despite *Bruton.*[43] The court said in *Jasch*, "There is nothing in *Bruton* or *Dutton* giving any hint that it would upset a doctrine that has prevailed for years."[44] Other courts have reached the same conclusion.[45]

It Looks Like a Coconspirator Exception

The Wyoming Supreme Court ignored the trial court's ruling that Jevne's statement was hearsay as to Jasch. The Wyoming Supreme Court found that the statement met all the requirements of, and was admissible as a coconspirator exception to the hearsay rule.

Neither of the defendants was charged with conspiracy. The court found the authorities in general agreement that conspiracy does not have to be charged in the indictment to allow an otherwise qualified extra-judicial statement to be ad-

39. Bruton v. United States, *supra* note 2, at 128 n. 3.
40. 400 U.S. 74 (1970).
41. He said, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Dutton v. Evans, *supra* note 40, at 77.
42. The Supreme Court said state courts could expand the coconspirator exception into the post-conspiracy concealment phase, a practice not allowed in federal courts. Dutton v. Evans, *supra* note 40.
43. The Dutton Court cited the same footnote from Bruton that the Wyoming court did in Jasch v. State (see note 35). Dutton v. Evans, *supra* note 40, at 86.
44. Jasch v. State, *supra* note 4, at 1331.
45. McGregor v. United States, 422 F.2d 925 (5th Cir. 1970); United States v. Littman, 421 F.2d 981 (2d Cir. 1970); Note, *The Admission of a Codefendant's Confession After Bruton v. United States: The Questions and a Proposal for their Resolution*, 1970 DUKE L.J. 329, 342.

mitted into evidence.[46] This line of reasoning is substantiated by the agency concept of the exception rule. In support, the court stated that, although no conspiracy had been charged, the state's case was "grounded on the same principles arising from agency."[47]

The court continued in its opinion to determine if the three requirements of furtherance, pendency, and independent evidence of conspiracy had been met. The declaration of the codefendant must be in furtherance of the conspiracy.[48] From the facts in the record it was obvious that if a conspiracy existed, Jevne's statement, that he had "the lid of grass from Jasch," was in furtherance of it. There is also the rule followed by all federal courts[49] and most state courts[50] that the statement must be made during the pendency of the conspiracy. *Dutton* allows state courts to admit declarations made after the conspiracy has terminated and during the concealment phase. However, the Wyoming court made no ruling as to whether or not it would restrict the use of the coconspirator exception to the active state of the conspiracy.[51] Jevne's statement was made during the pendency of the conspiracy, so that requirement was fulfilled.

Finally, there must be evidence independent of the declaration that a conspiracy or joint venture existed.[52] It is widely held that the order of independent proof of the conspiracy is within the discretion of the trial judge.[53] The court found that "[w]hile slight evidence of conspiracy is not enough, prima facie evidence is sufficient."[54] The court approved of a definition of prima facie as " 'sufficient evidence to permit the trial court reasonably to infer that there existed

46. Jasch v. State, *supra* note 4, at 1332, citing Olweiss v. United States, 321 U.S. 744 (1944); *see*, United States v. Snow, 521 F.2d 730 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1975); United States v. Snyder, 505 F.2d 595 (5th Cir. 1974), *cert. denied*, 420 U.S. 993 (1974).
47. Jasch v. State, *supra* note 4, at 1332.
48. *Id.* at 1332 citing McCormick, *supra* note 13, at § 267; *see*, Anderson v. United States, 417 U.S. 211 (1974); Note, *Developments in the Law of Conspiracy*, 72 HARV. L. REV. 920, 985 (1959).
49. Lutwak v. United States, 344 U.S. 604 (1953).
50. Some states also require the declaration made during the pendency of the conspiracy. State v. Speerschneider, 25 Ariz. App. 340, 543 P.2d 461 (1975); People v. Anya, 545 P.2d 1053 (Colo. 1975).
51. Jasch v. State, *supra* note 4, at 1331.
52. *See generally*, Annot., 46 A.L.R.3d 1148 (1972); Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigation: Putting Conspiracy Back into the Conspiracy Rule*, 5 HOFSTRA L.J. 77 (1976).
53. United States v. Turner, 528 F.2d 143 (9th Cir. 1975).
54. Jasch v. State, *supra* note 4, at 1334.

a conspiracy.' "[55] The Wyoming Supreme Court decided that there was a sufficient amount of evidence independent of the statement to meet this third requirement.

Sufficiency of the Evidence

The hearsay rule exists because it is felt that out-of-court statements, where the declarant is not subject to cross examination, are generally untrustworthy.[56] Since statements allowed in through the coconspirator exception are subject to the failings of hearsay, the independent evidence requirement was established to improve their trustworthiness.[57] It is a protection for the defendant because "[o]therwise hearsay would lift itself by its own bootstraps to the level of competent evidence."[58]

The quantity of evidence of conspiracy required to allow statements to be admitted under the coconspirator exception is not easily determined. A very few courts have said that only slight evidence of conspiracy is required[59] while some courts, at the other extreme, require evidence beyond a reasonable doubt of conspiracy.[60] The Wyoming Supreme Court correctly noted that the majority rule requires that independent evidence need only establish a prima facie case of conspiracy. "With little exception, the courts in the criminal cases which have considered the question have held or recognized that the independent evidence must establish a prima facie case of conspiracy."[61]

Of course the problem remains as to what the court will define as prima facie evidence. The most recent guidelines from the United States Supreme Court came in *United States v. Nixon*.[62] The Court stated in a footnote that, "[a]s a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury."[63] Although there is a question as to whether this holding is binding on the Wyoming Supreme Court, most

55. *Id.* citing State v. Thompson, 273 Minn. 1, 139 N.W. 2d 490 (1966), *cert. denied*, 385 U.S. 317 (1966).
56. Garland, *supra* note 5, at 3.
57. Annot., 46 A.L.R. 3d 1148 (1972).
58. Glasser v. United States, 315 U.S. 60, 75 (1941).
59. Burns v. State, 72 Okla. Cr. 432, 117 P.2d 155 (1941).
60. United States v. Ushakow, 474 F.2d 1244 (9th Cir. 1973).
61. Annot., 46 A.L.R. 3d 1148, 1161 (1972).
62. 418 U.S. 683 (1974).
63. *Id.* at 701 n.14.

courts do find that prima facie evidence is enough evidence that a court of appeals would uphold the sending of the question of conspiracy to the jury. This requirement should not be taken lightly as "[t]he sole restriction upon the use of such devastating testimony is the preliminary fact requirement."[64]

The court listed the evidence it held was "more than adequate"[65] proof establishing a conspiracy. Specifically, it was shown:

> [1] Jasch and Jevne had been longtime friends. [2] Codefendant was present in the first bar when Jasch made the deal with the undercover agent. [3] Codefendant left the bar a few minutes before the defendant and the undercover agent. [4] Defendant was paid for the marijuana. [5] A little later in the bar that defendant had designated, codefendant had appeared, possessed and handed the undercover agent a lid of marijuana.[66]

The fact of friendship is slim evidence for conspiracy. Justice McClintock pointed out in his dissent that "mere association is not sufficient evidence of complicity."[67] The record shows that the presence of Jevne in the first bar where the deal was made was in controversy.[68] Moore testified that he saw Jevne there. Sam Cooper, a bartender who originally introduced Jasch to Moore, was there with Jasch and Moore. He testified that he did not see Jevne, whom he knew, even though Moore said Jevne was where Cooper could see him. There is no basis for the Wyoming Supreme Court to determine how the jury decided this factual dispute. In addition, as noted earlier,[69] mere association is not adequate evidence. The court also mentioned Jevne's departure right after the sale had been arranged. This evidence is subject to the same limitations as Jevne's presence in the bar. Additionally, there was no evidence that Jasch and Jevne communicated with each other at any time.[70] Moreover, no evidence as to what

64. Kessler, *supra* note 52, at 82.
65. Jasch v. State, *supra* note 4, at 1334.
66. *Id.*
67. *Id.* at 1336 n.7, *citing* Glover v. United States, 306 F.2d 594 (10th Cir. 1962) Panci v. United States, 256 F.2d 308 (5th Cir. 1958); *See* United States v. De Cicco, 435 F.2d 478, 483 (2d Cir. 1970).
68. Jasch v. State, *supra* note 4, at 1339 (Justice Rose's dissent).
69. *See* note 67.
70. Jasch v. State, *supra* note 4, at 1339.

transpired between Jevne and Moore at the time of the delivery of the marijuana was introduced.[71] Perhaps Jevne asked for payment, or perhaps he negotiated his own arrangement. The main point is that there does not really appear to be "substantial independent evidence"[72] of a conspiracy without the statement by Jevne.

No Consideration by the Trial Court

At no time did the trial court consider the existence of a conspiracy or the admission of ostensible hearsay evidence through the use of the coconspirator exception.[73]

The Wyoming Supreme Court has said that it generally does not consider issues not raised in the trial court.[74]

> This court is primarily a court of review, except in cases in which this court has original jurisdiction or where a constitutional question is legally certified to this court. It is not its function to determine the facts and the law in a case in the first instance. That must be done by the trial court.[75]

The Wyoming Supreme Court has taken upon itself in this case to decide questions of fact and law that were never before the trial court. The court recently repeated that this is not its function.

> Counsel's arguments disclose only that there existed a situation where the basic and determinative facts were in direct dispute, requiring findings of fact and application of legal principles by the district court. For us to decide these questions of fact would make this court the original trier of fact, a role which we have consistently refused to assume.[76]

In *Jasch* the Wyoming Supreme Court had to make a finding of fact. It had to determine that the independent evidence of conspiracy was sufficient to allow admission of Jevne's statement into evidence. In the face of contradictory testimony,

71. *Id.*
72. United States v. Nixon, *supra* note 62.
73. Jasch v. State, *supra* note 4, at 1337.
74. Mercer v. Thorley, 48 Wyo. 141, 43 P.2d 692 (1935).
75. Buckman v. United Mine Workers of America, 80 Wyo. 199, 339 P.2d 398, 402 (1959), *rehearing denied*, 342 P.2d 236 (1959).
76. Bard Ranch Co. v. Weber, 557 P.2d 722, 730 (Wyo. 1976); Mader v. James 546 P.2d 190 (Wyo. 1976); Knudson v. Hilzer, 551 P.2d 680 (Wyo. 1976).

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the trial court can better determine the facts because it sees and hears the witnesses.

The overwhelming majority of authorities hold that either the trial judge or the jury must determine the sufficiency of the independent evidence of a conspiracy.[77] The Court in *United States v. Nixon* stated, "[w]hether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge."[78] Even the authorities the *Jasch* opinion cited to determine the amount of independent evidence necessary said it was a matter for the trial court to determine.[79]

Justice Rose, in his dissent, suggested it should be assumed the trial judge knew the relevant law while making his rulings unless it is shown otherwise.[80] The trial judge had ruled that Jevne's statement was hearsay as to Jasch, and so instructed the jury. This necessarily implies that the judge did not find the statement was admissible under the coconspirator exception.[81] A trial court's judgment cannot be disturbed except on clear grounds.[82] Because there was only slight evidence of a conspiracy, the trial court's ruling as to the statement being hearsay should not have been disturbed.

CONCLUSION

The Wyoming Supreme Court correctly concluded that the *Bruton* rule does not apply to the coconspirator exception to the hearsay rule. This is even more important because Wyoming has recently enacted a conspiracy statute[83] and there is no interpretive Wyoming case law. Furthermore, the court will likely hold that the other exceptions to the hearsay rule also survive *Bruton*.

The court basically stated the coconspirator exception to the hearsay rule in accordance with the majority of other courts. This too will be significant in conspiracy cases. The

77. United States v. Ushakow, 474 F.2d 1244 (9th Cir. 1973); Garland, *supra* note 5; Kessler, *supra* note 52.
78. United States v. Nixon, *supra* note 62, at 701 n.14.
79. Jasch v. State, *supra* note 4, at 1334.
80. *Id.* at 1342.
81. The question of the admissibility of the statement through the use of the coconspirator exception was not brought up by either the defense or prosecution.
82. Boschetto v. Boschetto, 80 Wyo. 374, 343 P.2d 503, 506 (1959); *see* Bruch v. Benedict, 62 Wyo. 213, 165 P.2d 561 (1946).
83. WYO. STAT. § 6-16.1 (Supp. 1975).

slight amount of evidence of conspiracy it found to be sufficient might also affect future cases. This low level of evidence could indicate that not many convictions will be overturned on this point.

The Wyoming Supreme Court ignored totally all the authorities that hold a trial court determination on admissibility is necessary. Combined with the slight amount of evidence required, this could mean that the protective requirement of independent proof of conspiracy means little in Wyoming.

The court should have remanded the case to the trial court for a finding on the coconspirator exception. If the trial court found there was sufficient independent evidence of conspiracy, then the conviction could be affirmed. However, if the statement was still hearsay as to Jasch, then the holding in *Bruton* would require a new and separate trial for Jasch. The United States Supreme Court in similar circumstances granted a remand for a factual finding in *Jackson v. Denno*.[84] The Court held that when pure factual considerations became an important ingredient, appellate review could not substitute for a full hearing and determination in the trial court.

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84. Jackson v. Denno, 378 U.S. 368 (1964).