

1969

# The State of Utah v. Richard B. Faulkner : Brief of Appellant

Utah Supreme Court

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## TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE AND DISPOSITION IN THE LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF FACTS . . . . .	2
ARGUMENT:	

### POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL  
ERROR BY DENYING THE SEVERANCE OF THE  
ACTIONS AGAINST MR. FAULKNER AND MR.  
JOOSTON . . . . . 4

A. THE ADMISSION OF HEARSAY TESTI-  
MONY OF STATE'S WITNESS AS TO WHAT  
ONE DEFENDANT, MR. JOOSTON, SAID WAS  
PREJUDICIAL AGAINST THE OTHER DEFEN-  
DANT, MR. FAULKNER . . . . . 6

### POINT II

IT WAS PREJUDICIAL ERROR FOR THE COURT  
ON ITS OWN MOTION TO AMEND THE INFOR-  
MATION AT A TIME AFTER BOTH THE PROSE-  
CUTION AND THE DEFENSE HAD RESTED . 7

A. DEFENSE NOT GIVEN ADEQUATE NOTICE  
OF AMENDMENT . . . . . 8

### POINT III

INSTRUCTIONS FOUR AND SIX ARE INCON-  
SISTENT IN THEIR CHARGES REGARDING  
THE NECESSARY INTENT OF THE DEFENDANT 8

## TABLE OF CONTENTS (Continued)

Page

### POINT IV

THE CIRCUMSTANTIAL EVIDENCE OFFERED BY THE STATE DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS, EXCEPT THAT OF THE DEFENDANT'S GUILT . . . . .	10
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CONCLUSION . . . . .	11
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### CASES CITED

People vs. Chadwick, 7 U. 134, 25 P. 737 (1891) . . . . .	7
State vs. Crawford, 59 U. 39, 201 P. 1030 (1921) . . . . .	10
United States vs. Jones, 5 U. 552, 18 P. 233 (1868) . . . . .	5

### STATUTES CITED

Utah Code Annotated, 76-9-5 . . . . .	10
Utah Code Annotated, 77-31-6 . . . . .	5
Utah Code Annotated, 77-44-6 . . . . .	6

IN THE SUPREME COURT  
OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

Case No. 11539

RICHARD B. PAULNER,

Defendant-Appellant.

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE AND  
DISPOSITION IN THE LOWER COURT

This is a criminal case wherein the defendant was charged with the crime of burglary in the third degree. A jury trial in the District Court of Weber County, Utah, resulted in a verdict of guilty against the defendant.

RELIEF SOUGHT ON APPEAL

The defendant respectfully requests this Court to reverse the conviction of the lower

court due to the grievous errors hereinafter set forth.

### STATEMENT OF FACTS

About 1:00 p.m. on July 31, 1968, in the lunch room of the Kiesel Building in Ogden, Utah, a coke machine which had previously been equipped with an alarm device, was opened, setting off the alarm which was a buzzer or bell type alarm.

The Maintenance Superintendent, Earl Lindquist, recognized the sounding alarm and proceeded to investigate the situation. On his way up to the lunch room, Mr. Lindquist met the defendant-appellant and another, coming down the stairway. Mr. Lindquist asked the defendant-appellant to remain there while the cause of the alarm was investigated.

The defendant-appellant, Mr. Richard B. Faulkner, and the other person with Mr. Faulkner, Mr. Jerry Joesten, did not remain, but

instead, undertook a peregrination that ended in the arrest of both Mr. Faulkner and Mr. Jooston.

The State produced witnesses to testify to the fact that Mr. Faulkner was one of the two men who left the building after being requested to stay. And evidence was introduced that a bag of keys, one of which was found to open the coke machine, belonged to Mr. Jooston and was in Mr. Jooston's possession when he left the Kiesel Building.

Mr. Faulkner testified that he did in fact open the coke machine, but that he did not take any money. The State stipulated that no money was taken (T-98). Also, Mr. Faulkner testified that he had come to the Kiesel Building for the purpose of seeing if he could have his parole changed from Salt Lake City to Ogden (T-73). Mr. Faulkner further testified that while he was in the

Giesel Building and while he was on the way to the Parole Office on the fourth floor, he was called by Mr. Jooston to come into the lunch room (T-74). The testimony continued to the effect that only after entering the lunch room was any intent to open the coke machine formed.

At trial, the judge refused a Motion of Severance as to the two defendants, Mr. Faulkner and Mr. Jooston. Also, on its own motion, the trial court amended the information at a time after both the prosecution and the defense had rested their cases.

### ARGUMENT

#### POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING THE SEVERANCE OF THE ACTIONS AGAINST MR. FAULKNER AND MR. JOOSTON.

The interest of conserving time and money are valid reasons for joining defendants in civil actions, but a greater restriction on the joinder of actions and defendants is due in criminal cases. Economy in time and money

must be subordinate to justice and fair and impartial trial.

In the present case, a pre-trial motion to sever (No. 8895-1), was filed in compliance with Utah Code Annotated, 77-31-6. The purpose of this section of the Code is to give defendants who have been jointly indicted the right to demand and have separate trials, especially in more serious crimes that may be punishable by imprisonment in the state prison, United States vs. Jones, 5 U. 352, 18 P. 233.

The trial court was advised of the probable undue prejudice that would result from a joint trial of the defendants by the Motion to Sever, No. 8895-1, dated October 9, 1968. The different degrees of involvement of the two defendants and the overwhelming disparity in the evidence against each defendant make the joint trial of the two a travesty upon the fair play and justice of the right of trial



one Mr. Faulkner.

A. THE ADMISSION OF HEARSAY  
TESTIMONY OF STATE'S WITNESS  
AS TO WHAT ONE DEFENDANT, MR.  
JOOSTON, SAID WAS PREJUDICIAL  
AGAINST THE OTHER DEFENDANT,  
MR. FAULKNER.

As expected, during the trial there were  
prejudicial statements which were the result  
of failure of trial court to grant separate  
trials. At page 46 of the record below, an  
objection was given to the testimony being  
received concerning what one of the defendants  
had said to the state's witness. The acceptance  
of this testimony by the court was prejudicial  
against the other defendant, Mr. Faulkner.  
Also, the receiving of this testimony was con-  
trary to section 77-44-6, Utah Code Annotated,  
concerning the use of a co-defendant's testi-  
mony.

In summary of Point I, the trial court  
erred in not granting separate trials, and  
also, in receiving the hearsay testimony of

what one defendant has said to the State's witness. These errors result in prejudicing the case of Mr. Faulkner much as in the case of People vs. Chadwick, 7 G. 134, 25 P. 737.

## POINT II

IT WAS PREJUDICIAL ERROR FOR THE COURT ON ITS OWN MOTION TO AMEND THE INFORMATION AT A TIME AFTER BOTH THE PROSECUTION AND THE DEFENSE HAD RESTED.

There must be a time when, for purposes of a given trial, the defendant can determine exactly what charge the State is alleging against him, lest the defendant never be able to prepare a defense for the case. By changing the information in the instant case, the defendant's position has been prejudiced.

The crime of burglary in the third degree requires the State to prove intent at a specific time in relation to the act. The amending of the information prejudiced the defendant by changing the elements that the State needed to prove and the defendant would have opportunity to refute, at a time after the case was

closed.

**A. DEFENSE NOT GIVEN ADEQUATE  
NOTICE OF AMENDMENT.**

The timing of the amendment effectively prohibited the defendant from having opportunity to refute and discredit the evidence given in relation to the new nature of the offense charged. The amendment, made without opportunity to reply, abridged Mr. Faulkner's rights of due process. A timely objection was given at page 98 of the record of the lower court.

**POINT III**

**INSTRUCTIONS FOUR AND SIX ARE  
INCONSISTENT IN THEIR CHARGES  
REGARDING THE NECESSARY INTENT  
OF THE DEFENDANT.**

Instruction number four charged the defendant with committing " . . . burglary of the Kiesel Building situate at 2427 Kiesel Avenue, Ogden, Weber County, Utah." Under this instruction, the jury must find that the defendant had the intent to steal or commit a felony before entering the building. Instruction number six conflicts directly with the

intent requirement of instruction number four, thus giving the jury an incorrect and confused direction for the conviction of the defendant.

Instruction number six charges the jury to find that if the defendant entered the lunch room with " . . . an intent to look around and see if there is something that can be stolen.", then he is guilty of burglary in the third degree. This changes the requisite time for the forming of the intent from instruction number four, and also, varies the substance of the intent requirement from that of law.

Charging a jury to convict a defendant of third degree burglary (the actual crime) when they are only required to find that the defendant is just looking around and "casing the joint" is an error in stating the requirements of the substantive law. The instruction is in error and prejudicial in that it requires only an intent to survey an area to see what articles are susceptible to theft, and not the statutory requisite intent of Utah Code

Annotated, 76-9-5, which demands the entering . . . ~~with~~ intent to steal, or to commit any felony . . . (emphasis added). Thus, the instruction number six fails to correctly and adequately state the law to the jury because it does not require the proper intent for the crime charged.

At page 113 of the record of the lower court, timely exception and objection were made concerning instruction number six.

#### POINT IV

THE CIRCUMSTANTIAL EVIDENCE OFFERED BY THE STATE DID NOT INCLUDE EVERY REASONABLE HYPOTHESIS, EXCEPT THAT OF THE DEFENDANT'S GUILT.

The prosecution failed to show circumstances such as to exclude every reasonable hypothesis except that of the defendant's guilt of the offense charged, State vs. Crawford, 39 U. 39, 201 P. 1030. Indeed, the defendant's own testimony provided a plausible, reasonable explanation for his conduct which would vitiate the third degree burglary charge.

Also, the State's case fails to bear the

burden of proof beyond a reasonable doubt, by the absence of some necessary links in the chain of evidence tending to establish the defendant's guilt, and the unrefuted presence of evidence consistent with the defendant's innocence of the crime charged, State vs. Crawford, supra.

### CONCLUSION

The defendant respectfully demands that by reason of the significant and substantial errors of the trial court, the conviction in this case was a miscarriage of justice and a travesty upon the rights and protections due the defendant, requiring a reversal of the lower court's conviction.

Respectfully submitted,

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