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IN THE

SUPREME COU

OF THE

STATE OF UTA

STATE OF UTAH,

Plaintiff-Respon

vs.

ROBERT "BUDDY" WASHINGTON,

Defendant-Appe

BRIEF OF RESPON

An Appeal from the Judgment of District Court, in and for Weber Cou Honorable Dallas H. Young, Distri

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
ROBERT "BUDDY" WASHINGTON,
Defendant-Appellant.

Case No. 12088

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant, Robert "Buddy" Washington, appeals from a judgment on a jury verdict of guilty to a charge of receiving stolen property having a value in excess of fifty dollars ($50.00) and being an habitual criminal, rendered in the Second Judicial District in and for Weber County, State of Utah, the Honorable Dallas H. Young, Judge, presiding.

DISPOSITION IN LOWER COURT

The appellant was charged by information with receiving stolen property having a value in excess of fifty dollars ($50.00) and being an habitual criminal. The jury found

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Robert "Buddy" Washington guilty on both charges and he was sentenced by the court to a term in the Utah State Prison not to exceed five years on the charge of receiving stolen goods, and a term of not less than fifteen years on the charge of being an habitual criminal, said terms to be served concurrently.

RELIEF SOUGHT ON APPEAL

Respondent submits that the decision of the District Court should be affirmed.

STATEMENT OF THE FACTS

In the fall of 1969 a series of burglaries were reported to the Ogden Police Department. Among the items listed as stolen from the different homes were the following:

1. A polaroid camera which cost $225.00 new;
2. A persian lamb coat which was purchased at Z.C.M.I. for $550.00;
3. A black and white television set valued at $60.00;
4. A color television set valued at approximately $400.00;
5. An electric hair dryer valued at $23.79;
6. A pendant watch;
7. A shot gun.

About the same time Miss Shirley Owens (or Shirley Gallegos, hereinafter referred to as Shirley Owens) testified that the appellant and three of his friends brought some items to her house (T. 65, 82). Among the items brought were a colored and a black and white television set,

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a persian lamb coat, 2 rifles, a pendant watch and a hair dryer (T. 65). Shirley Owens asked the appellant where he got these items but he refused to tell her (T. 70). Ap--pellant also went over to Mr. and Mrs. Lester Hall who lived in the duplex opposite Shirley and asked them if they would be interested in purchasing some items (T. 43). Mr. Hall purchased a couple of rifles (T. 43). Then appellant brought over a polaroid camera and a radio (T. 57). Mr. Hall purchased the polaroid camera and the appellant gave him the radio (T. 59). Later that night the appellant sold Mrs. Hall a colored television set and asked her to pick it up at Shirley Owens' place (T. 57). The appellant explained that he was leaving town and wanted to sell those items (T. 48). A black persian lamb coat was given by Miss Owens to Mrs. Hall (T. 71). However, Shirley Owens kept the hair dryer brought in by the appellant and his friends (T. 69).

Ten days later police officers Balls and Buzick picked up all the items either sold or given by the appellant to Mr. and Mrs. Hall, Shirley Owens and Mr. McClellan (T. 92-96). [Mr. McClellan had agreed to store the colored television set for Mrs. Hall.] All items picked up were identified by the victims of the aforementioned burglaries as belonging to them.

Mr. Howard Wade testified that he is the owner of Exhibit "A", the polaroid camera (T. 4, 5). C. W. Hortman testified that he owned Exhibit "B", a black persian lamb jacket (T. 11). Exhibit "C" which appellant brought to Shirley was identified by Dale Iverson as his black and

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white television set (T. 16). Virginia Chase claimed ownership of Exhibits "D" and "E" which were a Westinghouse radio and pendant watch respectively (T. 23, 26). Mrs. Muriel Hardy testified that the color television set, Exhibit "I", the antique gun, Exhibit "G", and the hair dryer, Exhibit "H", all belonged to her (T. 32, 33). The total value of all assets brought to Shirley Owens and Mr. and Mrs. Hall by Buddy Washington when new, except for the antique gun and pendant watch (which were hard to value), was over twelve hundred and sixty-five dollars ($1265.00).

The appellant claims a Mrs. Hussy wanted him to sell those items to post bail for her husband (T. 115), and that, contrary to Shirley Owens' testimony, Mrs. Hussy and another person, and not himself, took the stolen items to Shirley Owens' house (T. 124). However, testimony and evidence were introduced to impeach the appellant's testimony. The evidence was Mr. Howard Wade's credit card taken from appellant's person in Wyoming and also some credit slips with Howard Wade's forged name and appellant's address. The credit cards were taken from Mr. Wade's home along with the polaroid camera. There was also testimony that appellant was wearing shoes exactly the same as those stolen from the Chase home (T. 26, 27).

After a full trial the jury found appellant guilty of possession of stolen goods in excess of fifty dollars ($50.00), pursuant to Utah Code Ann. § 76-38-12 (1953).

Trial was then continued on appellant's second charge, to-wit: that appellant is an habitual criminal in violation of Utah Code Ann. § 76-1-18 (1953). Mr. James W. Johnson

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employed as a records and identification officer at the Utah State Prison (T. 143), brought copies of the commitments, Exhibits 1 and 2. The commitments showed Buddy Washington was committed on two different occasions to the Utah State Prison (T. 149, 150). The jury found the appellant guilty of being in the status of an habitual criminal and the court then set a time for sentencing (T. 157, 158). Appellant was then sentenced to a term of not more than five years and not less than fifteen years in the Utah State Prison.

ARGUMENT

POINT I.

THERE WAS AMPLE EVIDENCE TO SUSTAIN THE LOWER COURT'S VERDICT OF GUILTY.

Utah Code Ann. § 76-38-12 (1953) states what elements are necessary for a person to be found guilty of receiving stolen property.

> "Every person who, for his own gain or to prevent the owner from again possessing his property, buys or receives any personal property exceeding $50.00 in value, knowing the same to have been stolen, is punishable by imprisonment in the state prison not exceeding five years; if the value of the property so bought or received is $50 or less in value, he is guilty of a misdemeanor."

Thus, there are three elements that have to be proven to find an accused guilty of receiving stolen property, to-wit:

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(1) the accused must buy or receive the property;

(2) the value must be in excess of $50.00 dollars;

(3) the accused must know that the personal property was stolen.

The jury found the appellant guilty, but he contends that the evidence did not support the jury's verdict. Respondent submits that the evidence justifies the conviction.

First there must be proof of an unlawful taking of personal property that was or is in the possession of the accused.

> "In any case, before the inference may be made from possession of stolen property alone, there must be proof of an unlawful taking, coupled with convincing identification of the property stolen." *Jenkins* v. *United States,* 361 F. 2d 615 at 619 (10th Cir. 1966).

No one disputes that the property was stolen. Four people testified in court that they had property stolen. Those same people also made positive identification that those items sold and given away by appellant were the same items that were burglarized from their homes (T. 4, 5, 16, 23, 26, 32, 33). Each burglary victim had some identifying mark establishing that particular item as their own.

All of these stolen goods, as testimony proves, were at one time or another in the hands of Buddy Washington. Testimony of Mr. Hall:

> "MR. STRATFORD: Well, that[stolen rifles and polaroid camera] was in Shirley's home when you bought it, was it?

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MR. HALL: No, no.

MR. STRATFORD: You don't know if it was?

MR. HALL: I don't know where it come from. I know *he* [Buddy Washington] *brought it there.* I don't know whether it come from Shirley's home" (T. 49). (Emphasis added.)

Testimony of Mrs. Hall:

"MR. STRATFORD: Do you know whether or not most of them [stolen radio, rifles, polaroid camera, and color television] had been in Mrs. Owens' home?

MRS. HALL: I had never seen them before until *he* [Buddy Washington] *brought them in"* (T. 59). (Emphasis added.)

Shirley Owens' testimony:

"MR. STRATFORD: Alright. Now then, can you tell us approximately — was it in the month of September or October that he [Buddy Washington] brought things [stolen goods] to your home?

SHIRLEY OWENS: I would say he did, yes.

MR. STRATFORD: He did?

SHIRLEY OWENS: Well, I can't say he did. There was other people I didn't know there.

MR. STRATFORD: Was he with them?

SHIRLEY OWENS: Yeah, he was there. He is the only one I knew" (T. 79).

The testimony of four individuals positively identifying their stolen property, coupled with the testimony of three other persons stating appellant brought the same burglarized goods to them, should be ample proof that the

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goods were stolen and that Buddy Washington had possession of them. In California, that is all that is required to convict a person for receiving stolen property.

> "In prosecution for receiving stolen goods, where there was evidence that defendant had received the stolen property, evidence that he had paid anything for it was unnecessary, since the offense is committed when the person either buys or receives stolen property." *People* v. *Smith,* 26 Cal. 2d 854, 161 P. 2d 941 at 942 (1945).

The second element needed for a conviction is that the value of the goods must be in excess of $50.00. The following items were stolen: a polaroid camera, new cost $225.00; black persian lamb jacket, new cost $550.00; black and white television set, present value $60.00; Westinghouse radio, new cost $7.97; hair dryer, new cost $23.97; color television set, new cost $400.00; pendant watch and antique gun (upon which no actual cost could be given). Total value of the above items when new was in excess of $1265.00. All these prices were testified to in court, yet counsel for appellant contends there was not proof enough to support this element of the crime. The respondent acknowledges that some of the items were two years old, to-wit: the color television and black persian lamb coat, but common sense tells us the price would still be way above $50.00.

> "While jurors are not permitted to speculate as to value of the stolen property in prosecution for receiving such they should be permitted to use common sense." *State* v. *Grijalua,* 8 Ariz. App. 205, 445 P. 2d 88 at 90 (1968).

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The jury did use common sense in our case. They came back with a verdict finding the appellant guilty of receiving stolen property in excess of $50.00.

As stated in *State* v. *White,* 107 Utah 84, 152 P. 2d 88 (1944):

> "In prosecution for receiving stolen jewelry, testimony warranted finding that value of stolen property exceeded $50.00 and warranted refusal of defendant's motion to reduce charge from a felony to a misdemeanor." *Id.* at 89.

The third element needed to prove appellant guilty of the crime is that he knew the goods were stolen.

The appellant, Buddy Washington, had items that when new were valued over $1265.00. Yet the total amount received for those items was $72.00. He sold a two year old color television set for $30.00 which cost $400.00 new. He sold a $225.00 polaroid camera set for $12.00. He gave away a $34.97 hair dryer, a $7.97 Westinghouse radio, and a $550.00 black persian lamb coat! As stated in *People* v. *Reynolds,* 149 Cal. 2d 290, 308 P. 2d 48 (1957).

> "Sale of property at a price disproportionately low compared to its value may be a suspicious circumstance justifying inference of knowledge that property was stolen." *Id.* at 51.

Then when asked by Shirley Owens where he got all these items Washington refused to tell her (T. 70). However, when questioned on the stand appellant had a readily available story — he explained he was selling the stolen items for a friend, Mr. Hussey. However, evidence was introduced

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which impeached appellant's testimony by showing that stolen credit cards taken from Mr. Wade's home were in appellant's possession. Needless to say, there is a big question as to where Washington would get the stolen credit cards when he was only selling the items at the request of Mr. Hussey. As stated in *Findley* v. *United States*, 362 F. 2d 921 (9th Cir. 1966):

> "Possession of property recently stolen if not satisfactorily explained, is circumstantial evidence from which a jury may properly infer and find that the person in possession had knowledge that the property had been stolen." *Id.* at 923.

The same proposition was also stated in *State* v. *Murphy*, ... Or. ......, 455 P. 2d 178 (1969):

> "Evidence, including defendant's explanation for possession which a jury was entitled to disbelieve and from which guilty knowledge could be inferred, was sufficient to warrant finding of knowledge in prosecution for concealing stolen property." *Id.* at 179.

Appellant knew the items he sold were stolen, that's why he sold or gave away $1265.00 worth of goods for $72.00, refused to tell anyone where he got the goods and then fabricated an explanation when the police questioned him. The jury realized this and found him guilty. As stated by this Court in *State* v. *Roberts*, 91 Utah 117, 63 P. 2d 584 (1937).

> "The question of the credibility of the witnesses is for the jury and, if there is competent evidence upon which reasonable and unprejudicial

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minds might draw different conclusions, the jury's findings will not be disturbed." *Id.* at 588.

Based on the foregoing the state submits that there was sufficient evidence to convict the appellant of receiving stolen property having a value in excess of fifty dollars.

POINT II.

THE STATE'S WITNESSES WERE NOT ACCOMPLICES TO MR. WASHINGTON AND NO INSTRUCTION TO THE JURY ON AN ACCOMPLICE'S TESTIMONY WAS NECESSARY.

Counsel for Mr. Washington raises on appeal the refusal of the trial judge to instruct the jury on an accomplice's testimony. However, in the present case, the so called accomplices were witnesses for the state, and the appellant never sustained the burden of proving that these witnesses were accomplices. As stated in *State* v. *Bixby,* 27 Wash. 2d 144, 177 P. 2d 689 (1947).

> "Whether a person is an accomplice depends on particular facts, and fact that one is an accomplice must be shown by proof and *burden is on defendant* to show that witness for the state is an accomplice." *Id.* at 702. (Emphasis added.)

Respondent also contends that the so-called accomplices by case definition were not accomplices in this particular crime but simply witnesses for the state.

> "An 'accomplice' is one who is or could be *charged as a principal with the defendant* on trial." *State* v. *Bowman,* 92 Utah 540, 70 P. 2d 458 (1937); *State* v. *Coroles,* 74 Utah 94, 277 P. 203 (1929); *State* v. *Cragun,* 85 Utah 149, 38 P. 2d 1071 (1934).

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Note that the accomplice must be charged as a principal with the defendant. Thus, in our case the state's witnesses must or could be, to qualify as accomplices to Washington, charged as receiving stolen goods with the defendant. At no point in the transcript is there any evidence of the so-called accomplices helping Washington in receiving stolen property. They did not help him buy it, they did not help him receive it — they did nothing that could tie them in to his crime. They did buy and receive as gifts some items from appellant. However, they never aided, assisted nor participated with appellant in receiving the stolen property.

Case law states that even if the state's witnesses were guilty of receiving stolen property, they would not be accomplices to appellant. Not one of them in any form helped Washington in receiving the stolen goods. Their alleged crime (if there was one) was completely different and separate from that of his, the only thing in common would be receiving the same stolen goods. Those witnesses simply had nothing to do with Buddy Washington's offense. This very point was brought out in *State* v. *Bowman* (supra pg. 11).

> "An 'accomplice' whose testimony needs corroboration under statute is one who is culpably *implicated in commission of crime of which defendant is accused.*" *Id.* at 548. (Emphasis added.)

The state's witnesses were not accomplices to the offense committed by appellant of receiving stolen property in excess of $50.00 and on this basis no instruction was needed by the jury with regard to corroboration of accomplice's testimony.

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POINT III.

THE TRIAL COURT DID NOT ERR IN ADMITTING EXHIBITS J, K, AND L.

The trial court allowed into evidence Mr. Wade's credit cards (Exhibits J, K, and L) and Washington's receipts for the use of the credit cards, solely to impeach Mr. Washington. On this basis it is completely valid.

3 Wigmore, Evidence § 890 at 380 (3rd Ed. 1940) states:

> "The law is that a defendant taking the stand as a witness *may as a witness be impeached precisely like any other witness.*" (Emphasis added.)

The cases support Wigmore. In *Booth* v. *State,* 76 Okla. Cr. 410, 137 P. 2d 602 (1943), the Court said:

> "When the defendant chose to testify he became subject to the same rules of cross-examination and impeachment as other witnesses and in this connection it was perfectly proper for the county attorney to question him concerning prior convictions for the purpose of affecting his credibility."

The trial judge was correct when he allowed the credit cards into evidence for impeachment purposes only. Courts have also held that specific acts (such as using stolen credit cards) can be brought into evidence.

> "Notwithstanding the general rule that a witness may not be impeached by evidence of specific acts of bad character, as distinguished from evidence of general reputation for truth, honesty or integrity, *evidence or particular wrongful acts may be admissible where the issue goes beyond general*

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reputation of a witness and involves truthfulness as to the basic fact in issue." *State* v. *Hurlburt,* 166 Cal. App. 2d 334, 333 P. 2d 82 at 85 (1958). (Emphasis added.)

Based on legal authority and cases cited, there is no doubt that Exhibits J, K, and L were legally and properly brought into evidence.

POINT IV.

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON A LESSER OFFENSE.

The appellant feels the jury should have been instructed on a lesser offense, i.e., that if the stolen goods were less than $50.00 Washington could only be convicted of a misdemeanor. The court failed to instruct the jury to a lesser offense for the very reason stated in a case used by appellant — the evidence failed to justify a verdict on a lesser offense, *State* v. *Valdez,* 19 Utah 2d 426, 432 P. 2d 53 (1967). The value of the goods stolen by appellant when new exceeded $1265.00. Among the goods stolen was a color television, a black and white television, and a black persian lamb coat. None were more than two years old. There was obviously more than $50.00 worth of goods and the judge did not deem it necessary to so instruct the jury. As stated by this Court in *State* v. *Valdez, supra* (see also appellant's brief, pg. 17):

"As a general rule the trial court should submit to the jury included offenses *where the evidence*

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would justify such a verdict." *Id.* at 54. (Emphasis added.)

The respondent submits that the trial judge followed established Utah Supreme Court rules in refusing to instruct the jury to a lesser offense (receiving stolen goods under $50.00) when it was obvious that evidence (had goods with value new in excess of $1265.00) supported the crime for which Washington was indicted.

POINT V.

THE TRIAL COURT SENTENCED APPELLANT TO BEING AN HABITUAL CRIMINAL ACCORDING TO ADMISSIBLE EVIDENCE AND UTAH LAW.

Utah Code Ann. § 76-1-10 (1953) reads:

> "Whoever has been previously twice convicted of felonies, sentenced and committed to any prison, shall, upon conviction of a felony committed in this state, other than murder in the first or second degree, be deemed to be an habitual criminal, and shall be punished by imprisonment in the state prison for not less than fifteen years; provided, that if the person so convicted shall show to the satisfaction of the court before which such conviction is had that he was released from imprisonment upon either of such sentences upon a pardon granted on the ground that he was innocent, such conviction and sentence shall not be considered as such under this section."

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The statute is very precise, anyone convicted of two prior felonies, who is convicted for a third felony is an habitual criminal. Pursuant to that statute Mr. Stratford brought in Mr. James Johnson, records and identification officer at the Utah State Prison. Mr. Johnson brought Exhibits 1 and 2 with him from the state prison. Mr. Johnson testified that these exhibits were copies of commitments on Buddy Washington, taken by him from his files at the Utah State Prison (T. 145; 146). Mr. Johnson testified that the originals of each commitment were kept in each prisoner's file at the prison by himself (T. 145, 146). Mr. Johnson also testiifed that he received appellant for imprisonment on one felony (T. 150) and produced a receipt from another officer who received Washington for another and earlier felony (T. 150). Those coupled with the present conviction is ample proof that Buddy Washington is an habitual criminal. Appellant attempts to question evidence (copies of the commitments) that was and is used daily to put and confine prisoners in the Utah State Prison. These are official state records and are admissible. Utah Code Ann. § 78-25-3 (1953).

Counsel for appellant raises objection to his being sentenced for being both an habitual criminal and receiving stolen goods in excess of $50.00. He claims the court erred in sentencing appellant twice for a single offense. However, he cites Utah cases which state that being an habitual criminal is a status and is not being charged with a crime. (*State* v. *Wood*, 2 Utah 2d 34, 368 P. 2d 998 (1954)). If being an habitual criminal is a status and not a crime, it fol-

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lows that appellant was sentenced once for one crime and sentenced once for his status as an habitual criminal—which does not inflict further punishment for that crime. Appellant was sentenced to 5 years for his crime of receiving stolen goods in excess of $50.00 and 15 years for his status as an habitual criminal. As stated in *Zeimer* v. *Turner,* 14 Utah 2d 232, 381 P. 2d 721 (1962).

> "Being an habitual criminal is a status, and to be charged with being an habitual criminal is not to be charged with a crime. The habitual criminal statute will apply only upon a conviction of the criminal offense last charged. *Its invocation does not inflict additional or further punishment for the prior conviction or impose a new punishment* therefor. It only serves to make more severe the punishment for the last or subsequent offense which might be imposed because of the previous convictions." *Id.* at 723. (Emphasis added.)

This is completely constitutional and valid under Utah Supreme Court decisions. Appellant committed a crime, and due to his previous convictions he is by status an habitual criminal.

CONCLUSION

The respondent respectfully submits that the lower court decision should be upheld. Appellant was given a fair and impartial trial. Through the evidence presented

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and the testimony given, all of which were completely proper and justified, it is apparent that appellant was guilty of the crime as charged and was properly found to be in the status of an habitual criminal.

Respectfully submitted,

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