

1987

Utah v. David E. Brown : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **870504-CA**
DOCKET NO.

Plaintiff-Respondent, : Case No. 870504-CA

v. :

DAVID E. BROWN, : Category No. 2

Defendant-Appellant. :

BRIEF OF RESPONDENT

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APPEAL FROM A CONVICTION OF THEFT, A THIRD
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.
§ 76-6-404 (1978), AFTER A JURY TRIAL IN THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT
LAKE COUNTY, STATE OF UTAH, THE HONORABLE PAT
B. BRIAN, JUDGE, PRESIDING.

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FILED

AUG 22 1988

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Clerk of the Court
Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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v.	:	
DAVID E. BROWN,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of Theft, a third degree felony, after a jury trial in the Third Judicial District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1987).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the trial court properly admitted defendant's prior misdemeanor theft convictions under Rule 609(a)(2), Utah Rules of Evidence.
2. Whether the trial court properly found that a juror's alleged failure to respond to a voir dire question did not warrant a new trial?
3. Whether the trial court properly found that a juror's alleged remarks during a recess were not prejudicial pre-submission deliberations warranting a new trial?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Rules of Evidence, Rule 609(a):

(a) For the purpose of attacking the credibility of a witness, evidence that he

has been convicted of a crime shall be admitted if elicited from his or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Utah Code Ann. § 77-35-18(e)(14) (1982):

(14) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or commons notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

Utah Code Ann. § 77-35-17(j) (1982):

(j) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

Utah Code Ann. § 77-35-24(a) (1982):

The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

STATEMENT OF THE CASE

Defendant, David E. Brown, was charged with Theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1978). Defendant was found guilty after a jury trial held on September 16, 1987, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Pat B. Brian, Judge, presiding. The Court sentenced defendant to serve a term of zero to five years in the Utah State Prison and fined defendant \$5,000.00. The Court suspended the fine and the prison term and placed defendant on probation for eighteen months.

STATEMENT OF FACTS

On July 28, 1987, defendant placed a case of cigarettes in a shopping basket at a Farmer Jack's grocery store (R. 155, p. 55-57). He casually pushed the basket up and down the aisles until he eventually abandoned the basket and cigarettes and walked out of the store (R. 155, p. 57-58). Once outside, defendant mounted his ten-speed bike and began riding around the store parking lot while gazing through the store window (R. 155, p. 58). The store manager, Dale Olson, observed defendant's odd activities and informed Gary Young, the store's security officer, of defendant's suspicious behavior (R. 155, p. 58).

Defendant re-entered the store, grabbed the case of cigarettes, and began to walk out of the store (R. 155, p. 59). Mr. Young stopped defendant as he stepped out of the store (R. 155, p. 70). The case held 30 cartons of cigarettes valued at \$323 (R. 155, p. 60). Shortly thereafter, Officer Jo Ellen Waymunt of the Salt Lake Police Department arrived at the store and arrested defendant (R. 155, p. 86).

Prior to trial, defendant filed a motion in limine to exclude his prior misdemeanor theft convictions (R. 16-17). The trial court ruled that defendant's prior convictions were admissible for the limited purpose of impeaching the defendant (R. 155, p 15). As a result, defendant chose not to testify at trial (R. 155, p. 15).

During the jury deliberations, the court received a note from the jury which asked, "Does statements made by jurors during recess that disturbed some members render our verdict invalid?" (R. 155, p. 92.) The jury was called to the courtroom where the judge admonished them to only consider the law and evidence presented in the courtroom (R. 155, p. 93). Upon further deliberations, the jury returned a verdict of guilty (R. 155, p. 96). The trial court polled the jury and asked each juror individually whether they had considered anything other than the evidence presented at the trial or the law given by the court (R. 155, p. 96-97). Each juror responded, "no." Id.

Defendant filed a motion for a New Trial based on two grounds (R. 130-31). First, that during voir dire, Juror Hogan failed to truthfully respond to general questioning about previous retail employment (R. 138-39). Second, that statements made by Juror Hogan during a recess constituted pre-submission bias against defendant's case (R. 138-39). The trial court denied the motion (R. 152-53). Defendant now appeals.

SUMMARY OF ARGUMENT

The trial court properly ruled that defendant's prior misdemeanor theft convictions were admissible as impeachment

evidence under Rule 609(a)(2), Utah Rules of Evidence. The Utah Supreme Court has ruled that theft is a crime involving "dishonesty" for purposes of impeaching the credibility of a witness.

The United States Supreme Court has set forth a two-prong test to be applied in situations where a juror has allegedly failed to disclose information on voir dire. First, a defendant must demonstrate that a juror failed to answer honestly a material question on voir dire. Second, he must show that a correct response would have provided a valid basis for a challenge for cause. In the instant case, defendant failed to prove the truth of the hearsay allegations that a juror failed to disclose retail experience on voir dire. Second, even if the juror had responded that he had retail experience, that fact alone was not justification for a challenge for cause. The United States Supreme Court has specifically rejected defendant's claim that a juror's failure to properly respond on voir dire prejudices a defendant's right of peremptory challenge. Further, it would be injudicious for this Court to adopt a presumptive error rule under the State Constitution for alleged and unproven juror non-disclosure on voir dire.

The trial court did not abuse its discretion in denying defendant's Motion for New Trial based upon its finding that the alleged juror pre-submission statements were ambiguous and open to multiple interpretation, that any error was cured by the court's admonition and polling of the jury, and that any error was harmless in light of the strong evidence of guilt. Further,

under State constitutional analysis, the determination whether a juror had pre-judged a defendant's guilt should be the prerogative of the trial court, subject to review for abuse of discretion. Finally, the trial court's failure to admonish the jury not to converse during recesses was harmless.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY RULED THAT DEFENDANT'S PRIOR THEFT CONVICTIONS WERE ADMISSIBLE UNDER RULE 609(a)(2).

Defendant claims that the trial court erred in finding that defendant's prior misdemeanor theft convictions were admissible for impeachment purposes under Rule 609(a)(2), Utah Rules of Evidence. Defendant argues that he was prejudiced by the admission of the impeachment evidence in that he was effectively denied his right to testify on his own behalf.

Rule 609(a) allows evidence of other crimes to be admitted for impeachment purposes under the following circumstances:

Impeachment by evidence of conviction of crime. (a)General rule: For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Utah Rules of Evidence 609(a).

The Utah Supreme Court in State v. Cintron, 680 P.2d 33 (Utah 1984) unequivocally ruled that theft is a crime of dishonesty for purposes of impeachment evidence. Admittedly, Cintron was based upon former Rule 21 of the Utah Rules of Evidence, but was decided after the adoption of the new Rules of Evidence in 1983. Cintron, 690 P.2d at 34. However, the Utah Supreme Court's definition of crimes involving "dishonesty" as including theft has not been overruled and is controlling.

In the instant case, the trial court ruled that defendant's prior misdemeanor theft convictions were admissible as impeachment evidence since they constituted crimes of "dishonesty" as contemplated by Rule 609(a)(2) of the Utah Rules of Evidence (R. 155, p. 15). The trial court further stated that defendant's prior theft convictions directly reflect on the question of defendant's credibility. Id. Therefore, the trial court's ruling of admissibility was consistent with controlling Utah case law and evidentiary rules.

In his brief, defendant relies on State v. Banner, 717 P.2d 1325 (Utah 1986) and State v. Gentry, 747 P.2d 1032 (Utah 1987) to argue that the defendant's misdemeanor theft convictions should have been ruled inadmissible under 609(a). Neither Banner nor Gentry are applicable since they were decided under subparagraph (1) of Rule 609(a) which requires a balancing test for the admission of general felony convictions. In both Banner and Gentry, the Supreme Court held that the trial court did not properly weigh the probative value of the impeachment evidence against its prejudicial effect. The court did not address the

issue of whether those convictions would have been admissible under subsection (2) of Rule 609(a).

Other courts have ruled that theft type crimes are admissible as crimes of "dishonesty" under Rule 609(a)(2). In United States v. Bianco, 419 F.Supp. 507 (E.D.Pa. 1976), aff'd., 547 F.2d 1164 (3rd Cir. 1977), the district court judge ruled that a prior conviction for breaking and entering, and armed robbery were crimes of dishonesty. The court thus admitted the convictions for the limited purpose of impeachment. See also, United States v. Ackridge, 370 F.Supp. 214, 218 (E.D.Pa. 1973) aff'd., 500 F.2d 1400 (1974); United States v. Gray, 468 F.2d 257 (3rd Cir. 1972); United States v. Baber, 447 F.2d 1267, 1269, (D.C. Cir. 1971), cert. denied 404 U.S. 957 (1971).

Defendant also relies on United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976) for his assertion that theft is not a crime involving dishonesty. However, Smith involved an attempted robbery conviction which was admitted by the trial court without a consideration of Rule 609. Id. at 357. The appellate court found that attempted robbery is a crime of violence, not dishonesty, and remanded the case back to the trial court for a determination whether the probative value of admitting the evidence outweighed its prejudicial effect. Id.

Defendant further cites United States v. Millings, 535 F.2d 121 (D.C. Cir. 1976) in which the Smith court ruled that neither possession of a pistol without a license nor possession of narcotics possess elements of dishonesty. Because the offenses in Millings are not theft related, Millings is unsupportive of defendant's claim.

POINT II

THE TRIAL COURT PROPERLY RULED THAT A JUROR'S ALLEGED FAILURE TO RESPOND ON VOIR DIRE DID NOT WARRANT A NEW TRIAL.

A. Defendant's Fair-Trial Rights Under The United States Constitution Were Not Violated By A Juror's Alleged Failure To Respond To A Voir Dire Question.

Defendant asserts that the trial court erred in refusing to grant him a new trial where a juror allegedly failed to respond affirmatively to a question during voir dire. Defendant argues that he was prejudiced because he was unable to challenge the juror for cause, use a peremptory challenge, or further question the juror.

The United States Supreme Court in McDonough Power Equipment, Inc. v. Greenwood et al., 464 U.S. 548 (1984) set forth the test to be applied in situations where a juror has allegedly failed to disclose information on voir dire. The McDonough test is as follows:

We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. . . .

464 U.S. at 556. In the present case, defendant fails to meet either prong of the two-prong test.

In ruling on defendant's Motion for New Trial, the trial court found that the alleged statements of Juror Hogan contained in the affidavits were ambiguous and did not reflect bias or prejudice (R. 156, p. 30-31). Further, defendant failed to establish at the motion hearing that Juror Hogan actually

possessed retail experience and thus failed to respond affirmatively to voir dire questioning. Regarding hearsay allegations of juror misconduct, the Colorado Court of Appeals has held that:

a defendant must establish the truth of the allegations on which he basis his motion for new trial and must produce evidence of the alleged jury misconduct. . . . Failure to establish the truth of hearsay allegations contained in an affidavit will warrant denial of a motion for new trial based on alleged juror misconduct. . . .

People v. Rodgers, 706 P.2d 1288, 1291 (Colo. App. 1985)

(citations omitted). Because defendant failed to prove the hearsay allegations contained in the affidavits, the first prong of the McDonough test was not established.

Defendant further fails to establish the second-prong of the McDonough test which is that a correct response by the juror would have provided a valid basis for a challenge for cause. During voir dire, six jurors responded that they had worked in a retail store and were further asked whether their experience would affect their impartiality if they were selected as a juror. Each answered that their retail experience would not prevent them from being fair and impartial and, as a result, none of them were questioned or challenged for cause by defendant (R. 155, p. 36-38). Notably, defendant did not use a peremptory challenge against any of the retail experienced jurors (R. 114-15).

Clearly, under the facts of the present case, the possession of retail experience by a juror was insufficient by itself to establish grounds for a successful challenge for cause.

Therefore, under the McDonough test, defendant was not prejudiced by Juror Hogan's alleged failure to disclose any retail experience.

In support of his argument, defendant relies on People v. Diaz, 152 Cal.App.3d 926, 200 Cal.Rptr. 77 (Cal. Ct. App. 1984) to assert that the McDonough test has been expanded. In Diaz, the California Court of Appeals for the Fourth District held that a juror's failure to respond truthfully on voir dire deprives a defendant of his right to challenge for cause or to exercise a peremptory challenge. Diaz, 152 Cal.App.3d at 932-33. Defendant urges that Diaz extends the McDonough test to include situations where a truthful juror response would be grounds for a peremptory challenge. However, the United States Supreme Court in McDonough clearly rejected such a broad standard. In McDonough, the Tenth Circuit Court of Appeals ruled that the juror's failure to respond affirmatively on voir dire prejudiced defendant's right of peremptory challenge. Id. at 551-52. The United States Supreme Court rejected the Tenth Circuit's ruling and articulated the McDonough standard which requires a denial of a challenge for cause. Id. at 556.

Other courts in California have rejected the ruling in Diaz. People v. Kelly, 185 Cal.App.3d 118, 229 Cal.Rptr. 584 (Cal. Ct. App. 1986); People v. Jackson, 168 Cal.App.3d 700, 214 Cal.Rptr. 346 (Cal. Ct. App. 1985). In Jackson, the California Court of Appeals for the Second District agreed with the holding in McDonough that:

". . . [a] trial represents an important investment of private and social resources,

and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination." . . . This court has long held that "[a litigant] is entitled to a fair trial but not a perfect one," for there are no perfect trials.' . . .

People v. Jackson, 214 Cal.Rptr. at 349, quoting McDonough, 464 U.S. at 555 (citations omitted). Likewise, the Kelly court agreed with the dissent in Diaz that the right to exercise a peremptory challenge does not support a presumption of prejudice. People v. Kelly, 229 Cal.Rptr. at 584.

Defendant also relies on United States v. Bynum, 634 F.2d 768 (4th Cir. 1980) and People v. Borrelli, 624 P.2d 900 (Colo. Ct. App. 1980) which were decided prior to McDonough. Unlike the present case, both Bynum and Borrelli involved intentional concealment of bias by a juror. In the present case, there was no evidence presented in the lower court that Juror Hogan intentionally concealed information nor that prejudice resulted. In fact, the trial record establishes that Juror Hogan was not prejudiced against defendant as evidenced by his response during the polling of the jury:

THE COURT: Mr. David Hogan, was your verdict in this case influenced by anything other than the evidence presented in this courtroom and the law given you by the Court?

JUROR NO. 8: No, sir.

(R. 155, p. 97). Juror Hogan's answer assured the court that he had only considered the evidence at trial and the law given by the court and that he found defendant guilty based only on the law and the evidence.

B. Defendant's Fair-Trial Rights Under The Utah Constitution Were Not Violated By A Juror's Alleged Failure To Respond To A Voir Dire Question.

While admitting that there is no Utah case law precedent on the issue, defendant argues that the Utah constitution requires a more stringent test than the federal constitution when jury misconduct is involved. In support of his argument, defendant relies on State v. Pike, 712 P.2d 277 (Utah 1985) and State v. Erickson, 749 P.2d 620 (Utah 1987) in which the court's holdings were limited to situations involving juror contact with witnesses, attorneys, or court personnel. Id. Defendant analogizes that as in Pike and Erickson, this Court should hold that a juror's alleged and unproven failure to respond to a voir dire question should be presumed error. Defendant's argument should be rejected.

The United States Supreme Court in McDonough expressed its opinion in this regard when it said "[w]e have come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered "'citadels of technicality.'" McDonough, 464 U.S. at 553, quoting Kotteakos v. United States, 328 U.S. 750, 759 (1946) quoting Kanaugh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 A.B.A.J. 217, 222 (1925). "To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." 464 U.S. at 555.

As the California court noted in People v. Jackson,
supra:

It is with good reason that the law places severe limitations on the ability to impeach a jury's verdict. To hold otherwise would be to declare "open season" on jury verdicts not to a party's liking. A green light would be given for every unsuccessful litigant to root out after-the-fact evidence of any "subconscious bias." . . .

People v. Jackson, 214 Cal.Rptr. at 348.

For the same reasons, it would be injudicious for this court to adopt a presumptive error rule for alleged and unproven juror non-disclosure on voir dire. To allow such would permit an unsuccessful criminal defendant to presumptively invalidate an otherwise valid verdict by merely alleging, but not proving, juror bias. Thus, the burden in attacking a verdict would no longer be placed on the party seeking to upset the judgment, but rather, the burden would be placed on the party seeking to maintain it. As a result, the harmless error rule which requires a showing of prejudice in order to justify a reversal would be vitiated. Therefore, respondent strongly urges this Court to interpret Utah constitutional law consistent with the Supreme Court's ruling in McDonough.

Defendant further relies on Rule 18 of the Utah Rules of Criminal Procedure which sets forth the grounds upon which a juror may be challenged for cause. Utah Code Ann. § 77-35-18(e)(14) (1982). Defendant then speculates that had juror Hogan responded affirmatively to the voir dire question, "he very well may have fit within this subsection allowing for dismissal" (Br. of App. at p. 16). As argued above, mere speculation of juror

bias should not be grounds upon which to presume prejudice. In the absence of a showing of undisclosed juror bias which would, if disclosed, have been grounds to challenge for cause, the trial court's denial of defendant's Motion for New Trial was proper.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN RULING THAT A JUROR'S ALLEGED COMMENTS
DURING A RECESS DID NOT WARRANT A NEW TRIAL.

A. Defendant's Fair-Trial Rights Under The
United States Constitution Were Not Violated
By A Juror's Alleged Comments During A
Recess.

Defendant asserts that the trial court erred in denying his Motion for New Trial which alleged that Juror Hogan made prejudicial statements during a recess which constituted pre-submission deliberations. He concludes that any pre-submission jury deliberations violates a defendant's constitutional guarantee to an impartial jury.

A motion for new trial is governed by Rule 24(a) of the Utah Rules of Criminal Procedure which provides as follows:

The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

Utah Code Ann. § 77-35-24(a) (1982).

The Utah Supreme Court has made it clear that "the decision to grant or deny a new trial is a matter of discretion with the trial court and will not be reversed absent a clear abuse of that discretion. State v. Williams, 712 P.2d 220, 222 (Utah 1985); State v. Bundy, 589 P.2d 760, 761 (Utah 1978), cert.

denied, 441 U.S. 926 (1979); State v. Swain, 541 P.2d 5, 6 (Utah 1975). The Court further explained that a trial court will not be considered to have abused its discretion unless it is shown that there is a grave suspicion of a miscarriage of justice. State v. Harris, 513 P.2d 438 (Utah 1973). In other words, "[i]f there be evidence before the court upon which reasonable men might differ as to whether or not the defendant is guilty, the trial court may deny a motion for a new trial." Id. at 440.

In the present case, a woman juror allegedly commented during a pre-deliberation recess that "the defense attorney did not appear worried" (R. 138). In response, Juror Hogan stated, "Well, that guy doesn't matter." Id. He further referred to defendant as "that black man." Id.

During jury deliberations, the jury caused a note to be sent to the trial court (R. 155, p. 92). The jury returned to the courtroom and the following dialogue took place:

THE COURT: The Court has received a note from the jury as follows: "Does statements made by jurors during recess that disturbed some members render our verdict invalid?" The question sent out of the jury room has been shown to both counsel. The Court asked each individual juror during the jury selection process if you would listen to the law that was given to you by the Court, apply that law to the facts that were produced in court, evidence produced in court, and render a decision based on the law given and the facts and evidence presented in court. Each juror indicated, equivocally, they would. Your responsibility in this case is to disregard anything that you think has been said that may have some bearing on the outcome of the case. Disregard any conjecture or speculation that could possibly have come into consideration in the jury room. You decide the case solely on the law given to you by the Court and on the evidence

that was produced in the courtroom. Anything further?

JUROR NO. 6: Is that satisfactory to everyone?
(Affirmative response.)

JUROR NO. 6: Thank you.

THE COURT: You are welcome.

(R. 155, pp. 92-93).

The jury resumed deliberations and subsequently returned a verdict of guilty (R. 155, p. 96). The trial judge then polled each member of the jury whether their verdict was influenced by anything other than the evidence presented in the courtroom and the law given by the court (R. 155, pp. 96-97). Each member of the jury, including Juror Hogan, responded that they were not influenced by anything other than the law and the evidence. Id.

At the hearing on defendant's Motion for New Trial, defendant introduced an affidavit of Juror Alan Blain which alleged that Juror Hogan's statements were such that he appeared to have pre-determined defendant's guilt (R. 138-39). Defendant's trial counsel also submitted her affidavit setting forth her conversations with the jury members (R. 132-33). Pursuant to Rule 606(b) of the Utah Rules of Evidence, the trial court, on the State's motion, struck all statements and affidavits which inquired into the validity of the jury's verdict without a claim of extraneous influence (R. 22).

In ruling on defendant's motion, the trial court found as follows:

THE COURT: The Court makes the following findings. The statements made by the juror, Mr. Hogan, all three statements are ambiguous and subject to multiple interpretation. None of the statements reflect a direct expression of bias or prejudice against the defendant or a predetermination of the defendant's innocence or guilt by the juror making the statement.

Secondly, the Court finds that the statements made by the juror were perhaps inappropriate and perhaps were of some degree of error, but, in the totality of the case, the statements were harmless.

The Court further finds that once the concern by the jurors, after deliberations had commenced, that there was some concern about events that had occurred out of the jury room, the court assembled the jury. The jurors were questioned. The jurors were instructed that they were to follow the law, as set forth by the Court in its instructions, to apply the law to the facts that were presented in court, and that a proper and thorough admonition was given to the jurors prior to the time that a guilty verdict was returned against the defendant, and that any error that may have occurred prior to that time was corrected by the Court's inquiry and admonition.

The Court further finds that the outcome of this case would not have been any different whether the juror had made the prior expressions or not. The case, in the Court's opinion, was a very strong case for the State, regarding the defendant's guilt, and that any error that occurred was harmless error in the total scheme of the case.

The Court, therefore, denies the motion for a new trial on those specific findings.

(R. 155, pp. 30-31).

Thus, the trial court denied defendant's motion for three reasons: (1) that Juror Hogan's statements were ambiguous, open to multiple interpretations, and did not reflect bias or a pre-determination of guilt; (2) that any error was cured by the

trial court's admonition to the jury and polling of the jury's verdict, and; (3) that any error was harmless in light of the strong evidence of defendant's guilt. The trial court's findings being soundly based and clearly set forth, no abuse of discretion exists.

In a similar case, the Utah Supreme Court affirmed a trial court's denial of a Motion for New Trial. In State v. Moon, 688 P.2d 494 (Utah 1984), a bystander overheard one juror say to another, "Well, we only have to hear one more confession and then we are through." Id. at 495. The Court found that the juror's statement "can be construed in a number of ways that do not necessarily support defendant's conclusion that the juror had prejudged defendant's guilt before all the evidence was presented." Id. Under such circumstances, the Court stated that it is the prerogative of the trial court to determine whether a hearsay statement, subject to multiple interpretations, is prejudicial, and, if so, if it is to the point of reversibility. Id. at 495-96.

Likewise, in the instant case, great deference should be afforded the trial court's finding that the hearsay statements were ambiguous, subject to multiple interpretations and did not constitute reversible prejudice. Accordingly, this Court should affirm the trial court's denial of defendant's new trial motion.

B. Defendant's Fair-Trial Rights Under The Utah Constitution Were Not Violated By A Juror's Alleged Comments During A Recess.

Defendant argues that on questions of juror impartiality, Utah constitutional protections surpass federal

protections. He urges this Court to adopt a standard of presumed prejudice in circumstances where pre-submission deliberations are suspected. In support of his argument, defendant again relies on State v. Pike, 712 P.2d 277 (Utah 1985) in which the Utah Supreme Court found that juror contact with witnesses, attorneys, or court personnel is presumed prejudicial.

As discussed in Point II above, it would be ill-advised for this Court to adopt a presumptive error rule for alleged and unproven pre-submission jury deliberations. In fact, the Utah Supreme Court in State v. Moon, 688 P.2d 494 (Utah 1984), under similar circumstances, found that it is the trial court's prerogative to determine whether a juror had pre-judged a defendant's guilt before all the evidence was presented. Id. at 495. In light of the trial court's finding in the present case, as in Moon, that the evidence did not support defendant's claim of pre-submission deliberations, this Court should defer to the trial court's advantaged position.

Defendant further claims that Rule 17(j) of the Utah Rules of Criminal Procedure extends his State constitutional protections in circumstances where pre-submission deliberations are suspected. Utah Code Ann. § 77-35-17(j) (1982). Rule 17 reads as follows:

(j) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

Id. Defendant claims that because the trial court failed to admonish the jurors during a brief recess and at lunch, prejudicial error must be presumed. Defendant's claim is wholly without merit.

First, defendant failed to contemporaneously raise the issue in the trial court below and is thus precluded from raising the issue for the first time on appeal. See State v. McCardell, 652 P.2d 942 (Utah 1982) (applying contemporaneous objection rule Utah R. Evid. 103(a)(1)). Second, the recess and lunch break were respectively prior to the taking of evidence and after the evidence had been presented (R. 155, pp. 54, 87). Third, the juror statements alleged to be deliberative were ambiguous and insufficient to support defendant's claim of prejudice (R. 138; R. 155, pp. 30-31).

Finally, the trial court's failure to admonish the jury at the recess and lunch break should be considered harmless error in the absence of a showing of prejudice. See Utah Code Ann. § 77-35-30(a) (1982); Utah R. Evid. 103; State v. Tucker, 709 P.2d 313 (Utah 1985) (the court will not reverse a conviction unless the error is something substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result). In the present case, the trial court admonished the jury to consider only the law and evidence given in the courtroom (R. 155, p. 92-93). When polled, each member of the jury acknowledged that they had considered only the law and evidence (R. 155, pp. 96-97). The jury's conscientious behavior in notifying the court of disturbing juror

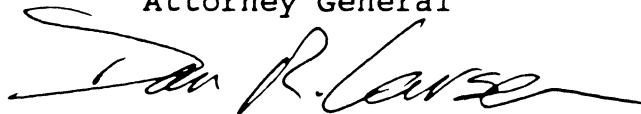
statements indicates that the jury wanted to assure the integrity and objectivity of their verdict. Lastly, the trial court found that on a scale of 1 to 10, 10 being the strongest case establishing guilt, defendant's trial rated a 10 (R. 156, pp. 17-18). In light of the above circumstances, there is no reasonable likelihood that defendant would have been acquitted had the trial court admonished the jurors not to converse among themselves during any recess.

CONCLUSION

Based on the foregoing arguments, respondent respectfully requests this Court to affirm defendant's conviction and sentence.

RESPECTFULLY submitted this 22nd day of August, 1988.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Frances M. Palacios and Joan C. Watt, Salt Lake Legal Defender Association, 424 East 500 South, Third Floor, Salt Lake City, Utah 84111, this 22nd day of August, 1988.

