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BRIGHAM YOUNG UNIVERSITY
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N THE SUPREME COURT
)F THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

JOHN FRANK PACE, and
MILTON E. HANSEN,
Defendants-Appellants.

Case No.
13606

BRIEF OF APPELLANT
Milton E. Hansen

**Appeal from a jury verdict of guilty in
Third Judicial District Court, in and for Salt Lake County,
State of Utah, the Honorable Joseph G. Jeppson, Presiding.**

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FILED
AUG 1 2 1974
Clerk, Supreme Court, Utah

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N THE SUPREME COURT
)F THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

JOHN FRANK PACE, and
MILTON E. HANSEN,
Defendants-Appellants.

Case No.
13606

BRIEF OF APPELLANT
Milton E. Hansen

STATEMENT OF THE NATURE OF THE CASE

The defendant Milton E. Hansen appeals his con-
iction for crimes of burglary in the second degree and
;rand larceny.

DISPOSITION IN THE LOWER COURT

Defendants were convicted by a jury of the crimes
)f burglary in the second degree and grand larceny

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in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Joseph G. Jeppson, Judge, Presiding. The defendant was sentenced to serve the indeterminate term as provided by law for the crime of burglary in the second degree.

RELIEF SOUGHT ON APPEAL

The defendant urges the reversal of the convictions on both counts and that the case be remanded to the District Court with directions to dismiss the grand larceny count and for a new trial on the burglary charge.

STATEMENT OF FACTS

On or about March 14, 1973 in the early hours of the morning a burglar alarm at the Intermountain Farmers' Association premises at 1800 South West Temple, Salt Lake City, Utah went off causing one Thomas Miller to telephone the police, the latter arriving on the scene at approximately 2:16 a.m. (T. 23, 24, 25). The premises consist of a yard area encircled by a large chain link fence with angle iron and barbed wire top strands, an office building, and a combination store and warehouse building. (T. 9, 10, 15, 16, 40, 64, 150). At the time the police arrived, the glass in the office door was broken. (T. 39). The defendants were never seen inside of the building, (T. 64) but were arrested within the fenced boundaries of the property and near the southwest corner of the yard. (T. 42, 43).

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ter the arrest of the defendants, there was found in : office building a safe on which an unsuccessful at- ıpt to "peel" had been made and one or two foot- nts left by damp shoes. (T. 46, 47).

Police officers inspected the store and warehouse rt of the premises where they saw some more damp ›tprints and puddles. (T. 48, 49). It had been snow- ; from approximately 12:00 a.m. to 2:00 a.m. on arch 14, 1973. (T. 37).

There were also several sets of tracks in the snow tside of the building, two sets of which led away ›m the building, over the fence, and left the area on ıearby railroad track. (T. 50, 67, 70). There was a ›ken window on the north side of the warehouse, (T.), from which window a set of tracks exited. (T. 44).

A large double door on the south side of the build- g was also open at the time. (T. 57). This door was type which had dead bolts on one side of the door ıich went into the ceiling and floor, the other door :king with a latch and key into the bolted door. (T. , 21). Entry into the warehouse and store building ıs made by kicking the south side double doors from e outside. (T. 98, 99).

There were some saddles in the store on March 13, '74 with a value of approximately $200.00 each. (T. !2, 123, 133). The record is not clear as to whether not the saddles were there on the following day. (T. !7, 129). But the defendants did not have them in eir possession when they were arrested. (T. 60).

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The defendants had entered the fenced area following some footprints, in search of persons whom the defendant Hansen believed had collided with his car sometime earlier, (T. 192, 193) walked around the building, (T. 192), noticed that the window had been broken and that the warehouse door was open, (T. 192), picked up some items that were in a pile near the open door, (T. 176, 199) and were arrested by police, (T. 179). The defendants did not enter the building or take any property. (T. 179).

ARGUMENT

POINT I

THE COURT ABUSED ITS DISCRETION IN FAILING TO GRANT THE DEFENDANT HANSEN'S MOTION FOR A SEVERANCE PRIOR TO THE TRIAL.

On the day of trial and after the jury had been impaneled, the defendant Hansen moved for a severence asserting that he would be prejudiced if tried jointly with the defendant Pace. (T. 3, 4). The question of whether or not a severance will be granted is within the discretion of the trial court. Utah Code Ann. § 77-31-6 (1953). This court has not heretofore delineated all of the reasons for which a severance can be granted under the referenced statute, but the State of California has a similar provision, Cal. Penal Code § 1098 (West 1970), and that court has set out the grounds for a severance under such a statute. *People*

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. *Massie*, 66 Cal.2d 899, 428 P.2d 869 (1967). The ;alifornia Court in discussing this statute found that mong other reasons, when the defendants have conlicting defenses or there exists the possibility that the o-defendant would give exonerating testimony, a sevrance should be granted.

During the trial the defendant Pace did not testify .nd offered no evidence of any kind in his behalf. In nstructing the jury, the court told them not to conider Pace's silence nor to draw any inferences against ιim from it. (R. 267). The court made no comment ιs to whether the silence of Pace could be considered in veighing the testimony of the defendant Hansen. There :xists a good possibility that the jury inferred Hansen's .estimony to be suspect because Pace, although present ιt the trial, did not confirm it. If the jury so considered Pace's silence against Hansen, he was prejudiced there-)y. Thus, the defendant Hansen was not only prevented from obtaining possibly exonerating testimony 'rom Pace because Pace was tried jointly with him ınd could not be called to confirm Hansen's testimony,)ut he was burdened with the possibly inculpating silence of Pace.

The defendant Hansen offered a defense while the lefendant Pace made no defense at all. A situation where there was a greater inconsistency in the defenses ;ould hardly be imagined short of that where each ıccuses the other of the crime. In refusing to grant Hansen's motion to sever, the court forced him to trial jointly with a defendant whose defense was inconstent

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with his own and whose silence likely was used against him. Further, the court made no attempt to prevent the jury from drawing improper inferences from the predicament of Hansen in being tried jointly with Pace. It cannot be said that Hansen was not prejudiced by the court's refusal to exercise its discretion in this regard. Therefore, the convictions should be reversed.

POINT II

THE COURT ERRED IN ALLOWING THE JURY TO HEAR AND CONSIDER TESTIMONY WHICH WAS INADMISSIBLE BECAUSE IT WAS,

A. EVIDENCE OF ANOTHER CRIME.

B. EVIDENCE OF INSTRUMENTS, THE POSSESSION OF WHICH WAS INFLAMMATORY BUT WHICH INSTRUMENTS WERE NOT CONNECTED TO THE CRIMES CHARGED.

At the trial, one officer Williams was called by the State and gave testimony over defense counsel's objection that he had searched the defendant Hansen in the jail subsequent to his arrest and found among clothing items a glass cutter and a lock pick. (T. 110, 111). The court asked the officer to spell "lock pick" and that was done. (T. 111). The officer went on to describe the lock pick and then related how such an item can be used to open a door for which one did not have the key. (T. 111, 112). The defendant asserts

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at the admission of this testimony was reversible error
ıich this court should notice despite counsel's failure
give the right reasons for his objections thereto at
e trial. *State v. Poe*, 21 Utah2d 113, 441 P.2d 512
968). Clearly the testimony was offered to show
at the defendant Hansen was in possession of burg-
r's tools which is a crime in this State, Utah Code
nn. § 76-5-205 (1953). Therefore, the offering of this
stimony was evidence of another distinct separate
ime than the one charged. The law is clear that evid-
ıce of crimes other than the one charged is inadmiss-
le. *State v. Cox*, 74 Utah 149, 277 P. 972 (1929);
tate v. Anselmo, 46 Utah 137, 148 P. 1071 (1915).
; is apparent from the testimony offered and the
ngthy explanation of the use of a lock pick that the
tate offered this evidence primarily for the purpose
creating in the minds of the jurors the impression
ıat the defendant had a propensity to commit crime
ıd thus committed this one because he carried burglary
ols. The offering of such testimony for that purpose
as been unequivocally condemned by decisions of this
ourt. *State v. Johnson*, 25 Utah2d 160, 478 P.2d 491
1970); *State v. Dickson*, 12 Utah2d 8, 361 P.2d 412
1961); *State v. Anselmo, supra*. In both the *Johnson*
nd *Dickson* cases the court held evidence of other
rimes was not admissible to disgrace the defendant as
person of evil character with the propensity to com-
ıit crime. In *Anselmo*, this court noted that only the
rime charged can be shown, any other which the de-
endant may have contemplated or committed being ir-
elevant. The court further said,

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> "If other actual offenses may not be shown, then it must follow that facts and circumstances from which some might deduce an inference that those who have offended might possibly be induced to commit more offenses can likewise not be shown." 46 Utah at 163.

Because this evidence had no relevancy to the crime charged, the admission thereof is improper. Further, it could only have had a prejudicial effect since it accuses the defendant of another crime and because of the inflammatory and unsavory nature of the instruments. Therefore, the reversal of the convictions is warranted.

B. THE EVIDENCE WAS INADMISSIBLE BECAUSE THE POSSESSION OF THE INSTRUMENTS IS INFLAMMATORY, THERE BEING NOTHING TO CONNECT THEM WITH THE CRIME CHARGED.

There was offered no evidence to show that the burglary was effected by the use of a lock pick or a glass cutter. On the contrary, all of the evidence tended to show the entry to have been made by breaking out a window, (T. 39), and by kicking down doors, (T. 98, 99). There was no physical evidence of the use of either of the two tools about which the objectionable testimony was solicited. As a result, the testimony becomes totally irrelevant and inadmissible under well settled rules. To be admissible, evidence must be used in the furtherance of the crime. *State v. Little*, 87 Ariz. 295, 350 P.2d 756 (1960) (Blackjack and bicycle chain inadmissible in prosecution for sale of narcotic);

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'eople v .Planagan, 65 Cal.App.2d 371, 150 P.2d 927 1944); *People v. Howard,* 10 Cal.App.2d 258, 52 '.2d 283 (1935).

The Supreme Court of Montana has treated this oint in the case markedly similar to this one. *State v. 'ilacchione,* 136 Mont. 238, 347 P.2d 1000 (1960). In hat case, the defendant was caught at the scene of an ttempted burglary and there was offered in evidence gainst him a crow bar, two screw drivers, a sledge hamner, and some canvas sacks. Although entry had not een made to the building, a police officer was allowed o testify as to how he learned in police school that such ools can be used to rip and peel a safe. The Montana Court reversed the conviction holding the admission of he tools and all evidence about their use to be error vhere there was no showing that any safe was ripped or peeled or that the defendants ever got near a safe. The situation is the same in the case before this court: There simply was no use ever made of a glass cutter or a lock pick or any evidence tending to indicate the use thereof.

That the evidence must be related to the commission of the offense is implicit in the Utah court's decision in *State v. Crawford,* 60 Utah 6, 206 P. 717 (1922). In *Crawford,* where it was alleged that a robbery was committed with a use of a .45 caliber revolver, this court found that the trial court erred in admitting into evidence .32 and .38 caliber cartridges found in the defendant's room.

But this testimony was offered not because it was

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relevant but because it was inflammatory. Admittedly, were it connected with the crime, the defendant would have to live with all of its implications and rejudicial inferences—but such is not the case. The State served up this testimony about a lock pick for the sole purpose of disparaging the defendant, of making him appear to be of evil disposition with a predisposition for the crime of burglary. There is no other explanation for the offering of the subject testimony. A similar attempt to degrade a defendant required a reversal in *State v. Anselmo*, 46 Utah 137, 148 P. 1071 (1915). In that case the defendant was charged with shooting a police officer in an attempt to escape arrest. Sometime after the shooting a search of the defendant's room turned up a revolver which the defendant claimed was his father's, a blackjack, two masks, and a pair of sneakers. This court observed that the trial court's admission of that evidence was error because,

> "The only effect that the admission of those articles in evidence before the jury could have had was to convince them that the appellant must be a bad man, or he would not have had them. . . ." 46 Utah at 160.

And such is the only effect that the admission of testimony about a lock pick could have in the instant case — magnified by the further error of letting the police officer describe how such an instrument was used when one did not have a key and amplified by the court's asking the witness to "spell it." (T. 111).

The trial court erred in admitting this testimony because there was nothing to connect it to the crime—

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peculiar error in the light of the court's ruling with espect to Exhibit 17 offered by the State. Exhibit 17 vas a hunting knife found on another defendant. The State urged that the knife be admitted arguing that it ould be used as a tool. (T. 164). To that argument, he court replied, "could be, but there is no evidence of use, is there?" (T. 164), and denied that exhibit. The ailure to reject the testimony about the lock pick and he glass cutter for which there was likewise no evidence of use is a reversible error. In the event that there exists doubt as to whether this error was prejudicial—an unlikely event considering the testimony—this doubt should be resolved in favor of the defendant. *State v. Lewis*, 8 Utah2d 224, 332 P.2d 664 (1958). Thus the convictions should be reversed.

POINT III

THE COURT'S FAILURE TO GRANT DEFENDANT HANSEN'S MOTION TO DISMISS THE GRAND LARCENY COUNT AT THE CLOSE OF THE STATE'S CASE WAS REVERSIBLE ERROR AS TO BOTH THE BURGLARY AND THE GRAND LARCENY COUNTS BECAUSE:

A. THERE WAS NOT SUFFICIENT EVIDENCE TO ALLOW THE GRAND LARCENY COUNT TO GO TO THE JURY.

B. THE SUBMISSION OF THE GRAND LARCENY COUNT ALLOWED THE JURY

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TO DRAW AN INFERENCE ON AN INFERENCE WHICH IS IMPROPER AS A MATTER OF LAW.

Counsel for the defendant Hansen moved to dismiss the grand larceny charge at the close of the State's case which motion was denied by the court. (T. 168). The basis for the motion was that there was not sufficient evidence of a grand larceny to warrant the jury's consideration of that charge. It will be noted from the transcript that at no time did the witness Lewis testify that saddles were missing although he did state that saddles were present on March 13, 1973. (T. 122). Some confusion exists as to the number of saddles which were present on the premises on March 13, 1973. (T. 123). On pages 122 through 140 of the transcript, considerable discussion took place about saddles and their value. At one point, the prosecutor asked,

> "Well, with regard to those *three saddles which you said were missing*, do you have the prices reflected in that book?" (T. 127) (emphasis added)

The fact is that the witness Lewis did not then or at any time testify that three saddles or any saddles were missing. Nor did any other witness testify that saddles were missing. It is at once apparent from the transcript that the prosecutor *assumed* that fact. In addition, the court erroneously assumed saddles were missing during the trial, (T. 129), and later greatly compounded its initial error by *instructing* the jury that saddles were missing. (T. 219). At one point, the

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vitness Lewis testified that there was a knife lying on . bag of feed next to the *saddles* on the 14th day of Aarch, 1973. (T. 124). In later testimony (T. 154, 55) Mr. Lewis opines that saddles "left the area" T. 156). However, from all of this testimony it is iot possible to determine whether or not saddles were tolen or even how many saddles were under discus-ion.

A further weakness in the grand larceny evidence ppears in the quality of that evidence as to the value f saddles. The defendant submits that there was no dequate foundation for the value testimony; that the vitness Lewis was not competent to testify to the value f the same and there was absolutely no other compe-ent evidence as to their value.

The defendants were not found in possession of ny saddles nor were any saddles ever marked for dentification or offered in evidence. (T. 157 to 164). Further, it was shown that there were no marks where addles were thrown over the fence, (T. 155), nor ny marks in the snow where saddles or their stirrups vould reasonably have left the same had they been aken. (T. 144, 145).

When in a situation such as this, the defendants lo not have the opportunity to call their own value wit-iesses who could offer testimony as to the value of the addles—they could not because there was no evidence o be appraised—it is especially prejudicial to the de-'endants to let an unqualified witness testify as to the

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value of saddles. The prejudice is even greater because this error is added on to the unfortunate assumption on the part of the court and the prosecutor that the saddles were in fact taken.

Because of these weaknesses in the quality and quantity of the evidence, the court was clearly in error in allowing the grand larceny count to go to the jury. Apparently the court felt so also in retrospect because it *vacated* the grand larceny conviction *after* it imposed the sentence on the burglary. (R. 254). Accordingly, the grand larcency charge should not only be vacated but reversed with directions to dismiss it.

B. THE SUBMISSION OF THE GRAND LARCENY COUNT ALLOWED THE JURY TO DRAW AN INFERENCE ON AN INFERENCE WHICH IS IMPROPER AS A MATTER OF LAW.

Although there exists certain other evidence from which the jury could infer that the defendants had entered the building and that they did so with the intent to commit larceny, it is apparent that they could also have arrived at a guilty verdict with respect to the burglary charge by relying on the evidence—such as it was—of the grand larceny, as reinforced by the court's improper comment with respect thereto. (T. 219). Whether or not the other evidence would convince the jury beyond a reasonable doubt cannot be determined. It likewise cannot be determined from this transcript and record whether the decision of the jury rested

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'holly or partially on the improperly submitted grand ırceny charge. Admittedly, if the jury concluded as ıey did without considering the evidence of the grand ırceny, the verdict is proper. If they considered the ırceny evidence, the verdict is improper. The only way o ensure that the jury did not go astray was to submit nly the burglary charge. The premise that the burg-ary charge must stand or fall on the basis of competent vidence needs no citation.

The conclusion that the defendants took the saddles s not a known, observed, or undisputed fact. It is he product of an inference. Nor is the conclusion that he defendants were in or entered the building based n known facts, but it may have been drawn from the *nference* that the defendants took the saddles. That he latter more likely occurred is supported in the Record, it appearing that the jury had deliberated for ıearly two hours on both charges and then found both harges against the defendants in only twenty-seven ninutes after being wrongly told that the saddles were nissing. It is this specious inference on an inference ort of reasoning that is improper in law, it being "a familiar rule that one presumption or inference cannot rest upon another mere inference or presumption . . . [But] . . . *can only rest on proven facts.*" *State v. Potello*, 40 Utah 56, 68, 119 P. 1023, 1028 (1911) (emphasis added). In the *Potello* case, the defendant was found in possession of a horse claimed as the property of another. There was at the time in effect in this State, as there is now, a "recent possession" statute. Comp. Law 1907 §4355; Utah Code Ann. §76-6-402 (1953).

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The State proved that the horse was missing but not that it was the subject of the larceny, there being no evidence that it was stolen but merely that it had strayed to the range. The court stated,

> "the State seeks to draw the inference that the horse strayed to the range some six or eight miles from the defendant's place, and that someone there took and drove him away; and, since the horse was found in the defendant's possession, the further inference is sought that the defendant took and drove . . . the horse from the range. But this is merely resting an inference or a presumption upon an inference or a presumption." 40 Utah at 69.

The court reversed the conviction of Potello holding that where the State fails to prove the larceny and shows only an inference thereof, it cannot then rely on a statute to further infer that the party in possession committed the larceny.

Clearly, the *Potello* decision prohibits that which the jury may well have done in the instant case: Drawn an inference from another inference not from proven facts. Admitting for purposes of argument only that the theft of the saddles was proven, the conclusion announced by the jury that the defendants committed that theft is an inference. Reason and the record tend to indicate that the jury then inferred that the defendants had entered the building relying on the inference that the defendants stole the saddles for that conclusion. Because the possibility exists that this may have occurred, the burglary conviction should be reversed

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nd remanded for a new trial and the grand larceny harge reversed with instructions to dismiss it.

POINT IV

MISCONDUCT OF THE JURY DEPRIV- ED THE DEFENDANT OF HIS RIGHT TO 'RIAL BY JURY, TO CONFRONT WIT- NESSES AGAINST HIM, AND TO CROSS- EXAMINE WITNESSES AGAINST HIM.

After the jury had retired to deliberate, two wit- lesses were called on behalf of the defense for the pur- ›ose of showing that certain of the jurors had failed to 'emain awake and perceptive during the course of the rial. (T. 206). Counsel for the defendant Hansen had noved for a mistrial on the day prior when the sleeping lad first been called to his attention. (T. 96). The :ourt noted at the time that "juror No. 7, Yvonne Zundel was sleeping." (T. 96), but did not observe :hat she missed anything, so therefore, denied the mo- :ion. (T. 96). One of the witnesses called after the jury had retired, noticed only one juror exhibiting signs of sleeping, while the other noticed two jurors doing so. (T. 210, 211, 212). The witnesses observed jurors rub their eyes, close their eyes, let their heads droop down and then jerk them to an upright position again, and otherwise comport themselves as dozing or being near sleep. (T. 209, 211, 212, 213). This conduct went on in the case of juror No. 7 for an hour to an hour and one-half, (T. 209), and with respect to the other juror for an hour or two. (T. 213). After this evidence

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was presented, counsel for the defendant Hansen again moved for a mistrial which motion was denied (T. 217).

Under the Constitution of Utah, certain fundamental precepts are established and guaranteed to defendants in a criminal prosecution. Among these are a right to a jury trial, a right to confront witnesses, and a right to cross-examine them. Utah Const. art. I, § 12. What the Constitution commands is that these rights be provided absolutely before the basic right to a fair and impartial trial has been satisfied. If a defendant is restricted in the exercise of any of these rights, he cannot have had that fundamental fairness which is an inextricable part of the American process. Inherent in the right to a jury trial is the premise that the jury will listen to the evidence. Obviously, if they are asleep, or so near sleep that their sensory processes are not functioning, they cannot do so. If the jury does not *hear* the evidence, the rights of the defendant to cross-examine, to be confronted by the witnesses against him, and to have a jury determine the evidence are not afforded him.

When courts discuss the question of jurors sleeping, it is lumped into the category of juror misconduct, the remedy for which is a new trial. However, most of the cases on this point find that there was no prejudice to the defendant or in fact no misconduct. See *State v. Jones*, 187 Kan. 496, 357 P.2d 760 (1960); *Hall v. State,* 223 Md. 158, 162 A.2d 751 (1960); *State v. Mellor*, 73 Utah 104, 272 P. 635 (1928).

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The Utah standards with respect to misconduct :e set out in *State v. Morgan*, 23 Utah 212, 64 P. 356 1901). In *Morgan* the court said,

> "misconduct by one or more of the jury which might have been prejudicial to the accused, raises the presumption, especially in a capital case, that the accused has been prejudiced thereby and vitiates the verdict unless the prosecution shows beyond reasonable doubt that the prisoner has received no injury by reason thereof." 23 Utah at 226.

In the instant case, it cannot be argued that the ozing of at least two jurors was not misconduct so as ɔ raise the requirement that the prosecution show the bsence of prejudice to the defendant. The record re- eals that the prosecution showed nothing with respect o this question, nor did the trial court's conclusions orrect the defect. The court should have inquired of he jurors whether or not they missed any of the testi- nony. This the court did not do and as a result the ›resumption that the defendant was prejudiced remains o require a reversal of the conviction.

POINT V

THE COURT ERRED IN FURTHER INSTRUCTING THE JURY WITH RESPECT ΓO THE LAW OF CIRCUMSTANTIAL EVIDENCE AFTER THEIR DELIBERATIONS HAD BEGUN BECAUSE:

A. THE INSTRUCTION WAS NOT IN WRITING

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B. THE INSTRUCTION WAS AN INCORRECT STATEMENT OF THE LAW CONCERNING THE USE OF CIRCUMSTANTIAL EVIDENCE

C. THE INSTRUCTION WAS AN IMPROPER COMMENT ON THE EVIDENCE, ASSUMED FACTS, AND CONFUSED AND MISLED THE JURY

The jury retired initially at 4:34 p.m. (T. 206) and deliberated until 6:25 p.m. when they returned with some questions about the quality and quantity of the grand larceny evidence. (T. 217, 218). The foreman stated, "Our question is: What is evidence, considered evidence, in regard to missing items? That is, items that are reportedly missing but not recovered?" (T. 218). At this point defense counsel requested a conference at the bench which request it appears was not acted on. The court then asked if the jury had any other questions and the foreman expanded on the nature of the jury's problem stating,

> "It has been stated that three saddles were removed. Our question is, to what extent must the State prove, that is, beyond a reasonable doubt, that these saddles were taken. In other words, would a statement by Intermountain the following morning that these saddles were missing upon searching the premises, and can we assume then that that was part of the same affair the night before? Or must the State have some other way of proving that these saddles are involved?" (T. 218, 219).

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To this question the court made the following reply:

> "This is circumstantial evidence. Nobody saw the saddles go out. And you may consider all of the evidence surrounding the event, *that they were there the day before, and they weren't there the next morning*, and the time involved and any people who might have been around, and determine from that whether they were taken and if so who took them. You may consider that as some evidence on the subject. Any other questions." (T. 219) (emphasis added).

The jury returned for further deliberations at 6:32 p.m. (R. 248). After the jury had retired again the court observed that jurors usually have two or three questions and noted, "I thought this one was rather simple, so I didn't bother to wait and send a written instruction on it." (T. 220).

Counsel properly objected to the court's so dealing with the jury. (T. 221). The jury returned at 6:57 p.m. with guilty verdicts on all counts and against both defendants. (T. 222).

The colloquy between the court and the jury set out above was fraught with errors, any one of which require a reversal of the convictions. The court's answer to the jury's question was an instruction. The court found it to be one, but so simple as not to require writing. The court is in error in believing that it can give an oral instruction. It cannot. *State v. Aikers,* 87 Utah 507, 51 P.2d 1052 (1935), *Kunz v. Nelson,* 94 Utah 185, 76 P.2d 577 (1938). Instructions to Utah juries must be in writing unless counsel stipulate

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to waive this requirement. Utah R. Civ. P. 51. This rules applies as well to instructions in criminal matters by virtue of the command of Utah Code Ann. § 77-31-1 (5) (1953).

This provision of the law obtains to require counsel and the court to take the time prior to instructing the jury to prepare the correct statement of law on the points reasonably raised by the evidence. It contemplates that opposing counsel, in conjunction with the court, will draft clear, understandable, fair, necessary, and proper instructions—instructions that will not unduly emphasize the position or evidence of either side and will accurately and appropriately state the law with respect to the evidence offered. The requirement of written instructions is designed to obviate the giving of a prejudicial instruction which assumes facts and is an improper comment on the evidence as occurred in the instant case. So fundamental and so vital is the right to proper instructions that even a failure to object to the improper giving of the same will not impinge on the rights of defendants. This court can notice these errors absent an objection in the trial court as is stated in Rule 51 and as has been stated by this court. *State v. Waid*, 92 Utah 297, 67 P.2d 647 (1937). Clearly then, the instruction phase of a trial demands and is afforded the utmost in protection against impropriety. It is axiomatic that the trial court cannot and must not deprive a defendant of his right to written instructions.

When the jury indicated their confusion, the court should have granted counsel's request to approach the

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nch. This request was made no doubt out of a desire have an opportunity to draft a proper instruction to 1 the jury in its handling of this circumstantial evid- ce. The court did not allow said conference. Rather, ıd in violation of the statute and rules requiring that ey be written, and absent a waiver of this require- ent by counsel, the court instructed orally. It is sub- itted that this procedure is improper and requires a versal and would have been so, even had the instruc- ons been substantially correct . . . which they clearly ere not.

B. THE INSTRUCTION WAS AN INCOR- ECT STATEMENT OF THE LAW CON- ERNING THE USE OF CIRCUMSTANTIAL VIDENCE.

This court has examined the characteristics of in- ructions with respect to circumstantial evidence on a ımber of occasions. See *State v. Laub*, 102 Utah 402, 31 P.2d 805 (1942), *State v. Erwin*, 101 Utah 365, 20 P.2d 285 (1941); *State v. Judd*, 74 Utah 398, 279 . 953 (1929). It has required that when evidence of circumstantial nature is presented to the jury it must e accompanied with an instruction telling the jury how) use the same. *State v. Burch*, 100 Utah 414, 115 '.2d 911 (1941). Basically, the instruction should in- orm the jury of the requirement that circumstantial vidence exclude every reasonable hypothesis other than ıe guilt of the defendant. *State v. Hutchings*, 30 Utah 19, 84 P. 893 (1906). In *Hutchings* the defendant 'as charged with the offense of stealing one hundred

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sixteen chickens. There was evidence that the chickens were not in the chicken house and the door thereto was open. The chickens were not found. There was evidence that a fire had consumed some buildings attached to the chicken house on the night of the alleged theft. Further, it was shown that the defendant was observed a few blocks from the site of the alleged larceny going toward and returning from the area of the chicken house at the time of the fire. The defendant was not observed by these witnesses to have been in possession of the chickens and he denied taking them. The court observed that several reasonable hypotheses existed other than that of the defendant's guilt. Among them were that the chickens were consumed in the fire or merely ran off. The court further observed that the defendant could not have had one hundred sixteen chickens when seen by the witnesses or the witnesses would have noticed it. The court held that an acquittal was incumbent if the evidence could be so reconciled and reversed the conviction because the instruction given did not properly allow the jury the latitude to so construe the circumstantial evidence.

The defendant submits that had the jury been properly instructed in the instant case they may well have found some of the evidence to be inconsistent with his guilt and thereby acquitted him. The defendant stated that he was within the fenced area of Intermountain Farmers' Ass'n. because he was following the tracks which he found exiting from a car which he believed had collided with his car earlier in the morning. He did

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not have any saddles with him and it is conceivable that these certain persons whom the defendant was following could have committed the burglary and larceny and made off with the saddles. On the other hand, it may be that the witness who testified about the saddles was not sufficiently sure of whether or not the saddles were in fact missing to convince the jury, had proper instructions on that point been given.

The defendant submits that rather than giving the oral instruction which it gave, the court should have given—at the time the confusion became apparent—the following instruction from *State v. Merritt*, 67 Utah 325, 247 P. 497 (1926).

> "The state must not only convince you beyond a reasonable doubt that the alleged facts and circumstances are true, but they must be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused." 67 Utah at 338.

Although words similar to these were given to the jury in instruction number 13 (R.272), the jury apparently did not understand that this applied to circumstantial evidence and it is not clear from the instruction that it does. If the court intended the instruction so to apply, it gave an inconsistent, contradictory, and confusing instruction in the giving of the oral one. When the instructions given are inconsistent or confusing, a reversal is warranted. *State v. Thompson*, 31 Utah 228,

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87 P. 709 (1906). The questions by the jury foreman indicated sufficient uncertainty on the part of the jury to make mandatory the giving of the above instruction. Had such been given and the jury understood that the quality and the quantity of the evidence with which they were concerned — and were clearly unconvinced by — must be such as to exclude every reasonable hypothesis other than guilt, they may have decided the point differently. The defendant urges this court reverse both convictions because of the improper oral instruction and because of these further observations about the same which make it objectionable.

C. THE INSTRUCTION WAS AN IMPROPER COMMENT ON THE EVIDENCE, ASSUMED FACTS, AND CONFUSED AND MISLED THE JURY

This court has interpreted Utah Const. art. I, § 12 to guarantee that a jury be the sole judge of the credibility of witnesses and the facts and to prevent a court from commenting on the evidence. *State v. Harris,* 1 Utah2d 182, 264 P.2d 284 (1953). Trial courts are also prohibited from making any remark which might indicate the court's attitude toward the quality or credibility of the evidence or that might imply the court favors the claims or positions of either party. *State v. Sanders,* 27 Utah2d 354, 496 P.2d 270 (1972); *State v. Gleason,* 86 Utah 26, 40 P.2d 222 (1935). To do so intrudes upon that exclusive province of the jury, although it is possible to make observations about the

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tnesses without making comments on the evidence. *ate v. Kallas*, 97 Utah 492, 94 P.2d 414 (1939).

The evil to be avoided by preventing a comment the evidence is the probability that the jury will consciously relinquish their fact finding function to e court if they are aware of the court's opinion on a ven point. This court examined the problem in *State Seymour*, 49 Utah 285, 163 P. 789 (1917). In that se, the defendant had been convicted of obtaining ney by false pretenses. The State had alleged that e of the false representations was about on-going ctory construction. In one of its instructions with spect to that fact, the trial court said, "which he [the fendant] then and there stated was in the course of nstruction and the same was near its completion." *l.* at 293, 163 P. at 792 . In finding that to be an iproper comment on the evidence and reversible error, is court stated,

> "Courts, in charging jurors should be very careful not to assume any material fact or facts. Jurors, who are laymen, are always eager to follow the opinion or judgment of the court, and if the court assumes any material fact in the charge, the jurors are most likely to follow the assumptions of the court. Indeed, we must assume that such is the case unless the record clearly shows the contrary." 49 Utah at 293-294.

'his court further reasoned that since there existed idence from which the jury could have found the deendant not guilty, the comment was prejudicial. In

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telling the jury in the instant case that they could consider the fact that the saddles "were there the day before and they weren't there the next morning" (T. 219), the trial judge commented on the evidence thereby committing the same error as did the trial judge in *Seymour.* Whether or not there were saddles on the premises on March 13, 1973 was a *fact* to be determined by the jury. Whether or not they weren't there on March 14, 1973 was likewise a fact to be determined by the jury. The court further erred in telling the jury in the next sentence that they could "consider that as some evidence on the subject" (T. 219). It is not clear whether in telling the jury to "consider that" the court is referring to its preceding comments or the testimony given. But certainly the jury could reasonably have believed that his statement about the saddles could be considered as evidence.

The mandate to refrain from commenting on the evidence predominates even when the defendant does not take the stand and the evidence is not otherwise controverted. *State v. Green,* 78 Utah 580, 6 P.2d 177 (1931). In *Green,* the defendant did not take the stand or admit anything although there was in evidence his confession made prior to the trial. The trial court gave an instruction that assumed the fact that there had been a killing. Although other evidence would amply bear out this conclusion, this court held it to be an improper comment on the evidence stating,

> "In this jurisdiction the trial judge is not permitted to comment on the evidence, *much less*

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may he indicate to the jury that some material facts, not admitted at the trial, are established beyond controversy. It is the sole and exclusive province of the jury to determine the facts in all criminal cases, whether the evidence offered by the state is weak or strong, is in conflict or is not controverted." 78 Utah at 589-590. (emphasis added).

.n reversing the conviction in *Green,* this court cited ınd amplified *State v. Seymour, supra.*

Not only should the trial court not assume facts ›r comment on the evidence, but it should avoid any ;tatement that indicates to the jury what *weight* the ;vidence has. *State v. Greene,* 33 Utah 497, 94 P. 987 (1908). In that case, an adultery prosecution, the court ıad observed that a man should not be allowed to coıabit with a woman, hold himself out to his neighbors ıs married, and otherwise make it appear that they were husband and wife and then because the State cannot produce a witness to the marriage or a marriage license, go "scot free". This court reversed the conviction saying that although the comments were not so intended, they were prejudicial as an expression of the court's opinion as to the weight of the evidence and therefore, improper.

In *State v. Harris,* 1 Utah2d 182, 264 P.2d 284 (1953), a situation very near that in the instant case was presented to this court. In *Harris* the defendant was convicted of driving under the influence of intoxicants. A subsequent trial was had to determine whether

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he had previously been convicted of the same offense. The State offered the court records of Layton City to show that the defendant had been so convicted. The jurors questioned the sufficiency of the court records to discharge the State's burden with respect to a prior conviction. In referring to the record of the prior conviction offered by the State a juror asked, "we can accept this as concrete evidence?" The judge replied:

> 'You can. If you accept that, it becomes your duty to answer the verdict a certain way. If not, you answer the other way. If you think Mr. Pederson has perjured himself, answer it the other way'." 1 Utah2d at 184.

This court reversed holding the foregoing remarks by the trial judge to be an improper comment citing the reasoning of Mr. Justice Elias Hansen in *State v. Green.*

In the four cases briefed above, *Seymour, Greene, Green,* and *Harris,* this court has propounded this rule: A trial court must not comment on the evidence. In doing so it runs the risk of assuming facts, indicating its opinion as to the weight of the evidence, and giving contradictory or confusing instructions. This invades the province of the jury and causes prejudice to the defendant which the Supreme Court will have to rectify with a reversal. The message could not be any clearer.

Lest the State maintain the defendant was not prejudiced by the trial court's comment about the saddles, the defendant submits the following observa-

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ıs. The jury was unsatisfied with the quality and quantity of the evidence with respect to the saddles stated by their foreman.

> "I think the reason why we are confused is, it is very easy to look at material things in front of you and then try to consider things that were never recovered and never offered in evidence, and because we weren't seeing them, *we didn't feel we were given evidence. . . .*" (T. 219) (emphasis added)

The jury deliberated only a mere 27 minutes after e court had given the instruction complained of. Dur- g this period they held four separate votes, counted e results, and executed four verdicts. Not much time is left for deliberation which makes inescapable this nclusion: The court's comments decided the matter r them—told them the saddles had been taken and rongly inferred that the defendants had done the tak- g. As a consequence the defendant urges the reversal his conviction.

CONCLUION

The defendant Hansen has herein set out five dis- ıct areas wherein the trial court erred. Any one of ese errors standing alone required a reversal of his nviction. When the errors are considered together, wever, the impact on the defendant's basic right to a ir trial is devastating. Our system guarantees to each us a just hearing when we finally have our "day in

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court." This was denied to the defendant Hansen in this case, and he humbly asks this court to afford him the protection of our Constitution and our laws by reversing the conviction below and directing the court to dismiss the grand larceny charge and grant him a new trial on the burglary.

Respectfully submitted,

J. FRANKLIN ALLRED

Attorney for Appellant
Milton E. Hansen

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